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ENCYCLOPÆDIA

OF

FORMS AND PRECEDENTS

FOR

PLEADING AND PRACTICE, AT COMMON LAW, IN EQUITY, AND UNDER THE VARIOUS CODES AND PRACTICE ACTS.

EDITED BY

WILLIAM MACK AND HOWARD P. NASH

UNDER THE SUPERVISION OF

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The American and English Encyclopædia of Law

AND THE

Encyclopædia of Pleading and Practice.

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COMPOUNDING OFFENSES.

By Jos. R. Long.

I. CRIMINAL COMPOUNDING, 1.
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I. CRIMINAL COMPOUNDING.

1. Generally.

Form No. 5967.

(Precedent in 2 Chit. Cr. L. 221; Archb. Cr. Pl. 586.)

Middlesex. The jurors for our lord the king upon their oath present that heretofore, to wit, on the *twentieth* day of *February*, in the *sixth* year of the reign of our sovereign lord *George* the *Fourth*, by the grace of God of the United Kingdom of Great Britain and Ireland, king, defender of the Faith, at the parish of *St. Paul, Covent Garden*, in the said county of *Middlesex*,* one *Richard Roe*, with force and arms, feloniously did steal, take and carry away *one* lamp, of the value of *twenty* shillings, of the goods and chattels of one *John Doe*, late of the parish of *St. Paul, Covent Garden*, in the said county of *Middlesex*, against the peace of our lord the king, his crown and dignity: And that the said *John Doe*, well knowing the premises, and the said felony to have been by the said *Richard Roe* so as aforesaid done and committed, but contriving and intending unlawfully and unjustly to pervert the due course of law, in this behalf, and to cause and procure the said *Richard Roe*, for the felony aforesaid, to escape with impunity, afterwards, to wit, on the *twentieth* day of *February* aforesaid,[1] with force and arms, at the parish of *St. Paul, Covent Garden*, aforesaid, unlawfully and for wicked gain's sake, did compound the said felony with the said *Richard Roe*, and did then and there exact, receive, and have of the said *Richard Roe* the sum of *eighteen* shillings, in moneys numbered, for and as a reward for compounding the said felony, and desisting from all further prosecution

1. Where an indictment for compounding a felony charged that the felony was committed on a certain date and the compounding at an earlier date, judgment was arrested, although the compounding was charged to have been committed "afterwards." State *v.* Dandy, 1. Brev. (S. Car.) 395.

against the said *Richard Roe* for the said felony; [and that the said *John Doe*, on the *twentieth* day of *February*, last aforesaid, at the parish of *St. Paul, Covent Garden*, aforesaid, did thereupon desist, and from that time hitherto both desisted, from all further prosecution of the said *Richard Roe* for the said felony;][1] to the great hindrance of justice, in contempt of our said lord the king and his laws, and against the peace of our said lord the king, his crown and dignity.

Form No. 5968.

(Precedent in Reg. *v.* Burgess, 15 Cox C. C. 779.)[2]

Central Criminal Court, to wit. The jurors for our Lady the Queen upon their oath present that heretofore, to wit, in the year of our Lord 1*885*, one *Arthur Bagley* feloniously did steal, take and carry away certain money, to wit, to the amount of *28*s. of the moneys of *Henry Bedford*, against the peace of our said Lady the Queen, her crown and dignity; and that *William Henry Burgess*, well knowing the said felony to have been done and committed by the said *Arthur Bagley* as aforesaid, and contriving and intending to pervert the due course of law and justice, and to cause and procure the said *Arthur Bagley* for the felony aforesaid to escape with impunity, afterwards, to wit, on the *5th* day of *July*, in the year aforesaid, in the county of *Surrey*, and within the jurisdiction of the said court, unlawfully and for gain's sake did compound the said felony with the said *Arthur Bagley*, and did then exact, take, receive and have from the said *Arthur Bagley* the sum of *28*s. for and as a reward for compounding the said felony, and desisting from prosecuting the said *Arthur Bagley*, and for procuring that the said *Arthur Bagley* should not be prosecuted for the felony aforesaid, to the great hindrance of justice, in contempt of our said Lady the Queen and her laws, and against the peace of our said Lady the Queen, her crown and dignity.

Form No. 5969.

(Precedent in Rex *v.* Gotley, Russ. & Ry. 84n.)[3]

Shropshire, to wit. The jurors [for our lord the king upon their oath present][4] that *Richard Gotley*, late of [*Holes Owen*, in the county of *Salop*,][4] being an evil disposed person, and not regarding the statute in such case made and provided, nor fearing the penalties

1. **Second Count.** — In 2 Chit. Pl. 221, the addition of a second count, omitting the words enclosed by [ ], is suggested.

2. A motion was made to quash this indictment on the ground that it did not charge any offense, in that it did not allege that the accused desisted from prosecuting the felon. A conviction under the indictment was, however, sustained, the court holding that the offense of compounding is complete when the agreement to abstain from prosecuting is made, and hence an allegation in the indictment that the accused did abstain from prosecuting and that by reason thereof the thief escaped prosecution is unnecessary.

3. This precedent was drawn under Stat. 18 Eliz., c. 5, § 4. For other forms under English statutes see 2 Chit. Cr. L. (5th Amer. from 2d Lond. ed.) 229–231; Rex *v.* Crisp, 1 B. & Ald. 282; Reg. *v.* Best, 5 Moo. C. C. 124, 9 C. & P. 368, 38 E. C. L. 159.

4. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

therein contained, heretofore, to wit, on the *19th* day of *November*, in the year of our Lord 1804, with force and arms, at *Holes Owen*, in the county of *Salop*, by and upon color and pretense of a certain matter of offense then and there pretended to have been committed by one *Edward Round* against a certain penal law, (that is to say) by and upon color and pretense that heretofore, to wit, on the *30th* day of *October*, in the year aforesaid, a certain wagon, of which the said *Edward Round* was then the owner, having the sole or bottom of the fellies of the wheels of less breadth or gauge than *six* inches, did pass and was drawn upon a certain turnpike road leading to *Birmingham*, in the county of *Warwick*, with more than *four* horses, to wit, with *six* horses, contrary to the form and effect of a certain statute made and passed in the thirteenth year of the reign of his present majesty, entitled (*setting out title*), unlawfully, wilfully and corruptly did compound and agree with the said *Edward Round*, who was surmised to have offended against the same statute in manner aforesaid, for the said pretended offense; and did thereupon then and there, to wit, on the said *19th* day of *November*, in the year of our Lord 1804 aforesaid, at *Holes Owen* aforesaid, without process, take of and from the said *Edward Round* a certain sum of money, to wit, the sum of *two* guineas, that is to say, the sum of *two* pounds and *two* shillings, of lawful money of Great Britain, and divers, to wit, *three* bank of England notes for the payment of the sum of *one* pound each, the said notes being then and there of large value, to wit, of the value of *three* pounds of like lawful money, as and by way of composition for the said pretended offense, and in order to prevent an action being brought against him, the said *Edward Round*, for and in respect of the same, without the order or consent of any or either of his majesty's courts at *Westminster*, and without any lawful authority for so doing, to the great hindrance and obstruction of public justice, in contempt of our said lord the king, and his laws, to the evil and pernicious example [of all others],[1] against the form of the statute [in such case made and provided, and][1] against the peace [of our said lord the king, his crown and dignity.][1]

Form No. 5970.

(Ala. Crim. Code (1886), § 4899, No. 28.)[2]

The State of *Alabama*, } *Circuit* court, *October* term, 1897.
Dale county. }

The grand jury of said county charge that, before the finding of this indictment, *John Doe*, knowing that one *Richard Roe* had been guilty of the commission of *burglary*, took (or *agreed to take*) from the said *Richard Roe*, money (*or other property*) to compound (or *conceal*) such felony (or *to abstain from any prosecution therefor*), against the peace and dignity of the State of *Alabama*.

Randolph Mason,
Solicitor of the *third* circuit.

1. The words enclosed by [] will not be found in the reported case, but have been added to render the form complete.

2. **Precedent.** — In Watt *v.* State, 97 Ala. 72, the defendant was convicted and assigned for error that "the in-

Form No. 5971.

(Precedent in People *v.* Bryon, 103 Cal. 676.)[1]

[In the *Superior* Court of the County of *Merced*, State of *California*.

The People of the State of California, plaintiff, against *William Bryon*, defendant. } Information for *Compounding a Felony*.

William Bryon is accused by the district attorney of the said county of *Merced*, by this information, of the crime of *compounding a felony*, committed as follows: On or about the *eleventh* day of *December*, 1893, in the county of *Merced* aforesaid][2] one *Maurice Hardy* did commit the crime of *grand larceny*, a felony; that is to say, that at said time and place the said *Maurice Hardy* did wilfully, unlawfully and feloniously steal and take from the person of *E. O. Mickle*, the sum of *forty* dollars, lawful money of the United States, said money being the property of and belonging to the said *E. O. Mickle*; that said *William Bryon*, at said time and place, and prior to the filing of this information, having knowledge of the commission[3] of said crime by said *Maurice Hardy*, as aforesaid, did take and receive from the said *Maurice Hardy* the sum of *twenty* dollars, lawful money of the United States, upon the agreement and understanding, wilfully, unlawfully and feloniously made and entered into with the said *Maurice Hardy*, that he, the said *William Bryon*, would compound and conceal the crime which had been committed as aforesaid by said *Hardy*, contrary [to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the people of the state of *California*.

Dated the *third* day of *January*, 1894.

F. G. Ostrander, District Attorney of said County of *Merced*.][2]

Form No. 5972.[4]

State of *Colorado*, } ss.
Arapahoe County. }

Of the *January* term of the *District* Court, in the year of our Lord 1898.

dictment fails to show the character of the felony compounded." It was held that the indictment was drawn in substantial and almost literal compliance with section 4006 of the Alabama Criminal Code and with the code form given in the text, and was not liable to the demurrer interposed, which was rightly overruled. The indictment, omitting the formal parts, was as follows:

"*Wheeler Watt*, then and there having knowledge of the commission of a felony, to wit, that *Milton Cooper*, *alias Matt Cooper*, was then and there guilty of *grand larceny*, the same being a felony under the laws of *Alabama*, did take or receive from the said *Milton Cooper*, *alias Matt Cooper*, *one* cow and yearling, and, to wit, *five* dollars in money, to compound or conceal said felony, or to abstain from any prosecution of said felony."

1. This information was held sufficient under Cal. Pen. Code, § 153. For a list of states having similar statutes see *infra*, note 1, p. 5.

2. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

3. **"Actual."**— It is not necessary to charge that the defendant had knowledge of the "actual" commission of the crime, although the word "actual" is used in the statute. People *v.* Bryon, 103 Cal. 676.

4. This form is drawn under Mills'

The grand jurors chosen, selected and sworn in and for the county of *Arapahoe*, in the name and by the authority of the people of the state of *Colorado*, upon their oaths, present that one *Richard Roe*, heretofore, to wit, on the *first* day of *December*, in the year of our Lord 1897, at the city of *Denver*, in the county of *Arapahoe* aforesaid, did then and there feloniously steal, take and carry away *one* diamond ring of the value of *one hundred* dollars, of the property of one *Samuel Short*; and that *John Doe*, late of said county of *Arapahoe*, afterward, to wit, on the *first* day of *January*, in the year of our Lord 1898, at the city of *Denver*, and county of *Arapahoe* aforesaid, did then and there unlawfully and wilfully take of and from the said *Richard Roe* money, to wit, *fifty* dollars (*or otherwise describe the thing taken, as goods, chattels, lands, or other reward or promise thereof, to suit the facts*), to compound the said criminal offense, so as aforesaid committed by the said *Richard Roe*, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the state of *Colorado*.

Form No. 5973.[1]

State of *Maine*.

Kennebec, ss. At the *Superior* Court begun and held at *Augusta*, within and for said county of *Kennebec*, on the *first Tuesday* of *December*, in the year of our Lord eighteen hundred and *ninety-seven*.

The jurors for said state, upon their oath present, that one *Richard Roe*, on the *first* day of *November*, in the year of our Lord eighteen hundred and *ninety-seven*, in the county of *Kennebec*, did then and

Anno. Stat. Colo. (1891), § 1293. Similar statutes may be found in the following states, to wit:

Georgia. — 3 Code (1895), § 323.

Illinois. — Starr & C. Anno. Stat. (1896), p. 1249, par. 92.

Nebraska. — Comp Stat. (1897), § 6841.

Ohio. — Bates' Anno. Stat. (1897), § 6901.

Wyoming. — Rev. Stat. (1887), § 959.

1. This form is drawn under Me. Rev. Stat. (1883), c. 122, § 17.

Similar statutes are found in the states and territories following, to wit:

Arizona. — Pen. Code (1887), § 236.

Arkansas. — Sand. & H. Dig. (1894), § 1488.

California. — Pen. Code (1897), § 153.

Florida. — Rev. Stat. (1892), § 2592.

Indiana. — Horner's Stat. (1896), §§ 2011, 2012.

Iowa. — Code (1897), §§ 4889, 4890, 5301.

Kansas. — 2 Gen. Stat. (1897), p. 330, §§ 185, 186.

Massachusetts. — Pub. Stat. (1882), c. 205, § 17.

Michigan. — How. Anno. Stat. (1882), § 9254.

Minnesota. — Stat. (1894), §§ 6397, 7254.

Mississippi. — Anno. Code (1892), §§ 987, 988.

Missouri. — Rev. Stat. (1889), §§ 3681, 3682.

Montana. — Pen. Code (1895), § 280.

North Dakota. — Rev. Codes (1895), §§ 6997, 8061.

Oregon. — Hill's Anno. Laws (1892), § 1839.

Pennsylvania. — Bright. Pur. Dig. (1894), p. 403, § 14.

Rhode Island. — Gen. Stat. (1896), c. 276, § 20.

South Dakota. — Dak. Comp. Laws (1887), §§ 6385, 7262.

Tennessee. — Code (1896), §§ 6690–6692.

Texas. — Pen. Code (1895), art. 291.

Vermont. — Stat. (1894), § 5165.

Virginia. — Code (1887), § 3760.

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 7200.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 4501.

Precedent. — For an information drawn under the *California* statute cited above see *supra*, Form No. 5971.

there unlawfully, wilfully and feloniously steal, take and carry away the sum of *five hundred* dollars, lawful money of the United States, of the property of one *Samuel Short*; and that *John Doe*, of *Augusta*, in the said county of *Kennebec*, *laborer*, at *Augusta*, in the said county of *Kennebec*, afterward, to wit, on the *tenth* day of *November*, in the year of our Lord eighteen hundred and *ninety-seven*, then and there having knowledge of the commission of the said offense, so as aforesaid committed by the said *Richard Roe*, did then and there unlawfully and wilfully take of and from the said *Richard Roe* a valuable consideration, to wit, the sum of *one hundred* dollars, lawful money of the United States, with an agreement and understanding then and there unlawfully and wilfully made and entered into by the said *John Doe* with the said *Richard Roe*, that he the said *John Doe* would compound and conceal the said offense so as aforesaid committed by the said *Richard Roe* (or *would not prosecute the said Richard Roe by reason of* or *would not give evidence of the said offense so as aforesaid committed by him, the said Richard Roe, but would compound and conceal the same*), against the peace of said state and contrary to the form of the statute in such case made and provided.

Jacob E. Corbett, Foreman.

Randolph Mason, County Attorney.

Form No. 5974.

(Precedent in State *v.* Quinlan, 40 Minn. 56.)[1]

[The *District* Court for the County of *Hennepin* and State of *Minnesota*.][2]

The State of Minnesota
against
Michael Quinlan and *Nathaniel W. King*. } Indictment.

Michael Quinlan and *Nathaniel W. King* are accused by the grand jury of the county of *Hennepin*, in the state of *Minnesota*, by this indictment, of the crime of compounding a crime, committed as follows: The said *Michael Quinlan* and *Nathaniel W. King* did, on the *20th* day of *October*, A. D. 1887, at the city of *Minneapolis*, in said *Hennepin* county, wilfully, unlawfully and wrongfully take from one *Gotlieb Beisswinger* money, to wit, *one hundred* dollars, genuine and current money of the United States of America, a more particular description of which said money is to the grand jury unknown, upon an agreement then and there made by the said *Michael Quinlan* and *Nathaniel W. King* with said *Gotlieb Beisswinger* to withhold evidence of a crime, to wit, the crime of selling [spirituous][3] liquor without first having obtained license therefor; which said crime had heretofore, to wit, on the *12th* day of *September*, A. D. 1887, been committed by *Christ Snyder* and *Fred Vongard*, in this: that the said *Christ Snyder* and

1. This form is drawn under Minn. Stat. (1894), § 6397. For a form drawn under a similar statute in *New York* see *infra*, Form No. 5975.

2. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

3. The word "spirituous" has been inserted to supply an omission in this part of the indictment, "selling liquor" without a license being no offense under the *Minnesota* statutes.

the said *Fred Vongard*,[1] did, on the *12th* day of *September*, A. D. 1887, in said *Hennepin* county, wilfully, unlawfully and wrongfully sell spirituous liquor, to wit, one glass of whiskey,[1] to one *N. H. King*, without first having obtained license therefor,— said *Christ Snyder* and *Fred Vongard* not being then and there a regular licensed druggist, dispensing said liquor in filling a prescription made by a regular, reputable and duly licensed physician in the practice of his profession; said crime not being then and there a case where a compromise is allowed by law. Contrary to the statute in such case made and provided, and against the peace and dignity of the state of *Minnesota*.

Dated at *Minneapolis*, in said *Hennepin* county, this *2d* day of *March*, A. D. 1888.

J. A. Wolverton,
Foreman of the Grand Jury.

Form No. 5975.[2]

Supreme Court, County of *Kings*.
The People of the State of New York
against
John Doe.

The grand jury of the county of *Kings*, by this indictment, accuse *John Doe* of the crime of compounding a crime, committed as follows:

The said *John Doe*, on the *first* day of *December*, 1897, at the city of *Brooklyn*, in this county, did feloniously,[3] unlawfully and wilfully take of and from one *Richard Roe* money, to wit, the sum of *one hundred* dollars (*or other property, gratuity or reward, or engagement or promise therefor, as the case may be*), upon an agreement and understanding then and there made and entered into by the said *John Doe* with the said *Richard Roe* to compound (or *conceal* or *compound and conceal* or *to abstain from a prosecution of the said Richard Roe for and by reason of* or *to withhold evidence of*) a crime (or *a violation of statute*), to wit, the crime of *arson* in the *first* degree, which said crime had been theretofore committed by the said *Richard Roe*, in this that the said *Richard Roe* on the *first* day of *November*, 1897, about *eleven* o'clock in the night of said day, at the city of *Brooklyn* aforesaid, did feloniously, unlawfully, wilfully and maliciously set fire to and burn a certain inhabited building there situate, in which there was at the time a human being, namely, *Samuel Short*, and being then and there the property of another, to wit, of the said *Samuel Short*; which said crime was not then and there a case where a compromise is allowed by law.

Randolph Mason,
District Attorney of the County of *Kings*.

1. The defendants having been convicted on this indictment an order refusing a new trial was reversed on appeal, on the ground that there was a fatal variance between the pleading and the proof, the proof being that Gotlieb Beisswinger, who was also known as Christ Snyder, and "William Bungard" had sold one glass of "beer" without a license.

2. *New York.* — Pen. Code, § 125, Birds. Rev. Stat. (1896), p. 474, § 1. See also a similar statute in *Minnesota* (Minn. Stat. (1894), § 6397) and a precedent drawn under that statute in Form No. 5974, *supra*.

3. **"Feloniously."** — The word "feloniously" is to be used only where the offense of compounding is made a felony by the statute.

2. After Prosecution Begun.[1]

Form No. 5976.

(Precedent in 2 Chit. Cr. L. 220.)

(*Commencing as in Form No. 5967, and continuing down to* *) one *John Doe* in his own proper person came before *John Poe*, esquire, then and yet being one of the justices of our said lord the king, assigned to keep the peace of our said lord the king, in and for the county of *Middlesex*, and also to hear and determine divers felonies, trespasses and other misdemeanors in the said county committed, and then and there upon his oath did charge and accuse one *Mary Jones*, the wife of *Peter Jones*, with feloniously stealing, taking and carrying away *one* silver spoon and *two* silk handkerchiefs, of the goods and chattels of the said *John Doe*, upon which the said *John Poe* then and there issued out his warrant, under his hand and seal made in due form of law, for the apprehending and taking the said *Mary Jones* to answer and be examined of and concerning the felony aforesaid, on her as aforesaid charged, and that afterwards, to wit, on the *twentieth* day of *February* aforesaid, the said *Mary Jones*, the wife of *Peter Jones* aforesaid for the said felony, and by virtue of the said warrant, was taken and arrested, and then and there was brought before the said *John Poe*, the justice aforesaid, and then and there before the same justice, of and concerning the same felony, was examined, upon which the said *John Poe*, the justice aforesaid, did then and there make a certain warrant under his hand and seal in due form of law, directed to the keeper of Newgate or his deputy, and thereby commanding the aforesaid keeper, or his deputy, to receive into his custody the body of the said *Mary Jones*, so charged with such felony as aforesaid, and her in custody safely to keep, until she should be discharged by due course of law. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said *John Doe*, late of the parish of *St. Paul, Covent Garden*, in said county of *Middlesex*, and *Richard Roe*, late of said parish, well knowing the premises, and each of them well knowing the same, but contriving and intending unlawfully and unjustly to pervert the due course of law in this behalf, and to cause and procure the said *Mary Jones* for the felony aforesaid to escape with impunity, afterwards, to wit, on the *twenty-first* day of *February* aforesaid, at the parish aforesaid, unlawfully and for wicked gain sake, did take upon themselves to compound the said felony on the behalf of the said *Mary Jones* and then and there did exact, receive and have of the said *Peter Jones*, the husband of the said *Mary Jones*, *twenty-six* shillings, in moneys numbered, for and as a reward for compounding the said felony, and desisting from all further prosecution against the said

1. **Precedents.** — See another form in 2 Chit. Cr. L. 221, against third persons for prevailing upon a woman, on whom rapes had been committed, to compound the same with the offenders, after the offenders had been imprisoned and were about to be prosecuted; and in 4 Wentw. Pl. 329, for compounding an information in the exchequer for not having the words upon the door of the house, agreeable to the Distillers act. See also Davis' Precedents of Indictments, pp. 97, 98.

Mary Jones for the felony aforesaid, to the great hindrance of justice, to the evil example of all others, in contempt of our said lord the king, and his laws, and against the peace of our said lord the king, his crown and dignity.

Form No. 5977.[1]

In the *Marion Circuit* Court of *Indiana*, of the *January* Term, A. D. 1898.

State of Indiana }
against }
John Doe. }

The grand jury of the county of *Marion*, upon their oath do present: That *John Doe*, on the *tenth* day of *November*, A. D. 1897, at the county of *Marion* aforesaid, came before *Jacob E. Corbett*, a justice of the peace of said county, duly elected, commissioned and qualified to execute and perform the duties of said office, and did then and there, before said justice, make complaint in writing and upon oath, in which said complaint the said *John Doe* did then and there upon his oath charge one *Richard Roe* with then lately before feloniously stealing, taking and carrying away *one* diamond ring of the value of *one hundred* dollars, of the property of the said *John Doe*,[2] upon which said complaint the said *Jacob E. Corbett* then and there issued his warrant in due form of law for the arrest of the said *Richard Roe* to answer to, and be examined and dealt with for the felony aforesaid as to law and justice might appertain; and afterwards, to wit, on the day and year aforesaid, at the county aforesaid, by virtue of said warrant and for the felony aforesaid, the said *Richard Roe* was duly arrested and taken and carried before the said *Jacob E. Corbett*, justice as aforesaid, and duly examined and heard by the said *Jacob E. Corbett*, touching and concerning the felony aforesaid, whereupon the said *Jacob E. Corbett*, justice as aforesaid, did then and there make a certain warrant, under his hand and seal, in due form of law, directed to the keeper of the common jail in said county of *Marion*, thereby commanding the said keeper or his deputy to receive into his custody the body of the said *Richard Roe*, and him in custody safely to keep until he should be discharged by due course of law; and that afterwards, to wit, on the *first* day of *December*, in the said year, and while said cause was pending, at the county aforesaid, the said *John Doe*, well knowing the premises, did unlawfully and wilfully take and receive from the said *Richard Roe* the sum of *fifty* dollars upon an agreement and understanding, then and there made and entered into by the said *John Doe* with the said *Richard Roe*, to

1. This form is drawn under Horner's Stat. Ind. (1896), § 2013. For similar statutes see as follows:

Georgia. — 3 Code (1895), § 324.

Minnesota. — Stat. (1894), § 6397.

New York. — Pen. Code, §125 (Birds. Rev. Stat. (1896), p. 474, § 1).

North Dakota. — Rev. Codes (1895), § 6998.

Ohio. — Bates' Anno. Stat. (1897), § 6901.

South Dakota. — Dak. Comp. Laws (1887), § 6385.

2. Under the *Ohio* statute it has been held not necessary to aver in the indictment or prove on the trial that a crime had been committed. Fribly *v.* State, 42 Ohio St. 205.

compound (or *discontinue* or *delay* or *withhold evidence in aid of*) the said prosecution then so pending for the said crime as aforesaid (or *to encourage* or *procure the absence of witnesses* or other testimony *on the examination* or *trial of the said charge*), contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of *Indiana*.

Randolph Mason, Prosecuting Attorney.

II. COMPROMISE BY LEAVE OF COURT.

1. Acknowledgment of Satisfaction.

Form No. 5978.

(Cook's Code Crim. Proc. N. Y. (1891), p. 473, No. 250.)[1]

State of *New York*, } ss.
County of *Suffolk*. }

I, *John Doe*, of the town of *Huntington*, county of *Suffolk*, State of *New York*, do hereby acknowledge to have received of *Richard Roe*, of the same place, the sum of *one hundred* dollars in full satisfaction for the injury to me at said town of *Huntington*, on the *third* day of *January*, 1*898*, by said *Richard Roe*, in assaulting and beating me, and for which assault and battery I made complaint, on oath, on the *fifth* day of *January*, 1*898*, before *Abraham Kent*, one of the justices of the peace, and which said complaint is now pending and undetermined; and I desire that no further proceeding be had against said *Richard Roe*.

John Doe.

County of *Suffolk*, ss.

I hereby certify that, on the *sixth* day of *January*, 1*898*, before me personally appeared *John Doe*, of the town of *Huntington*, in said county, personally known to me to be the same person mentioned in and who executed the foregoing acknowledgment of satisfaction; and he acknowledged the execution of the same.

Abraham Kent, Justice of the Peace.

2. Warrant to Discharge Defendant from Custody.

Form No. 5979.

(Cook's Code Crim. Proc. N. Y. (1891), p. 474, No. 251.)[1]

State of *New York*, } ss.
County of *Suffolk*. }

In the Name of the People of the State of *New York*.

To the keeper of the common jail of said county:

1. *New York*. — Pen. Code, § 663, as *amended* Laws (1884), c. 63 (Birds. Rev. Stat. (1896), p. 474, § 3); Pen. Code, § 664, as *amended* Laws (1884), c. 63 (Birds. Rev. Stat. (1896), p. 475, § 4).

See also similar statutes as follows:

Iowa. — Code (1897), §§ 5622–5625.

Michigan. — How. Anno. Stat. (1882), § 9481.

Mississippi. — Anno. Code (1892), § 1457.

Montana. — Pen. Code (1895), §§ 2540–2542.

Washington. — 2 Hill's Anno. Stat. (1891), §§ 1292–1294, 1598.

Whereas, *John Doe*, upon whose oath *Richard Roe* was arrested for assault and battery against the said *John Doe*, and was duly committed to your charge on the *fifth* day of *January*, 1898, and who now remains under your care;

And whereas, the said *John Doe* has duly executed an acknowledgment of satisfaction for said assault before me;

Now, this is to command you forthwith to discharge the said *Richard Roe* from your custody in said jail, unless detained upon some other warrant of commitment.

Dated at *Northport*, in the town of *Huntington*, this *sixth* day of *January*, 1898.

Abraham Kent, Justice of the Peace.

3. Order Discharging Recognizance.

Form No. 5980.

(Cook's Code Crim. Proc. N. Y. (1891), p. 474, No. 252.)[1]

County of *Suffolk*, ss.

The within named complainant, *John Doe*, having this day appeared before me, *Abraham Kent*, a justice of the peace of the county of *Suffolk*, and acknowledged in writing that he had received full satisfaction of the within named *Richard Roe*, for the injury complained of, I do hereby order the within recognizance to be discharged.

Dated at *Northport*, in the town of *Huntington*, this *sixth* day of *January*, 1898.

Abraham Kent, Justice of the Peace.

1. See *supra*, note, 1, p. 10.

COMPROMISE.

By Thomas E. O'Brien.

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CROSS-REFERENCES.

For Forms of Compromise of Criminal Actions, see the title COMPOUNDING OFFENSES, ante, Forms Nos. 5978 to 5980.

I. Offer to Compromise by Allowing Judgment.

1. The Offer.[1]

1. **Offer to Confess Judgment.** — For forms relating to offers to confess judgments see the title Confession of Judgment, *post,* p. 46 *et seq.*

a. By Party.

(1) Generally.

Form No. 5981.[1]

Supreme Court, *Albany* County.

John Doe, plaintiff,
against
Richard Roe, defendant.

1. Statutory Provisions.—This is the proper form of offer after action is commenced. In *New York* the defendant may, before trial, serve upon plaintiff's attorney a written offer to allow judgment to be taken against him for the sum or property or to the effect therein specified with costs. If the plaintiff, within ten days thereafter, serves upon the defendant's attorney a written notice that he accepts the offer, he may file the summons, complaint, and offer with proof of acceptance, and thereupon the clerk must enter judgment accordingly. If notice of acceptance is not thus given and the plaintiff fails to obtain a more favorable judgment, he cannot recover his costs from the time of the offer, but must pay the costs from that time. Code Civ. Proc., § 738, as *amended* Laws (1877), c. 116; Birds. Rev. Stat. (N. Y. 1896), p. 2198, § 3, p. 1780, § 32 (applying to justices' courts).

Similar or analogous statutes exist in the following states:

Arkansas.—Sand. & H. Dig. (1894), § 5900.

California.—Code Civ. Proc. (1897), § 997.

Idaho.—Rev. Stat. (1887), § 4870.

Indiana.—Horner's Stat. (1896), § 514.

Iowa.—Code (1897), § 3819.

Kansas.—2 Gen. Stat. (1897), c. 95, § 445.

Kentucky.—Bullitt's Civ. Code (1895), § 634.

Michigan.—How. Anno. Stat. (1882), § 7372.

Minnesota.—Stat. (1894), § 5405, § 4976 (in justices' courts).

Missouri.—Burns' Anno. Prac. Code (1896), § 565.

Montana.—Code Civ. Proc. (1895), § 1800.

Nebraska.—Comp. Stat. (1897), § 6157.

Nevada.—Gen. Stat. (1885), § 3397.

New Mexico.—Laws (1897), c. 73, § 118.

North Carolina.—Code (1883), § 573.

North Dakota.—Rev. Codes (1895), § 5639.

Ohio.—Bates' Anno. Stat. (1897), § 5140.

Oklahoma.—Stat. (1893), c. 66, § 539.

Oregon.—Hill's Anno. Laws (1892), c. 4, § 520.

South Carolina.—2 Rev. Stat. (1893), § 386.

South Dakota.—Comp. Laws Dak. (1887), § 5246.

Utah.—Rev. Stat. (1898), § 3217.

Wisconsin.—Sanb. & B. Anno. Stat. (1889), §§ 2789, 4269.

Wyoming.—Rev. Stat. (1887), § 2527.

Connecticut.—In all actions on contract or for the recovery of money only, defendant may, before trial, file with the clerk a written notice, signed by himself or attorney, directed to the plaintiff or his attorney, offering to allow plaintiff to take judgment for a sum named in said notice, etc. Gen. Stat. (1888), §§ 1057–1059; § 684 (relating to justices' courts).

In actions before the superior court, court of common pleas, or district court, or any city court, the plaintiff may, within ten days after being notified by the defendant of the filing of such offer, file with the clerk of the court a written notice, signed by himself or his attorney, that he accepts said offer; and such notice being filed the court shall render judgment against the defendant. Conn. Laws (1897), c. 180, § 3.

Mississippi.—Defendant, in any personal action, except actions for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation or seduction, may offer with his plea or in writing afterward, before trial, and pay into court a sum of money by way of compensation or amends, and may plead that the sum is sufficient to satisfy the plaintiff in respect to the cause of action mentioned. If the plaintiff accept same, judgment shall be entered

The above named defendant *Richard Roe*[1] hereby offers to allow judgment to be taken against him and in favor of the above named plaintiff *John Doe* in the above action now pending[2] in this court for the sum of *three hundred* dollars (*and if interest is intended add* "with interest[3] from the *first* day of *July*, 1897"*; or say* "for the recovery of the following described property," *describing it; or say* "to the effect," *specifying for what the judgment may be taken*),[4] together with

therefor with costs, and if plaintiff fails so to do, and fails to recover more than the sum so offered, he shall pay all costs accruing after such offer. Anno. Code (1892), § 713.

Precedents — *Indiana.* — In Harris *v.* Dailey, 16 Ind. 184:

"*Samuel F. Dailey* v. *Noah Harris.* } In the *Grant* Circuit Court, *Spring* Term, 1858.

The plaintiff in the above entitled cause will take notice that I hereby offer to allow judgment to go against me in said cause for $*306.70* and costs. *April 5*, 1858. *Noah Harris.*"

Nebraska. — In Ossenkop *v.* Akeson, 15 Neb. 622:

"To *Peter Akeson*: I hereby offer you judgment against me in the sum of *twenty dollars* and costs to this time in the action now pending between us before *Hon. J. W. Johnson*, county judge of *Cass* County, *Nebraska*.

[*William Ossenkop.*]

Delivered to *Peter Akeson, June 6th*, 1882.

William Ossenkop."

Ohio. — Notice in writing served on plaintiff or his attorney by defendant, to the effect that the defendant does then offer to confess judgment in the action for a sum therein named and costs to that date, should be regarded as an offer to allow judgment within the meaning of the *Ohio* Code. Adams *v.* Phifer, 25 Ohio St. 301. The offer in this case was as follows:

"*Stephen Phifer* and *Joseph Plowman* against *Eli H. Adams* and *J. C. Davidson.* } *Madison* Common Pleas, No. *1720*. The plaintiffs are hereby notified that the defendants offer to confess judgment in favor of the plaintiffs for the sum of *three hundred and fifty* dollars, and costs of suit to this date.

Goode & Bowman,
Defendant's Attorneys."

1. To Be Made by All Defendants. — The offer must come from all the defendants or their common attorney. The plaintiff's right is to have judgment on the submitted offer in the pending action, and consequently against all whom he has sued, and unless the offer is commensurate with this right it is unavailing. Williamson *v.* Lock's Creek Canal Co., 84 N. Car. 629; Binney *v.* Le Gal, 19 Barb. (N. Y.) 502; Schneider *v.* Jacobi, 1 Duer (N. Y.) 694.

One partner has no power to make the offer to the plaintiff to take judgment against himself and his copartners without some evidence from which it is to be inferred that his copartners authorized him to make the offer or assented to it. Binney *v.* Le Gal, 19 Barb. (N. Y.) 594.

2. While action is pending, only, can the offer be made. Horner *v.* Pilkington, 11 Ind. 440; Crane *v.* Hirschfelder, 17 Cal. 582.

3. "With interest" has no significance where an offer is made for a certain sum with interest, not specifying the amount of interest or fixing any date for its computation. Smith *v.* Bowes, 11 Daly (N. Y.) 320.

4. Sufficiency of offer *should be couched in clear and specific language*, leaving no reasonable ground for controversy or misunderstanding respecting the relief proposed by it or the judgment the party will be entitled to under the acceptance of it. Bettis *v.* Goodwill, 32 How. Pr. (N. Y. Supreme Ct.) 137.

Specifying Amount or Relief. — Must be for a sum named and costs; and an instrument which stated that defendant did not admit that he was indebted to the plaintiff, but, for the purpose of buying his peace and saving further litigation, would pay a stated sum and costs if the plaintiff would dismiss the suit, was not an offer to allow judgment. Quinton *v.* Van Tuyl, 30 Iowa 557. The amount need not, however, be specified in the offer. This may be rendered certain by a reference in the offer to the complaint. Burnett *v.* Westfall, 15 How. Pr. (N. Y. Supreme Ct.) 420.

Action Relating to Personalty. — In action for possession of personal property, an offer to allow judgment for a

costs.[1]

Dated the *ninth* day of *February*, 1898.

Richard Roe, Defendant.
106 State Street, *Albany*, *N. Y.*[2]

specified sum in damages, but not including an offer to allow judgment to be taken adjudging the title, is not sufficient. Oleson *v.* Newell, 12 Minn. 186.

Where an action is brought to recover damages for the conversion of personal property, it has been held that defendant cannot force the plaintiff to accept the property or pay the costs on refusal to do so, and even if the action had been brought to recover the specified property tendered, the defendant will have no such right unless the offer includes with the proposed delivery of articles tendered a proposal to pay an amount as damages for detention not less than that ultimately assessed by the jury. Stephens *v.* Koonce, 103 N. Car. 266.

Discharging Mechanics' Lien. — An offer in writing to pay into court the stated amount in discharge of a mechanics' lien must follow strictly the statute (Birds. Rev. Stat. N. Y. (1896), p. 1964, § 49). The omission of the words "discharge of the lien" has been held to render the offer ineffectual. Burton *v.* Rockwell, 63 Hun (N. Y.) 163, *following* Hall *v.* Dennerlein, (C. Pl.) 39 N. Y. St. Rep. 67, questioning, however, the soundness of the rule.

In action for state and county taxes, the offer must specify in what sum judgment will be allowed for state and what sum for county taxes. Sacramento County *v.* Central Pac. R. Co., 61 Cal. 250.

Must be unconditional and leave no facts to be ascertained and determined. An offer containing the statement "this offer being subject to the covenant for the stay of proceedings entered into between the parties hereto" is void. Pinckney *v.* Childs, 7 Bosw. N. Y. 662. In this case the offer was insufficient, and was as follows, omitting formal parts:

"Please take notice that the above named defendants, *Henry M. Childs*, *Seneca Durand* and *Anthony Arnoux*, hereby severally withdraw the answers by them made in the above entitled cause, copies of which have been heretofore served upon you, and the said defendants hereby offer to allow judgment to be taken against them for the sum of *one thousand nine hundred and sixty-three* dollars and *sixty* cents, without costs, this offer being subject to the covenant for a stay of proceedings entered into between the parties hereto."

But in De Long *v.* Wilson, 80 Iowa 217, the words "said amount to be a full settlement of the above action" were held not to constitute a condition upon which the offer was made, but only a legal and logical conclusion of the acceptance. Quinton *v.* Van Tuyl, 30 Iowa 554.

Confined to what Claims. — Must be confined to the claims made by the plaintiff in the suit. Phillips *v.* Shearer, 56 Iowa 262.

1. With Costs. — An offer to allow judgment to be taken must expressly state that it may be taken with costs. Ranney *v.* Russell, 3 Duer (N. Y.) 689; Harter *v.* Comstock, 11 Ind. 525; Quinton *v.* Van Tuyl, 30 Iowa 557. But an offer to allow judgment with "accrued costs" is sufficient. Holland *v.* Pugh, 16 Ind. 21. And where an offer of judgment with costs "to date" was made, it was held that the words "to date" were mere surplusage. Lynk *v.* Weaver, 128 N. Y. 175. In *Wisconsin*, however, an offer for a judgment for a specified sum as damages is sufficient, although it does not expressly offer judgment for costs also. Brown *v.* Bosworth, 58 Wis. 379. In this case the offer was annexed to an affidavit by one of the defendants served upon the plaintiff within ten days after service of the summons and complaint upon the defendants. The affidavit, including the proper venue, is set out in the reported case, as follows:

(*Title of cause.*) "The defendants hereby offer to allow judgment to be taken against them in the above action for $992.79 in favor of the plaintiff.

February 4th, 1882.

G. W. Cate,
Defendants' Attorney."

2. Must be Signed. — The offer without signature is not sufficient, though in writing authorizing plaintiff to take judgment for a specified sum and costs. Ossenkop *v.* Akeson, 15 Neb. 622.

To *John Doe*, plaintiff.
(*Proof of service.*)[1]

Form No. 5982.[2]

State of *Indiana*, *Posey* County. } In the *Posey Circuit* Court.

John Doe, plaintiff, against *Richard Roe*, defendant. } Offer to allow judgment.

The above named defendant *Richard Roe*, on this *twenty-fourth* day of *November*, 1897, hereby offers to allow judgment for the sum of *three hundred and fifteen* dollars, together with costs to have accrued and may accrue, to be taken against him the said *Richard Roe* by him the said *John Doe* in the above entitled action now pending in this court, which said action is based upon a claim of the sum of *four hundred* dollars, which the said *John Doe*, plaintiff, has against said *Richard Roe*, defendant, for *certain goods, wares and merchandise* by the said *John Doe* to him the said *Richard Roe sold and delivered.*

Richard Roe, Defendant.

To *John Doe*, plaintiff.
(*Proof of service.*)[1]

(2) In Justice's Court.

Form No. 5983.[3]

(N. Car. Code (1883), § 909, No. 43.)

John Doe against *Richard Roe.* } *Justice's* Court.

But it is not required that the offer shall be acknowledged by the defendant when signed by him personally. That it shall be subscribed by him is all that the code requires. Pfister *v.* Stumm, 7 N. Y. Mis. Rep. (Buffalo Super. Ct.) 530, *distinguishing* Bridenbecker *v.* Mason, 16 How. Pr. (N. Y. Supreme Ct.) 203. In the Pfister case the offer of judgment was held sufficient and, omitting formal parts, was as follows: "The defendant hereby offers to allow judgment in this action establishing the amount of the plaintiff's lien at the sum of *three hundred* dollars and costs. *Jacob Stumm.*"

In cases of counterclaim, where the plaintiff serves an offer upon defendant to allow judgment to be taken against him upon the counterclaim, etc., the forms given above, with slight changes, will be found sufficient.

New York. — Birds. Rev. Stat. (1896), p. 2198,-§ 4 (Code Civ. Proc., § 739, as *amended* Laws (1877), c. 416).

North Carolina. — Code (1883), § 573.

North Dakota. — Rev. Codes (1895), § 5640.

Ohio. — Bates' Anno. Stat. (1897), § 5143.

South Carolina. — 2 Rev. Stat. (1893), § 386.

South Dakota. — Comp. Laws Dak. (1887), § 5247.

Utah. — Rev. Stat. (1898), § 3217.

Wyoming. — Rev. Stat. (1887), § 2530.

1. **Proof of Service.** — For forms of acknowledgments of or affidavits of service *consult* title Service of Writs and Papers.

2. *Indiana.* — Horner's Stat. (1896), § 514.

See also list of statutes cited *supra*, note 1, p. 13. Consult annotations appended to Form No. 5981, *supra*, the general form relating to the offer by a party to compromise.

3. *North Carolina.* — Code (1883), § 840, rule 12. Similar or analogous pro-

To *John Doe*: Take notice that the defendant hereby offers to allow judgment to be taken against him by the plaintiff in the above action for the sum of *fifty* dollars with costs. Dated this *tenth* day of *January*, 1898.[1]

Richard Roe.

(*Proof of service.*)[1]

(3) In Appellate Court.

(*a*) *On Notice of Appeal.*

Form No. 5984.[2]

Albany County Court.

John Doe, respondent,
against
Richard Roe, appellant.

To *John Doe, respondent* (or *Jeremiah Mason, attorney for respondent*) herein.

Sir: The *appellant* hereby offers to allow judgment to be rendered in the *County* Court above named against him in this cause, and in favor

visions will be found in the statutes of the following states:

California. — Code Civ. Proc. (1897), § 895.

Florida. — The defendant may, before answering, make an offer to allow judgment to be taken against him for an amount to be stated in such offer, with costs. The plaintiff shall thereupon, and before any proceedings shall be had in the action, determine whether he will accept or reject such offer. If he accept the offer and give notice thereof to the justice, the justice shall note the offer and the acceptance thereof and render judgment accordingly. Rev. Stat. (1892), § 1617.

Idaho. — Rev. Stat. (1889), § 4731.

Kansas. — 2 Gen. Stat. (1897), c. 103, § 154.

Montana. — Code Civ. Proc. (1895), § 1628.

Nebraska. — Comp. Stat. (1897), § 6527 (before trial).

Nevada. — Gen. Stat. (1885), § 3576.

New York. — Code Civ. Proc., § 2892 (Birds. Rev. Stat. (N. Y. 1896), p. 1780, § 32).

North Carolina. — Code (1883), § 840, rule 16.

North Dakota. — Rev. Codes (1895), § 6713.

Ohio. — Bates' Anno. Stat. (1897), § 6581.

Oklahoma. — Stat. (1893), c. 67, § 123.

South Carolina. — 2 Rev. Stat. (1893), § 88, subs. 15.

South Dakota. — Comp. Laws Dak. (1887), § 6108.

Utah. — Rev. Stat. (1898), § 3731.

Vermont. — Stat. (1894), § 1690.

Wisconsin. — Sand. & B. Anno. Stat. (1889), § 3627.

Wyoming. — Rev. Stat. (1887), § 3479.

1. Proof of service, see *supra*, note 1, p. 16.

2. Upon appeal from a judgment of a justice of the peace, where judgment is for a sum of money only, either party may, within fifteen days after service of notice of appeal, serve upon the adverse party or upon his attorney a written offer to allow judgment to be rendered in the appellate court in favor of either party for a specified sum. If the party, within ten days after service of the offer upon him, serves upon the party making same, or upon his attorney, written notice that he accepts the offer, he must file it, with an affidavit of service of the notice of acceptance, with the clerk of the appellate court, who thereupon must enter judgment accordingly. N. Y. Code Civ. Proc., § 3070, as *amended* Laws (1885), c. 522; Laws (1895), c. 356; Birds. Rev. Stat. N. Y. (1896), p. 1815, § 214.

of the *respondent* in the above action, for the sum of *sixty-five* dollars.

Dated the *ninth* day of *February*, 1898.

Richard Roe, *Appellant*.[1]

(*Proof of service.*)[2]

(*b*) *In Action Pending in Appellate Court.*

Form No. 5985.[3]

(*Title and address as in Form No. 5984.*)

The above named *appellant*, *Richard Roe*, hereby offers to allow judgment to be taken against him by the above named *respondent*, *John Doe*, in this cause now pending in this court, for the sum of *sixty-five* dollars (or *for the recovery of the following described property*, describing it), with (or *without*) costs.[4]

Dated the *third* day of *February*, 1898.

Richard Roe, *Appellant*.

(*Proof of service.*)[5]

b. By Agent.

Form No. 5986.[6]

(Precedent in Carpenter *v.* Kent, 11 Ohio St. 554.)[7]

1. By Attorney. — The offer to allow judgment, under section 3070 of the New York Code of Civil Procedure, may be made by the attorney of the party. Sherman *v.* Shisler, 6 N. Y. Misc. Rep. (Buffalo Super. Ct.) 203.

The authority of the attorney to appear in the defendant's behalf empowers him to make an offer of judgment. All the incidents to the authority attach thereto, and among others to bind the principal by any proceedings which the principal might take therein, and it is not necessary that, in addition to his swearing to his authority to appear generally, he should further swear to his authority to make the offer of judgment. Fowler *v.* Haynes, 91 N. Y. 351.

2. Proof of service, see *supra*, note 1, p. 16.

3. After action is deemed at issue in appellate court, and before the trial, either party may at any time serve upon the adverse party a written offer to allow judgment to be taken against him for the sum or property or to the effect therein specified, with or without costs. If the party receiving the offer within ten days thereafter serves upon the adverse party notice that he accepts it, he may file it with proof of acceptance and thereupon the clerk must enter judgment accordingly. N. Y. Code Civ. Proc., § 3072 (Birds. Rev. Stat. N. Y. (1896), p. 1815, § 216). Consult annotations to Form No. 5984, *supra*.

4. Costs. — An offer under section 3072 should state whether the judgment is offered with or without costs, while an offer served under section 3070 is to be silent in respect to costs. Zoller *v.* Smith, 45 Hun (N. Y.) 321.

5. Proof of service, see *supra*, note 1, p. 16.

6. *Ohio.* — Bates' Anno. Stat. (1897), §§ 5140, 6581, 6705. See also list of statutes cited *supra*, note 1, p. 13.

Notice in writing served on plaintiff by defendant, stating that the latter offers to confess judgment for a sum therein named and costs to date, was regarded as an offer to allow judgment within the meaning of the Ohio Stat., § 5140. Adams *v.* Phifer, 25 Ohio St. 301.

Must be made in a separate writing and served as prescribed by law. It should not be made a part of the answer. Armstrong *v.* Spears, 18 Ohio St. 373; Tipton *v.* Tipton, 49 Ohio St. 364.

7. This writing was held to be in its terms a clear and explicit offer to the plaintiffs to suffer them to take a judgment against the defendants in the action then commenced for the sum of fifty dollars, and that the offer could

[The State of *Ohio*, *Monroe* County, ss. } Before *Abraham Kent*, Justice of the Peace for ——— Township in said county.][1]

James Kent and *Wm. T. Kent, as administrators of the estate of William Kent, deceased*,
v.
Reason Carpenter, *Samuel Carpenter* and *Daniel Breeding*. } Civil Action.

The defendants hereby tender to the plaintiffs a judgment in favor of said plaintiffs against said defendants of *fifty* dollars, with the costs that have accrued up to this date. *March 2*, 1857.

Reason Carpenter.[2]
Samuel Carpenter.
Daniel Breeding.
By *Jas. M. Stout*, their Agent.

[(*Proof of service.*)][3]

c. By Attorney.

Form No. 5987.[4]

Supreme Court, *Ontario* County.

William B. Burnett against *George D. Westfall.*

Sir: Take notice that the defendant hereby offers to allow the plaintiff in this action to take judgment against him for the sum of *two hundred* dollars, being the amount claimed in the summons and complaint herein, to wit, the sum of *four hundred and fifty* dollars, less the amount of the *two* notes of *Joseph Westfall* set up in the *third* and *fourth* defenses in the answer, the said *two* notes amounting to *two hundred* dollars, and for costs and disbursements.[5]

Yours, etc.,
Cornwell, Welling & Arnold, Defendant's Attorneys,[6]
106 State Street, *Geneva, N. Y.*[7]

not have been made more obligatory upon the defendants. Carpenter *v.* Kent, 11 Ohio St. 560.

1. Words within [ ] are not found in the reported case.

2. **One of two defendants** may make this offer. New York, etc., R. Co. *v.* Clark, 54 Ohio St. 509.

3. **Proof of service,** see *supra*, note 1, p. 16.

4. *New York.* — Birds. Rev. Stat. (1896), p. 2198, § 3; Code Civ. Proc., § 738, as *amended* Laws (1887), c. 416. See also list of statutes cited *supra*, note 1, p. 13.

5. **Stating Specific Sum.** — This is an offer based upon the facts in the case of Burnett *v.* Westfall, 15 How. Pr. (N. Y. Supreme Ct.) 420. In that case the offer was held sufficient, although it did not state that it was made for a specific sum. This, however, seems to be required under the provisions of the present section of the code (Code Civ. Proc., § 738).

6. **Signature of Attorney.** — Although the statute provides that the offer when made by an attorney shall be subscribed by him, it is not essential that the papers have the genuine signature of the attorney. His name subscribed in any manner, either written or printed, is sufficient, inasmuch as it is treated by the attorney as subscribed by him. Smith *v.* Kerr, 49 Hun (N. Y.) 31; Barnard *v.* Heydrick, 49 Barb. (N. Y.) 62; New York *v.* Eisler, 2 Code Civ. Proc. Rep. (N. Y. C. Pl.) 125.

7. **Office Address.** — Attorney must add to his signature his office address,

To *S. Baldwin*, Esq., Plaintiff's Attorney.
(*Affidavit of attorneys' authority.*)[1]
(*Proof of service.*)[2]

Form No. 5988.[3]

(Precedent in De Long *v.* Wilson, 80 Iowa 217.)

District Court in and for *Mahaska* county, state of *Iowa.*

E. F. De Long vs. *E. M. Wilson.* } *April* Term, 1890.

To *E. F. De Long*, or *Bolton & McCoy*, his attorneys of record:

The above named defendant, *E. M. Wilson*, hereby offers to allow judgment to be taken against him in the above entitled cause for the sum of *twenty-five* dollars, with costs to date; said amount to be a full settlement of the above cause.[4] This is an offer of compromise under section 2900 of the Code of Iowa.

E. M. Wilson,
J. F. & W. R. Lacey,
W. G. Jones,
His Attorneys.

[(*Proof of service.*)][5]

specifying a place within the state where there is a post-office. If in a city, he must add the street and the street number, if any, or any suitable designation of a particular locality. N. Y. Code Civ. Proc., § 421 (Birds. Rev. Stat. (1896), p. 2269, § 3); Code Civ. Proc., § 417 (Birds. Rev. Stat. (1896), p. 12, § 10).

1. Attorney's Affidavit of Authority. — Unless the offer made as prescribed by law is subscribed by the party making it, his attorney must subscribe it and annex thereto his affidavit to the effect that he is duly authorized to make it in behalf of the party. N. Y. Code Civ. Proc., § 740. McFarren *v.* St. John, 14 Hun (N. Y.) 387; Riggs *v.* Waydell, 17 Hun (N. Y.) 515, *affirmed* in Riggs *v.* Waydell, 78 N. Y. 586.

The following may be used as the form for such an affidavit:

"*Ontario* County, ss.

Jeremiah Mason, being first duly sworn, on oath says, that he is the duly authorized attorney for the said *Richard Roe*, defendant in the above named proceeding, and that he has been authorized by the said *Richard Roe* to make the above offer of judgment in his behalf.

Jeremiah Mason.

Sworn to before me this *ninth* day of *February*, 1898.

(SEAL) *Norton Porter*,
Notary Public."

In Riggs *v.* Waydell, 17 Hun (N. Y.) 515, the offer to allow judgment, omitting the formal parts, was as follows: "The defendants in this action hereby offer to allow judgment to be taken therein against them for the sum of $*800.00* and interest thereon from *April 26*, 1877, with costs." The defendants' attorney served the offer, which was signed by himself but was not accompanied by an affidavit showing his authority to make it. Plaintiff served notice declining to accept the offer. On trial, recovery was had for less than the amount named in the offer. Defendant was not allowed to amend the offer by annexing the proper affidavit of authority required by N. Y. Code Civ. Proc., § 740.

2. Proof of Service. — For form of acknowledgments of or affidavits of service consult the title SERVICE OF WRITS AND PAPERS.

3. *Iowa.* — Code (1897), § 3819. See also list of statutes cited *supra*, note 1, p. 13.

4. The words "said amount to be a full settlement of the above cause," in this offer, were held not to constitute a condition upon which the offer was made, but only a legal and logical consequence of the acceptance, *distinguishing* Quinton *v.* Van Tuyl, 30 Iowa 554.

5. Proof of service, see *supra*, note 1, p. 16.

Form No. 5989.[1]

(Precedent in Wordin *v.* Bemis, 33 Conn. 216.)

Isaac H. Wordin v. *Stephen C. Bemis.* } *Superior* Court, *Fairfield* County, *March* term, 1863.

To the plaintiff and to Messrs. *Treat & Blake*, his attorneys:

The defendants hereby offer to allow you to take judgment in this action for the sum of $*138*, being a balance of freight after payment of $*30*, to wit, $*134.70*, with interest on said sum since *November 1st*, 1862, and a small excess allowed for possible difference in computing interest with costs.

By *F. Chamberlain*, attorney for defendants.

Form No. 5990.[2]

(Precedent in Rose *v.* Peck, 18 Neb. 529.)[3]

Amos Peck v. *Peter W. Rose.* }

Now comes the defendant, *Peter W. Rose*, by his attorneys, *Brown & Ryan Bros.*, and offers to allow judgment to be taken against him for $*5.00* and costs in this action, wherein *Amos Peck* is plaintiff and *Peter W. Rose* is defendant, now pending in the *district* court of *Lancaster* county, *Nebraska*.

Brown & Ryan Bros., Attys. for Deft.

(*Indorsement.*)[4]
(*Proof of service.*)[5]

2. The Acceptance.

a. Generally.

Form No. 5991.[6]

(*Title of court and cause as in Form No. 5981.*)

To *Richard Roe* (or *Jeremiah Mason, his attorney*):

John Doe, the above named plaintiff, hereby notifies you that he accepts the offer of *Richard Roe*, the above named defendant, to allow

1. *Connecticut.* — Gen. Stat. (1888), §§ 1057–1059. See also list of statutes cited *supra*, note 1, p. 13.

2. *Nebraska.* — Comp. Stat. (1897), § 6527. See also list of statutes cited *supra*, note 1, p. 13.

3. **Necessity of Notice to Plaintiff.** — In this case it was held that the offer to allow judgment was unavailing to throw upon plaintiff the costs made after the filing of the offer, for the reason that the offer, though in writing and filed in the office of the clerk, was not served upon the plaintiff or his attorney, nor was it made in open court while plaintiff was present.

4. **Indorsement.** — The offer to allow judgment set out in the text was indorsed as follows: "*Amos Peck* v. *Peter W. Rose*. Offer to confess judgment. Clerk's Office, *district* court. *Filed March 2*, 1885. *E. R. Sizer*, Clk. *D. C.*"

5. **Proof of service**, see *supra*, note 1, p. 16.

6. *New York.*— Code Civ. Proc., § 738, as *amended* Laws (1877), c. 416 (Birds. Rev. Stat. (1896), p. 2198, § 3). See also list of statutes cited *supra*, note 1, p. 13, for similar statutory provisions.

judgment to be taken against him in the above entitled action for [the sum of *three hundred and fifteen* dollars],[1] with costs that have accrued and may accrue herein.

Dated the *twenty-seventh* day of *November*, 1897.

John Doe (or *Oliver Ellsworth, Attorney for Plaintiff,*
1006 State Street, *Albany, N. Y.*)

(*Affidavit of attorney's authority.*)[2]

(*Proof of service.*)[3]

1. Or, instead of the words within [ ], specify the particular judgment or relief offered to be allowed, as shown in the offer of the defendant.

2. Affidavit of Attorney's Authority. — In *New York*, when the acceptance is subscribed by the attorney of the party, he must annex thereto his affidavit to the effect that he is duly authorized to make it in behalf of the party. N. Y. Code Civ. Proc., § 740 (Birds. Rev Stat. N. Y. (1896), p. 2198, § 5). See *supra*, note 1, p. 20. The following form of affidavit is sufficient under this section:

"*Albany* County, ss.

Jeremiah Mason, being duly sworn on oath, says that he is the attorney for the above named plaintiff, *John Doe*, and that he is duly authorized by said plaintiff to accept the above offer of judgment.

Jeremiah Mason.

Subscribed and sworn to before me this *fourth* day of *January*, 1898.

(SEAL) *Norton Porter*,
Notary Public."

3. Proof of Service. — See *supra*, note 1, p. 16.

Plaintiff's affidavit that notice of acceptance was delivered in the time limited by the statute, to be filed with the offer, as provided by Neb. Comp. Stat. (1897), § 6157, may be in the following form:

"*John Doe*, plaintiff,
against
Richard Roe, defendant.

State of *Nebraska*,
County of *Colfax*. } ss.

John Doe, being duly sworn, upon oath deposes and says that he is the plaintiff in the above entitled action; that on the *tenth* day of *January*, A. D. 1897, at *Schuyler*, in said county, an offer to allow judgment made by the defendant and hereto annexed was served upon him, and that within *five* days thereafter, to wit, on the *fourteenth* day of *January*, A. D. 1897, he served upon *Daniel Webster*, defendant's attorney, at his office in *Schuyler* aforesaid, a notice that he, the plaintiff, accepted the said offer; and that a true copy of said notice is hereto annexed.

John Doe.

Subscribed and sworn to before me this *fourteenth* day of *January*, A. D. 1897.

(SEAL) *Norton Porter*,
Notary Public."

Under N. Y. Code Civ. Proc., § 738, as *amended* Laws (1877), c. 416 (Birds. Rev. Stat. (1896), p. 2198, § 3), the following affidavit is sufficient:

"*Supreme* Court, *Albany* County.

John Doe, plaintiff,
against
Richard Roe, defendant.

Albany County, ss.

Jeremiah Mason, attorney for *John Doe*, the above named plaintiff, being duly sworn, upon oath deposes and says that on the *sixth* day of *February*, A. D. 1897, at *Albany*, in said county, an offer to allow judgment, made by the defendant, and hereto annexed, was served upon him, and that within *ten* days thereafter (or *within the time prescribed by the statute*), to wit: on the *fourteenth* day of *February*, A. D. 1897, he served upon *Daniel Webster*, defendant's attorney, at his office in *Albany* aforesaid, a notice that the plaintiff accepted the said offer, and that the above is a true copy of said notice.

Jeremiah Mason.

Subscribed and sworn to before me this *fourteenth* day of *February*, A. D. 1897.

(SEAL) *Norton Porter*,
Notary Public."

For similar provisions in other jurisdictions see list of statutes cited *supra*, note 1, p. 13.

b. In Justice's Court.

Form No. 5992.[1]

(N. Car. Code (1883), § 909, No. 44.)

(*Title of court and cause as in Form No. 5983.*)

To *Richard Roe*: Take notice that the plaintiff hereby accepts the offer to allow the plaintiff to take judgment in the above action for the sum of *fifty* dollars with costs, and the justice will enter up judgment accordingly. Dated this *eleventh* day of *January*, 1898.

John Doe.

(*Proof of service.*)[2]

c. In Appealed Cases.

Form No. 5993.[3]

(*Title of court and cause as in Form No. 5984.*)

To *Richard Roe* (or *Daniel Webster, his attorney*):

John Doe, the above named *respondent*, hereby notifies you that he accepts the offer of *Richard Roe*, the above named *appellant*, to allow judgment to be rendered in the county court above named against him in the above entitled action, for the sum of *sixty-five* dollars.

Dated the *fourth* day of *February*, 1898.

John Doe, Respondent
(or *Jeremiah Mason*, Attorney for *Respondent*,
1001 State Street,
Albany, New York).[4]

(*Proof of service.*)[2]

3. The Judgment.

a. Generally.

Form No. 5994.[5]

Supreme Court, *Albany* County.

John Doe, plaintiff,
against
Richard Roe, defendant.

John Doe, the plaintiff above named, having filed the summons and complaint in the above entitled cause, together with the offer of

1. *North Carolina.* — Code (1883), § 840, rule 12. See list of statutes cited *supra*, note 1, p. 13.

2. **Proof of Service.** — See *supra*, note 1, p. 13.

3. *New York.* — Code Civ. Proc., § 3070, as *amended* Laws (1885), c. 522; Laws (1895), c. 356; Birds. Rev. Stat. (1896), p. 1815, § 214. Consult annotation to Forms Nos. 5984 to 5985, *supra*.

4. **By Attorney.** — See *supra*, note 1, p. 18.

5. *New York.* — Code Civ. Proc., § 738, as *amended* Laws (1877), c. 416; Code Civ. Proc., § 739, as *amended* Laws (1877), c. 416; Birds. Rev. Stat. (1896), p. 2198, §§ 3 and 4. See also list of statutes cited *supra*, note 1, p. 13.

In appealed cases in *New York*, under Code Civ. Proc., § 3070, as *amended* Laws (1885), c. 522, Laws (1895), c. 356 (Birds. Rev. Stat. (1896), p. 1815, § 124), the judgment to be entered by the clerk

the above named defendant *Richard Roe* in writing, to allow the said plaintiff to allow judgment against him for the sum of *seven hundred and fifty* dollars (*or specifying other relief, as the case may be*), with the proof of acceptance of said offer in writing; therefore, on motion of *Jeremiah Mason*, attorney for plaintiff aforesaid, it is considered and adjudged that the said plaintiff do have and recover against the said defendant the sum of *seven hundred and fifty* dollars damages aforesaid (*or specifying other relief, as the case may be*), with his costs expended by him in this cause, taxed at *eight* dollars, amounting in the whole to *seven hundred and fifty-eight* dollars. Dated this *fourth* day of *January*, A. D. 1898.

Calvin Clark, Clerk of *Albany* County.

b. In Justice's Court.

(1) Upon Acceptance of Offer.

Form No. 5995.[1]

(N. Car. Code (1883), § 909, No. 45.)

John Doe against *Richard Roe.* } Justice's Court.

(*The justice will state all the proceedings in the action from the issuing of the summons down to the appearance of the parties and the complaint of the plaintiff, and then proceed as follows:*) Whereupon the said defendant, before answering said complaint, made and served an offer in writing to allow the plaintiff to take judgment against him for the sum of *fifty* dollars with costs; * and the said plaintiff thereupon accepted such offer and gave notice thereof to the defendant in writing, said offer and acceptance thereof being filed.

Now, therefore, judgment is accordingly rendered in favor of the plaintiff and against the defendant for the sum of *fifty* dollars damages and the further sum of *one* dollar costs.

Dated this *eleventh* day of *January*, A. D. 1898.[2]

[*Abraham Kent*, Justice of the Peace.]

where the party, within ten days after service of the offer, serves upon the party making the same a written notice that he accepts the offer, and files it with an affidavit of service of the notice of acceptance, may be in the following form:

(*Title of court and cause.*)

"The above entitled action comes to this court on appeal taken from a judgment rendered by *Abraham Kent*, a justice of the peace within and for the county of *Albany* aforesaid, in favor of the above named respondent *John Doe* and against the above named appellant *Richard Roe*, on the *tenth* day of *December*, A. D. 1897, for the sum of *two hundred* dollars damages and his costs by him expended, and an offer in writing to allow judgment to be taken in this court for the sum of *one hundred and fifty* dollars having been duly made by the aforesaid respondent, and the said offer having been duly accepted by the aforesaid appellant, and the same having been filed in the office of the clerk of said county of *Albany*, together with an affidavit of the service of notice of said acceptance, wherefore, on motion of *Daniel Webster*, attorney for appellant aforesaid, it is considered that the said respondent *John Doe* have and recover against the said *Richard Roe* the sum or *one hundred and fifty* dollars damages aforesaid" (*concluding as in Form No. 5994*).

1. *North Carolina.* — Code (1883), § 840, rule 12. See list of statutes cited *supra*, note 1, p. 13.

2. The words and figures enclosed by

(2) Upon Refusal of Offer or Failure to Accept.

Form No. 5996.[1]

(N. Car. Code (1883), § 909, No. 45.)

[(*Commencing as in Form No. 5995, and continuing down to**)][2] and the said plaintiff having refused to accept such offer, the defendant answered the complaint by denying, etc. (*State the defense of the defendant down to the judgment, which, in case the plaintiff fails to recover more than the sum mentioned in the offer, should be entered thus:*) After hearing the proofs and allegations of the respective parties, I adjudge that the plaintiff do recover the sum of *fifty* dollars and the further sum of *one* dollar costs.

I further adjudge that the defendant do recover of the plaintiff the sum of *two* dollars and *seventy-five* cents costs accruing in the action subsequent to the offer of the defendant referred to.

Dated this *eleventh* day of *January*, A. D. 1898.[2]

[*Abraham Kent*, Justice of the Peace.]

II. Offer to be Defaulted.

1. By Party.

Form No. 5997.[3]

Penobscot, ss. *Supreme Judicial* Court.
January Term, 1897.

John Doe
against } Offer to be defaulted.
Richard Roe.

And now the said *Richard Roe*, defendant in the above entitled action, on the *first* day of the said term of said court comes and offers

[ ] will not be found in the statute, but have been added to render the form complete.

1. *North Carolina.* — Code (1883), § 840, rule 12. See list of statutes cited *supra*, note 1, p. 13.

2. The words and figures enclosed by [ ] will not be found in the statute, but have been added to render the form complete.

3. **Maine.** — In any personal action, defendant may, in writing entered of record with its date, offer to be defaulted for a specified sum. If accepted, interest may be added from that date to the date of judgment. If the plaintiff does not accept the offer, and fails to recover a sum as due at the time of the offer greater than the sum offered, he recovers such costs only as accrued before the offer, and the defendant recovers costs accrued after that time. Rev. Stat. (1883), c. 82, § 25.

Massachusetts. — When a defendant, in an action at law or suit in equity wherein damages only are sought to be recovered, offers in court and consents in writing to be defaulted, and the judgment shall be rendered against him as damages for a sum therein specified, the same shall be entered of record, together with the time when it was made, and the plaintiff may, at any time within ten days after he has received notice of such offer and consent, accept the offer, and the court shall render judgment accordingly, with costs to the date of the notice. If, after such notice, the court for good cause grants the plaintiff a further time to elect, he may signify his acceptance within the time allowed and the judgment will be rendered as if the acceptance had been within ten days. Pub. Stat. (1882), c. 167, § 65.

If the plaintiff does not elect to accept such offer and does not recover a greater sum than the sum offered, not

to be defaulted in the above entitled action for the sum of *fifty* dollars and costs of court, to be taxed by the court according to law.[1]

Dated the *fourth* day of *January*, 1897.

Richard Roe.

2. By Agent or Attorney.

Form No. 5998.[2]

(Precedent in Jackson *v.* Hampden, 20 Me. 37.)

Penobscot, ss. *Supreme Judicial* Court,
October Term, 1836.

Leonard Jackson
v.
Inhabitants of Hampden.

And now the said *inhabitants of Hampden* on the *first* day of the term of the said court, by their agent, offer to be defaulted in said action for the sum of *ten* dollars debt or damage and costs of court, taxed by the court according to law.

Hannibal Hamlin,
Agent and attorney for the town of *Hampden.*

III. COMPROMISE AGREEMENTS.

1. The Agreement.[3]

Form No. 5999.

(Precedent in Young *v.* Pickens, 45 Miss. 555.)

Pickens & Green
v.
F. F. Chalmers.

By way of compromise of the above stated suit, pending in the *Circuit* Court of *Pontotoc* county, it is hereby agreed between the

including interest on the sum recovered and damages from the date of the offer, the defendant shall have judgment for his costs after said date. The plaintiff, if he recovers damages, shall be allowed his costs only to the date of the offer. Mass. Pub. Stat. (1882), c. 167, § 66.

1. An offer in writing by a defendant in an action pending in court "to be defaulted for the sum of seventy dollars damages in said action," is a compliance with the requirements of section 22, chapter 115, of the Maine Revised Statutes. Gowdy *v.* Farrow, 39 Me. 474.

2. *Maine.* — Rev. Stat. (1883), c. 82, § 25.

Massachusetts. — Pub. Stat. (1882), c. 167, §§ 65, 66.

Consult annotations to Form No. 5997, *supra.*

3. There is no particular technicality to be observed in the drawing of an agreement for compromise, such agreements being ordinary contracts or stipulations between the parties or their respective attorneys. In addition to the precedents above given, see also precedents of compromise agreements in Mullen *v.* Morris, 43 Neb. 596; Rowland *v.* Thompson, 73 N. Car. 510.

Two Suits Involved in One Compromise Agreement. — In Bonney *v.* Morrill, 57 Me. 369, the negotiations concerning a compromise of two actions resulted in the drawing and signing and placing on file an agreement of the following tenor, omitting the detailed description of the land, to wit:

"*S. J.* Court, *Ken.* County, *Nov.* Term, 1864. *William B. Bonney* v. *Samuel Morrill. Samuel Morrill et al.* v. *William B. Bonney et al.*

In the above actions it is agreed by the parties that the defendant in the

said parties, that so much of the claim sued on shall be abated by plaintiffs as will reduce the sum to $1,250, and that defendant will withdraw his plea at the present term of the court, and suffer plaintiffs to take judgment, *nil dicet*, for the above sum, with stay of execution *six* months.

Given at *Pontotoc*, this *10th* day of *April*, A. D. 1867.

F. F. Chalmers,
Israel Pickens, surviving partner
Pickens & Green.

Form No. 6000.

(Precedent in Phillips *v.* Pullen, 45 N. J. Eq. 831.)

New Jersey Supreme Court,
Mercer County *Circuit.*

Ralph L. Pullen
v.
George E. Phillips.
} In *Case.*

The said cause having been settled between the parties upon the terms that the said defendant is to pay the plaintiff or his attorney the sum of *seven thousand and five hundred* dollars in full satisfaction of all damages under said cause; it is therefore agreed by the respective counsel of the said parties, that the payment of the said sum shall be made within *two* weeks from the date hereof, and upon such payment the said plaintiff shall execute a release to the defendant in full for the damages claimed in the said action.

Dated *Trenton, N. J., Jan'y 20th*, 1886.

G. D. W. Vroom, Att'y for Defendant,
Geo. O. Vanderbilt, Att'y for Plaintiff.

2. Action upon the Agreement.

Form No. 6001.[1]

(Conn. Prac. Act, p. 61, Form No. 86.)[2]

To the Sheriff of the county of *Hartford* or either of the constables of the town of *Hartford* in said county — Greeting:

By authority of the state of *Connecticut* you are hereby commanded

action *Bonney* v. *Morrill* shall be defaulted and judgment entered for the plaintiff for so much of the land declared for in the plaintiff's writ as lies easterly of a line (*specifically described*). And said *Bonney* is to have judgment for his legal costs. And it is further agreed, that in the action *Morrill et al.* v. *Bonney et al.* the plaintiffs shall become nonsuit, the defendants recover their legal costs, and the executions for costs in both actions shall be stayed until the next term of this court."

1. For another complaint on a compromise agreement see the title COMPLAINTS, vol. 4, Form No. 5914.

2. **Complaint.** — For the formal parts of complaints in other jurisdictions consult the title COMPLAINTS, vol. 4, p. 1019.

For petition in an action upon a compromise agreement see Mullen *v.* Morris, 43 Neb. 596. For the formal parts of petitions, generally, consult the title COMPLAINTS, vol. 4, p. 1019.

For declaration in an action upon a compromise agreement see Grandin *v.* Grandin, 49 N. J. L. 509. For the formal parts of declarations, generally, consult the title DECLARATIONS.

For special count in a declaration in an action upon a compromise agree-

to attach, to the value of *one thousand* dollars, the goods or estate of *Richard Roe* of *Windsor* in said county, and him summon to appear before the Court *of Common Pleas* to be held at *Hartford* in and for the county of *Hartford* on the *first Monday* of *February*, 1880, then and there to answer *John Doe*, of said *Hartford*, in a civil action, wherein plaintiff complains and says:

1. On *May 15th*, 1879, an action was pending in this court between the parties to this action, brought by the plaintiff to recover from the defendant a book account of $500, which the plaintiff claimed to be justly due,[1] but which the defendant disputed.[2]

2. On said day, in consideration that the plaintiff promise to discontinue his said action forthwith, if the defendant would on *June 19th*, 1879, pay $300 in satisfaction of said disputed claim, the defendant promised to pay the plaintiff said sum on said last mentioned day.

3. The plaintiff accordingly did discontinue said action.[3]

4. Said sum has not been paid.

The plaintiff claims $325 damages.

[*Samuel Short* of *Haddam* is recognized in $——— to prosecute, etc.]

Of this writ with your doings herein make due return.

Dated at *Hartford* this *third* day of *January*, 1880.

3. The Setting Up the Agreement in Defense.

Form No. 6002.

(Conn. Prac. Act, p. 207, Form No. 374.)[4]

John Doe vs. *Richard Roe.* } Court *of Common Pleas.* *Hartford* County. *February* Term, 1880.

1. Before this action, the plaintiff having demanded said sum (or *said goods*, or otherwise) from the defendant, the defendant refused

ment see Frank *v.* Heaton, 56 Ill. App. 227.

For bill in equity praying for the ratification and approval of a compromise agreement see Caldwell *v.* Brown, 66 Md. 295. For the formal parts of bills in equity, generally, consult the title BILLS IN EQUITY.

1. A shadow of claim on the part of the plaintiff should be averred. Dolcher *v.* Fry, 37 Barb. (N. Y.) 152. But the complaint need not allege that the plaintiff's claim was a valid one. Palmer *v.* North, 35 Barb. (N. Y.) 282; Moore *v.* Powell, 1 Disney (Ohio) 144.

2. On Compromise of Claim Not Sued On. — Instead of paragraph 1 in text, insert: "On *May 15th*, 1879, there were pending between the parties to this action *arbitration proceedings* upon a claim of the plaintiff herein against the defendant herein for the sum of $500 on a *book account*, which said plaintiff claimed to be justly due but which said defendant disputed," or as the case may be.

3. That the litigation was discontinued according to the compromise must be alleged. Dolcher *v.* Fry, 37 Barb. (N. Y.) 152.

4. Answer. — For the formal parts of answers in other jurisdictions consult the title ANSWERS IN CODE PLEADING, vol. 1, p. 799 *et seq.*

Pleas. — For the formal parts of pleas, generally, consult the title PLEAS.

Accord and Satisfaction. — For forms of pleas and other answers setting up a similar defense consult the title ACCORD AND SATISFACTION, vol. 1, p. 181 *et seq.*

In Dabney *v.* McFarlin, (Tex. Civ. App. 1896) 34 S. W. Rep. 142, to the

to pay the same because (*Here state facts showing the claim to have been a doubtful one*).

2. The parties thereupon agreed to compromise said claim, and that the defendant should pay and the plaintiff accept $*50* in satisfaction thereof.

3. On *July 1st*, 1879, defendant so paid and the plaintiff so accepted said sum.

And therefore he prays judgment.

By *Jeremiah Mason*, his attorney.

petition filed in the county court of Hardiman county by R. L. Dabney against J. L. McFarlin, G. S. White and William F. Brice, to recover judgment on a writ of error bond, defendant pleaded as follows, omitting the formal parts:

"That in consideration of his delivering immediate possession of the land and premises to plaintiff, and renting the same back for *one* year at a stipulated price, and waiving citation and entering his appearance in the suit to be filed on the *two* $*1,833.60* notes, for foreclosure of the vendor's lien on the land, and in not resisting the claim, but allowing judgment to go by default, and allowing foreclosure and sale, and agreeing that he would not bid at the sale against plaintiff, but would allow plaintiff's attorney to bid in the land, he, the said *Lewis M. Dabney*, as agent of *R. L. Dabney*, with authority so to do, agreed to cancel and release the judgment to be obtained on the *two* principal notes, as well as the judgment and bonds sued on in this case; and that he, *McFarlin*, did and performed, fully, and in good faith, all that he had agreed to do as aforesaid; and that, therefore, he and his sureties on said bonds are discharged from all liability thereon."

It was held that demurrer to this answer, because it failed to show considerations, was correctly overruled and that the release of the judgment on both claims was, under the evidence, clearly within the scope of the son's apparent authority.

To avoid a settlement pleaded by defendant to a petition, claiming a balance on contract for the sale of cattle, for which a note was given, the plaintiff must allege mutual mistake or fraud in settlement. Williams *v.* Dean, (Tex. Civ. App. 1897) 38 S. W. Rep. 1024.

CONCEALED WEAPONS.

See the title CARRYING WEAPONS, vol. 4, p. 351.

CONCEALMENT OF BIRTH OR DEATH.

By Mel Emerson Peters.

I. Of a Child Generally, 30.
II. Of a Bastard Child, 31.
1. *Generally*, 31.
2. *Alleging Manner of Concealment*, 33.
3. *For Being Delivered in Secret*, 35.
III. Aiding, Abetting and Assisting, 35.

CROSS-REFERENCES.

For matters of Procedure, see the title CONCEALMENT OF BIRTH OR DEATH, 4 Encyclopædia of Pleading and Practice, p. 624.

For matters of Law and Evidence, see the title CONCEALMENT OF BIRTH OR DEATH, 6 American and English Encyclopædia of Law (2d ed.), p. 424.

I. Of a Child Generally.

Form No. 6003.[1]

(Precedent in State *v.* Stewart, 93 N. Car. 540.)[2]

State of *North Carolina*, } *Superior* Court,
Burke County. } *Spring* Term, 1885.

The jurors for the State, upon their oath, present that *Laura Stewart*, late of the county of *Burke*, on the *first* day of *March*, A. D. 1885, with force and arms at and in the county aforesaid, unlawfully and wilfully did endeavor to conceal the birth of a new-born *male* child, not yet named, of her, the said *Laura Stewart*, by then and

1. *North Carolina.* — Code (1883), § 1004. See also the following statutes of similar tenor, to wit:
Minnesota. — Stat. (1894), § 6548.
Missouri. — Rev. Stat. (1889), § 3479.
New York. — Pen. Code, § 296, Birds. Rev. Stat. (1896), § 483.

2. Upon her arraignment the defendant moved to quash this indictment, drawn under N. Car. Code (1883), § 1004, upon two grounds: First, that the enactment upon which the indictment was found was so vague and indefinite in its terms as not to create a criminal offense, and, second, that the indictment itself failed to set out and charge an indictable offense; but it was held that a refusal to sustain this motion, and a motion in arrest of judgment for the same reason, was no error. The court said: "The statute constitutes the secret burying or other secret disposal of a dead child, born alive, a misdemeanor; and also the

there secretly placing and leaving the dead body of said child in a secret place, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state.

J. S. Adams, Solicitor.

II. OF A BASTARD CHILD.[1]

1. Generally.

Form No. 6004.[2]

In the *Circuit* Court, for the *Third* Judicial Circuit of *Florida*, *Suwannee* County, *November* Term, in the year of our Lord one thousand eight hundred and *ninety-seven*.

The State of Florida against *Mary Doe.* } Indictment for Concealing Death of Bastard Child.

In the name and by the authority of the state of *Florida*: The grand jurors for the state of *Florida* impaneled and sworn to inquire and true presentment make in and for the body of the county of *Suwannee*, upon their oath do present, that *Mary Doe*, single woman, late of the said county of *Suwannee*, and state of *Florida*, on the *first* day of *October*, in the year of our Lord one thousand eight hundred and *ninety-seven*, in the county and state aforesaid, being then and there pregnant and big with a male (or *female*) child, afterward, to wit, on the same day and year aforesaid, was then and there delivered of the said child alive, which said child being so delivered as aforesaid, and so being the issue of the body of her the said *Mary Doe*, was by the laws of this state a bastard; and that the said child afterward, to wit, on the same day and year aforesaid, in the county and state aforesaid, sickened and died; and that afterward, to wit, on the same day and year aforesaid, in the county of *Suwannee* aforesaid, the said *Mary Doe*, as soon as the child was dead, did then and there unlawfully conceal the death of said bastard child, the said issue of her body, so that it might not be known whether such child was born alive or not, or whether it was murdered or not; against the peace and dignity of the state of *Florida*.

Paul Jones, State's Attorney
for the *Third* Judicial Circuit of *Florida*.

endeavor to conceal the birth of such child. This latter is the criminal act imputed to the accused, and it is brought within the condemnation of the law by the averment of hiding of the body in a secret place, whereby its birth is attempted to be concealed."

1. See also the title BASTARDY, vol. 3, Forms Nos. 4064 to 4066.

2. *Florida*. — Rev. Stat. (1892), § 2393. See also similar statutes as follows:

Georgia. — 3 Code (1895), § 79.

Massachusetts. — Pub. Stat. (1882), c. 207, § 11.

Michigan. — How. Anno. Stat. (1882), § 9284.

Oregon. — Hill's Anno. Laws (1892), § 1865.

Rhode Island. — Gen. Laws (1896), c. 281, § 10.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 4585.

Form No. 6005.[1]

State of *Maine*.

Kennebec, ss. At the *Superior* Court begun and held at *Augusta*, within and for said county of *Kennebec*, on the *first Tuesday* of *September*, in the year of our Lord eighteen hundred and *ninety-six*, the grand jurors for said state upon their oath present that *Mary Doe*, of *Augusta*, in the county of *Kennebec*, single woman, at *Augusta*, in said county of *Kennebec*, on the *fourth* day of *July*, in the year of our Lord eighteen hundred and *ninety-six*, being then and there pregnant and big with a male (or *female*) child, was then and there willingly delivered in secret of said male (or *female*) child, the issue of the body of her the said *Mary Doe*, which said child, being so delivered as aforesaid, would, under the laws of this state, be a bastard if born alive; and that the said child, then, to wit, on the day and year aforesaid, died; and the said *Mary Doe*, afterward, to wit, on the same day and year aforesaid, in the county of *Kennebec* aforesaid, did then and there conceal the death of said child, the issue of her body as aforesaid, so that it is not known whether said child was born dead, or alive and was murdered; against the peace of said state, and contrary to the form of the statute in such case made and provided.

Freeman P. Lane, Foreman.

Dennis Kimberly, County Attorney.

Form No. 6006.[2]

In the Court *of Quarter Sessions of the Peace* for the County of *Dauphin*, *February* Session, 1897.

Dauphin County, ss. The grand inquest of the *commonwealth* of *Pennsylvania* inquiring in and for the county of *Dauphin*, upon their respective oaths and affirmations do present that *Mary Doe*, late of the county of *Dauphin* aforesaid, on the *first* day of *January*, in the year of our Lord one thousand eight hundred and *ninety-seven*, at and in the county aforesaid, being big with a male (or *female*) child, the same day and year, in the county aforesaid, did bring forth the said child of the body of her the said *Mary Doe*, which said male (or *female*) child, if it were born alive,[3] would by the law of this *commonwealth* be a bastard; and the said male (or *female*) child afterward, to wit, on the same day and year aforesaid, at and in the county aforesaid, died,[4] and the said *Mary Doe*, afterward, to wit, on the

1. *Maine*. — Rev. Stat. (1883), c. 124, § 7. For a statute nearly identical see N. H. Pub. Stat. (1891), p. 739, § 14.

2. *Pennsylvania*. — Bright. Pur. Dig. (1894), p. 472, § 3. See also the following statutes, which are nearly identical with the above, to wit:

Colorado. — Mills' Anno. Stat. (1891), § 1195.

Illinois. — Starr & C. Anno. Stat. (1896), p. 1249, par. 93.

Nevada. — Gen. Stat. (1885), § 4597.

North Dakota. — Rev. Codes (1895), § 7179.

The *North Dakota* statute concerning the concealment of death relates only to children under the age of ten years.

3. **Child Born Alive.** — It is not necessary in the indictment to allege that the child was born alive. Douglass *v.* Com., 8 Watts (Pa.) 535.

4. **Death of Child must be Alleged.** — The death of the child must be distinctly averred, and nothing can be taken by way of intendment or recital to supply the want of certainty in this respect in the indictment. Douglass *v.* Com., 8 Watts (Pa.) 535.

said *first* day of *January*, in the year aforesaid, at and in the county aforesaid, as soon as the said male (or *female*) child was born, did endeavor[1] privately to conceal[2] the death of the said child, so that it might not come to light whether it were born dead or alive, or whether it was murdered or not; contrary to the form of the act of general assembly in such case made and provided, and against the peace and dignity of the *commonwealth* of *Pennsylvania*.

Cornelius Darragh, District Attorney.

2. Alleging Manner of Concealment.

Form No. 6007.

(Precedent in Sullivan *v.* State, 36 Ark. 65.)[3]

[State of *Arkansas*, *Independence* County. } *Independence Circuit* Court.][4]

The grand jury of *Independence* county [in the name and by the authority of the state of *Arkansas*][3] accuse *Mary O. Sullivan* of the crime of endeavoring privately to conceal the death of issue of her body, committed as follows, to wit: The said *Mary O. Sullivan*, on the *twelfth* day of *May*, 1880, in the county aforesaid, then and there being pregnant, gave birth to a child, [which by the laws of this state was a bastard,][5] which said child then and there died;[6] and that the said *Mary O. Sullivan* then and there feloniously did endeavor privately to conceal the death of said child, that it might not come to light, by then and there feloniously and secretly depositing the corpse of said child in a well,[7] against the peace [and dignity of the state of *Arkansas*.

Daniel Webster, Prosecuting Attorney
Third Judicial Circuit of *Arkansas*.][4]

In Boyles *v.* Com., 2 S. & R. (Pa.) 40, the portion of the indictment under consideration was the averment of death, which was as follows, and was held to be sufficient: "Which same infant, so being brought forth alive, was, by the laws of this *commonwealth*, a bastard, and that the said *Sarah Boyles* afterwards, to wit, the same day and year aforesaid (the said *female* infant having, on the day and year last aforesaid, at the township and county aforesaid, died), did endeavor, privately, to conceal the death of the said *female* infant, so that it might not come to light whether the said *female* infant was born dead or alive, or whether the said *female* infant was murdered or not, contrary to the form of the act of general assembly."

1. Endeavor to Conceal. — An "endeavor to conceal," and not "concealing," constitutes the offense, and it should be so alleged in the indictment. Boyles *v.* Com., 2 S. & R. (Pa.) 43.

2. Manner of Concealment. — It is not necessary to set forth in the indictment the manner or by what acts the accused endeavored to conceal the death of the child. Boyles *v.* Com., 2 S. & R. (Pa.) 43.

3. *Arkansas.* — Sand. & H. Dig. (1894), §§ 1666, 1667.

4. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

5. Averment that Child was a Bastard. — The words "which by the laws of this state was a bastard" have been inserted, as in this case it was held that the indictment must allege that the child was a bastard.

6. Averment of Death of Child. — The indictment must expressly and distinctly allege that the child is dead. But it need not state whether the child died before, at or after its birth. State *v.* Ellis, 43 Ark. 93.

7. Manner of Concealment. — The in-

Form No. 6008.[1]

Nicholas Circuit Court.

The Commonwealth of Kentucky
against
Jane Doe.

The grand jury of *Nicholas* county, in the name and by the authority of the *commonwealth* of *Kentucky*, accuse *Jane Doe* of the crime of endeavoring privately to conceal the death of a bastard child, the issue of her body, committed as follows, to wit: The said *Jane Doe*, on the *twenty-seventh* day of *November*, 1897, in the county aforesaid, being then and there pregnant and big with a male (or *female*) child, was then and there delivered of the said child, the issue of her body, which said child, if the same had been born alive, would, by the laws of this *commonwealth*, have been a bastard, and afterward, to wit, on the same day and year last aforesaid, in the county aforesaid, the said *Jane Doe* did unlawfully and feloniously endeavor privately, by drowning[2] the said child, to conceal the birth thereof, so that it might not be known whether the said child were born alive or not, against the peace and dignity of the *commonwealth* of *Kentucky*.

dictment need not allege in what manner or by what acts the mother endeavored to conceal the death of her child. State *v.* Ellis, 43 Ark. 94.

1. Kentucky. — Gen. Stat. (1888), p. 410, § 14. See also a similar statute in Mo. Rev. Stat. (1889), § 3479. The *Missouri* statute, however, does not confine the punishment to the concealment of the death of a bastard child.

Precedent. — In State *v.* Joiner, 4 Hawks (N. Car.) 351, one count of the indictment was as follows:

"That the said *Rinney Joiner*, on the *twenty-seventh* of *November*," etc., "being big with a certain *male* child, afterwards, to wit, on the same day and year last aforesaid, at and in the county of *Pitt* aforesaid, by the providence of God, did bring forth the said child of the body of her the said *Rinney Joiner*, alone and in secret, which said *male* child, if the same had been born alive, would by the laws of this state have been a bastard; and that the said *Rinney Joiner*, being moved by the instigation of the devil, afterwards, to wit, on the said *twenty-seventh* day of *November*, in the year," etc., "as soon as the said *male* child was born, with force and arms, at and in the county of *Pitt* aforesaid, unlawfully, wickedly and wilfully, did throw, put and place the said *male* child under and beneath a crib there situate; and the said *male* child did then and there, under and beneath the crib aforesaid, unlawfully, wickedly and wilfully, hide, secrete and conceal, she the said *Rinney Joiner*, in manner and form last aforesaid, endeavoring privately so to conceal the death of the said *male* child that it might not come to light whether the said child were born alive or not, but be concealed, against the form of the statute."

This indictment was drawn under an early *North Carolina* statute nearly identical with the statutes of *Kentucky* and *Missouri*. For an indictment under the present *North Carolina* statute see *supra*, Form No. 6003.

2. Means of Concealment. — The statute requires a physical concealment of the bastard child, either by drowning, burying, or in some other way, therefore the acts constituting the offense of concealment must be stated in the indictment; and an allegation that the accused "did feloniously conceal the birth of a bastard child, the issue of her body, by secreting the said child so that it might not be known whether or not it had been born alive, said child being dead when found," is only the statement of a conclusion of law, and is insufficient to support a judgment of conviction. Foster *v.* Com., 12 Bush (Ky.) 373.

3. For Being Delivered in Secret.

Form No. 6009.[1]

To the Hon. *Superior* Court for the County of *New Haven*, now in session:

Daniel Webster, of *New Haven*, Esquire, attorney for the state in and for said county, here in court informs that *Jane Doe*, of said *New Haven*, was pregnant of a child of her body, which when born would be a bastard, and on the *third* day of *January*, 1898, at said town of *New Haven*, she unlawfully concealed said pregnancy, and was then and there willingly and intentionally delivered in secret by herself of her said child, the issue of her body, against the peace, and contrary to the statute in such case made and provided; wherefore the said attorney prays that a bench warrant may issue against the said *Jane Doe*, that she may be arrested and brought before this court to answer to this information and be dealt with according to law.

Daniel Webster, Attorney.

III. AIDING, ABETTING AND ASSISTING.[2]

Form No. 6010.[3]

Providence, sc. At the Court *of Common Pleas* of the State of *Rhode Island and Providence Plantations* holden at *Providence*, within and for the county of *Providence*, on the *first Monday* of *February*, in the year of our Lord one thousand eight hundred and *ninety-eight*.

The grand jurors for the state of *Rhode Island and Providence Plantations*, in and for the county of *Providence*, upon their oaths present that *Jane Doe*, of *Cranston* in said county, spinster, on the *eleventh* day of *November*, in the year of our Lord one thousand eight hundred and *ninety-seven*, with force and arms at *Cranston* aforesaid, in the aforesaid county of *Providence*, being big with a certain child, the same day and year last aforesaid, at *Cranston* aforesaid, did bring forth the said child of the body of her the said *Jane Doe*, which said child so being brought forth alive was, by the laws of this state, a bastard, and that the said *Jane Doe* afterward, to wit, on the same day and year last aforesaid, at said *Cranston*, did conceal the birth of said child, so that it might not appear whether said child was born dead or alive, and that *Richard Roe* of said *Cranston*, *laborer*, and *Cynthia Roe*, wife of the said *Richard*, at said *Cranston*, on the said *eleventh* day of *November*, in the year of our Lord one thousand eight hundred and *ninety-seven*, did feloniously and wickedly aid, assist,

1. *Connecticut.* — Gen. Stat. (1888), § 1533. See also a similar statute in *New Jersey*. N. J. Gen. Stat. (1895), p. 1064, § 83.

2. See also Reg. v. Bird, 2 C. & K. 817, 61 E. C. L. 817, for the substance of a sufficient indictment.

3. This is substantially the second count of the indictment in State *v.* Sprague, 4 R. I. 257, in which case it was held that, upon proper proof, the defendants might be convicted of aiding, assisting, etc., the commission of the offense, although the indictment does not charge them with being "present" and aiding, abetting, etc. The indictment was under R. I. Stat. (1844), § 86, which statute is identical with R. I. Gen. Laws (1896), c. 281, § 10.

abet, counsel, hire, commission and procure the said *Jane Doe* the said offense in manner and form aforesaid to do and commit, against the form of the statute in such case made and provided and against the peace and dignity of the state.

Daniel Webster, Attorney-General.

CONDEMNATION PROCEEDINGS.

See the title EMINENT DOMAIN.

CONFESSION AND AVOIDANCE.[1]

By Thomas E. O'Brien.

I. By Plea or Answer, 37.
II. By Replication or Reply, 42.
III. By Notice of Special Defense, 44.

CROSS-REFERENCES.

For Forms of other Pleas and Answers setting up new matter in Confession and Avoidance, see the various special pleas treated in this work, such as ACCORD AND SATISFACTION; ANSWERS IN CODE PLEADING; ARBITRATION AND AWARD; CHAMPERTY AND MAINTENANCE; COMPROMISE; CONSIDERATION; COVERTURE; DECEIT; DURESS; ESTOPPEL; FALSE REPRESENTATIONS; FRAUD; DRUNKENNESS; INFANCY; INSANITY; INSOLVENCY; LACHES; PAYMENT; PERFORMANCE; PLEAS; RELEASE AND DISCHARGE; RES JUDICATA; SET-OFF AND COUNTERCLAIM; STATUTE OF FRAUDS; STATUTE OF LIMITATIONS; USURY; etc., and the GENERAL INDEX to this work.

For matters of Procedure, see the title CONFESSION AND AVOIDANCE, 4 Encyclopædia of Pleading and Practice, p. 664 *et seq.*

I. By Plea or Answer.[2]

1. Specially Pleaded. — New matter in confession and avoidance must be specially pleaded. 1 Chit. Pl. (16th Am. ed.) 518, 532, 535; Parker *v.* Lowell, 11 Gray (Mass.) 353; Blair *v.* Coffman, 2 Overt. (Tenn.) 176; Maggort *v.* Hansbarger, 8 Leigh (Va.) 540; Churcill *v.* Bauman, 95 Cal. 545; Stringer *v.* Breen, 7 Ind. App. 559; Norris *v.* Casel, 90 Ind. 143; Byrne *v.* Hibernia Nat. Bank, 31 La. Ann. 84; Nash *v.* St. Paul, 11 Minn. 174; Musser *v.* Adler, 86 Mo. 445; Moore *v.* Ringo, 82 Mo. 468; George *v.* Williams, 58 Mo. App. 138; Hardwick *v.* Cox, 50 Mo. App. 509; Paige *v.* Willett, 38 N. Y. 28; Roe *v.* Angevine, 7 Hun (N. Y.) 679; Dresler *v.* Hard, 57 N. Y. Super. Ct. 192; Lupo *v.* True, 16 S. Car. 587.

2. For formal parts of pleas, generally, consult the title Pleas; and for the formal parts of answers, generally, consult the title Answers in Code Pleading.

The plea must admit the facts alleged in the declaration and avoid them by matter which plaintiff would not be bound to prove if the general issue only had been pleaded. 1 Chit. Pl. (16th Am. ed.) 552; Taylor *v.* Cole, 32 T. R. 298; Manchester *v.* Vale, 1 Saund. 27; Griffith *v.* Eyles, 1 B. & P. 413; M'Pherson *v.* Daniels, 10 B. & C. 263; 21 E. C. L. 69; Ocean Steamship Co. *v.* Williams, 69 Ga. 251; Augusta Factory *v.* Barnes, 72 Ga. 217; Phelps *v.* Thurman, 74 Ga. 837; Seymour *v.* Bailey, 76 Ga. 340; Anson *v.* Dwight, 18 Iowa.

242; Martin *v.* Swearengen 17 Iowa 349; Morgan *v.* Hawkeye Ins. Co., 37 Iowa 360; State *v.* Williams, 48 Mo. 212; Bauer *v.* Wagner, 39 Mo. 385; Day *v.* Mill-Owners' Mut. F. Ins. Co., 75 Iowa 700; Keedy *v.* Long, 71 Md. 388; Brandegee *v.* National Ins. Co., 20 Johns. (N. Y.) 333; Auburn Bank *v.* Weed, 19 Johns (N. Y.) 300; Conger *v.* Johnston, 2 Den. (N. Y.) 96; McMurray *v.* Gifford, 5 How. Pr. (N. Y. Supreme Ct.) 15; Brown *v.* Artcher, 1 Hill (N. Y.) 266; Tobias *v.* Rogers, 3 Code Rep. (N. Y. Supreme Ct.) 156; Blood *v.* Adams, 33 Vt. 52; Dibble *v.* Duncan, 2 McLean (U. S.) 553.

But the cause of action need not be confessed precisely as alleged. Cooper *v.* Smith, 119 Ind. 315.

A party is not required to admit all the facts alleged in order to admit some of them, or to deny all the facts in order to deny a part of them. He may admit such facts as he supposes to be true, and excuse or avoid them, and deny the alleged facts which he believes are not true. State *v.* St. Paul, etc., Turnpike Co., 92 Ind. 42.

Where the defendant's pleas admitted in effect the making of a contract and its subsequent breach by the defendant, but one of which set up a justification, and two others set up a judgment, they were held to be good pleas by way of confession and avoidance. Keedy *v.* Long, 71 Md. 388.

Must Answer the Whole Declaration or Count. — Manchester *v.* Vale, 1 Saund. 28, note 3; Racer *v.* State, 131 Ind. 401; Hutchinson *v.* Sangster, 4 Greene (Iowa) 341; Armfield *v.* Nash, 31 Miss. 366; Ayrault *v.* Chamberlain, 33 Barb. (N. Y.) 237; Bebout *v.* Simmonds, Tappan (Ohio) 260.

Where new matter is pleaded as a partial defense under the code, unless it is expressly so stated it will be assumed the matter is pleaded as a complete defense. Thompson *v.* Halbert, 109 N. Y. 329; Mattice *v.* Wilcox, (Supreme Ct.) 36 N. Y. St. Rep. 915.

The defense need not be stated completely in one paragraph or count. It may refer to matter in other counts, and the matter thus referred to may be considered as a part of the count in which it is referred to. Dexter *v.* Alfred, (Supreme Ct.) 46 N. Y. St. Rep. 791; Bogardus *v.* New York L. Ins. Co., 101 N. Y. 328.

Unless the answer in terms adopts or refers to matter contained in some other count, it will be tested as a pleading alone by the matter itself contained. Baldwin *v.* U. S. Telegraph Co., 54 Barb. (N. Y.) 517.

Facts must be Stated upon which the Defense Relies. — Raymond *v.* Pritchard, 24 Ind. 320; Knowles *v.* Gee, 4 How. Pr. (N. Y. Supreme Ct.) 317; Russell *v.* Clapp, 4 How. Pr. (N. Y. Supreme Ct.) 347; Glenny *v.* Hitchins, 4 How. Pr. (N. Y. Supreme Ct.) 98; Williams *v.* Hayes, 5 How. Pr. (N. Y. Supreme Ct.) 470; McMurray *v.* Gifford, 5 How. Pr. (N. Y. Supreme Ct.) 15; Weed *v.* Hill, 2 Miles (Pa.) 122; Elmore *v.* Hill, 46 Wis. 618.

Facts must be Stated Clearly and with Certainty. — Hudson *v.* Wabash Western R. Co., 101 Mo. 13; Northrup *v.* Mississippi Valley Ins. Co., 47 Mo. 444; Ells *v.* Pacific R. Co., 51 Mo. 200; Gihon *v.* Levy, 2 Duer (N. Y.) 180; Lewis *v.* Kendall, 6 How. Pr. (N. Y. Supreme Ct.) 59; Bateman *v.* Johnson, 10 Wis. 1.

An answer cannot confess and avoid and also deny the cause of action in the same paragraph. Cronk *v.* Cole, 10 Ind. 485; Kimble *v.* Christie, 55 Ind. 140; Woollen *v.* Whitacre, 73 Ind. 201; Richardson *v.* Snider, 72 Ind. 425; State *v.* Foulkes, 94 Ind. 498; Petty *v.* Church of Christ, 95 Ind. 278; Nysewander *v.* Lowman, 124 Ind. 590; Racer *v.* State, 131 Ind. 401; Coble *v.* McDaniel, 33 Mo. 363; Adams *v.* Trigg, 37 Mo. 143; Darrett *v.* Donnelly, 38 Mo. 492; Smith *v.* Culligan, 74 Mo. 387; Zacharias *v.* French, 1 Chit. Pl. (16th Am. ed.) 559, 10 Misc. Rep. (N. Y. C. Pl.) 202, 24 Civ. Proc. Rep. (N. Y.) 88.

But a paragraph in an answer may confess and avoid part of the cause of action and deny other facts stated in the complaint. Colglazier *v.* Colglazier, 117 Ind. 463; State *v.* St. Paul, etc., Turnpike Co., 92 Ind. 42.

A denial may be pleaded in the same answer with new matter. South Dakota *v.* McChesney, 87 Hun (N. Y.) 294; Whedbee *v.* Reddick, 79 N. Car. 518; Sumner *v.* Shipman, 65 N. Car. 623; Reed *v.* Reed, 93 N. Car. 465.

A Pleading Cannot Constitute both an Answer and a Cross Complaint. — Crow *v.* Carver, 133 Ind. 262; Conger *v.* Miller, 104 Ind. 592; Anderson Bldg., etc., Assoc. *v.* Thompson, 88 Ind. 414; Washburn *v.* Roberts, 72 Ind. 213.

Hypothetical pleading is not allowed generally. 1 Chit. Pl. (16th Am. ed.) 552; Margetts *v.* Bays, 4 Ad. & El. 489, 31 E. C. L. 117; Sayles *v.* Wooden, 6 How. Pr. (N. Y.) 84. It has been held, how-

Form No. 6011.[1]

In the *King's Bench.*

Trin. Term, *51 Geo. III.*

Richard Roe }
ats. }
John Doe. }

(*First plea, general issue.*)[2]

And for a further plea in this behalf as to the fishing in the said fishery in the said *first*[3] count mentioned and the said fish there found and being, catching, seizing, taking and carrying away and converting and disposing thereof to his own use, the said *Richard Roe*, by leave of the court here for this purpose first had and obtained according to the form of the statute in such case made and provided, says that the said *John Doe* ought not to have or maintain his aforesaid action thereof against him, because, he says that the place in which the said supposed several fishery now is and at the several times, when, etc., was a certain close, or place or piece or parcel of land covered with water and which said close, or piece or parcel of land, now is, and at the said several times, when, etc., was the close, soil and freehold of the said *Richard Roe*, wherefore the said *Richard Roe*, at the said several times, when, etc., entered into the said close, piece or parcel of land, and fished there for fish, and the said fish in the said first count mentioned there found and being, caught, seized, took and carried away and converted and disposed thereof to his own use as it was lawful for him so to do for the cause aforesaid; which are the said several supposed trespasses in the introductory part of this plea mentioned whereof the said *John Doe* hath complained against him the said *Richard Roe.*[4] And this the said *Richard Roe* is ready to

ever, that in certain cases the defendant may answer hypothetically. He may be ignorant of the truth of plaintiff's allegations, or he may know them to be false. Ketcham *v.* Zerega, 1 E. D. Smith (N. Y.) 553; Brown *v.* Ryckman, 12 How. Pr. (N. Y. C. Pl.) 317. And the plea "that the said several supposed causes of action" has been held to be good. Eavestaff *v.* Russell, 10 M. & W. 365.

Inconsistency. — Where an action was brought by an administrator *de bonis non* for the recovery of money deposited with the defendant by the decedent, the defendant's answer admitting the debt of decedent and also of the deposit alleged first payment of the entire amount deposited to the former administrator in his representative capacity and a subsequent deposit by him of such amount to his individual account; secondly, the payment, upon the order and direction of the previous administrator, of divers sums amounting to the whole sum deposited was held to be bad, the defenses being inconsistent. Smith, Adm'r, *v.* Culligan, 74 Mo. 387.

1. At common law, this plea is sufficient as setting up matter in confession and avoidance. 2 Chit. Pl. 609.

2. General issue in trespass, at common law, was as follows: "And the said *Richard Roe*, by *Jeremiah Mason*, his attorney, comes and defends the force and injury, when, etc., and says, that he is not guilty of said supposed trespasses above laid to his charge or any part thereof in manner and form as the said *John Doe* hath above thereof complained against him. And of this he, the said *Richard Roe*, puts himself upon the country," etc. See also the title PLEAS.

3. Where the answer is to one count, it must appear what count it is intended to answer. Kneedler *v.* Sternbergh, 10 How. Pr. (N. Y. Supreme Ct.) 67.

4. This is a second plea to trespass for fishing in a several fishery, setting up that the *locus in quo* was the defendant's freehold. 2 Chit. Pl. 609.

To trespass for assault and battery the

verify,[1] wherefore he prays judgment if the said *John Doe* ought to have or maintain his aforesaid action thereof against him, etc.

Form No. 6012.[2]

In the *King's Bench.*

The *9th* day of *February*, 1838.

Richard Roe ats. *John Doe.* } The said defendant, by *Jeremiah Mason*, his attorney, says that after the making of the said promise (or *accruing of the said causes of action*) in the declaration mentioned and before the commencement of this suit, to wit, on the *tenth* day of *July* in the year eighteen hundred and *thirty-seven*, the plaintiff by his certain writing of release sealed with his seal and now shown to the said court here, the date whereof is the day and year last aforesaid, do remise, release and forever quitclaim unto the said defendant, his heirs, executors and administrators, the said promise (or *causes of action and each and every of them*) in the said declaration mentioned and all sum and sums of money then due and owing (*as in the release*) as by the said deed or writing of release, reference being thereunto had will fully appear, and this the defendant is ready to verify.

Jeremiah Mason, Attorney for Defendant.

Form No. 6013.[3]

John Doe against *Richard Roe.* } In *Washington* County Court, *September* Term, A. D. 1897.

And the said *Richard Roe*, by *Jeremiah Mason*, his attorney, comes and defends the force and injury, when, etc., and says that he is not guilty of the trespasses above laid to his charge, in the manner and

following plea was held to be good: "As to the assaulting of the plaintiff and beating, bruising and ill treating him with the said stick, giving and striking him the said blows, etc , he the defendant at the time when, etc., was lawfully possessed of and in a certain close called, etc., at, etc., and being so possessed the plaintiff at the said time when, etc., with force and arms and with a strong hand as much as in him lay did attempt and endeavor forcibly to break into and enter the said close of the defendant, and would have broken into and entered the said close without the defendant's license and against his will, whereupon the defendant, being then in his said close and seeing the said attempt and endeavor of the plaintiff, did then and there resist and oppose such entrance into the said close and upon that occasion did then and there defend his possession as it was lawful for him to do, and that if any damage or injury then and there happened to the plaintiff it was in the defense of possession of the said close." Weaver *v.* Bush, 8 T. R. 78. Consult also title ASSAULT, vol. 2, Forms Nos. 2502, 2503.

1. **Verification.** — All pleas by way of confession and avoidance must conclude with a verification. 1 Chit. Pl. (16th Am. ed.) 583; Bennet *v.* Filkins, 1 Saund. 22; Union Bank *v.* Ridgely, 1 Har. & G. (Md.) 325; Dewees *v.* Manhattan Ins, Co., 34 N. J. L. 253; Patrick *v.* Brown, 7 Phila. (Pa.) 133; Mayer *v.* Gimbel, 9 Phila. (Pa.) 90; Joslyn *v.* Tracy, 19 Vt. 569; Virginia F. & M. Ins. Co. *v.* Saunders, 84 Va. 210.

2. **Under the Hilary rules**, this plea of release is good. Petersdorf's Prec. 319. The form applies only to a general release. See also the title RELEASE AND DISCHARGE.

3. **In common-law states** this plea in trespass is good as an illustration of a plea of confession and avoidance. Aiken's Prac. F. (Vt.) 310.

form as the said *John Doe* hath above complained against him; and of this he, the said *Richard Roe*, puts himself upon the country, etc. And as to the breaking and entering the said dwelling-house in the said declaration mentioned and in which, etc., and staying and continuing therein for the said space of time in the said declaration also mentioned above to have been done by the said *Richard Roe*, he the said *Richard Roe*, by leave of the court here for this purpose first had and obtained according to the form of the statute in such case made and provided, says that the said *John Doe* ought not to have his aforesaid action thereof maintained against him, because he says that the said dwelling-house in the said declaration mentioned and in which, etc., long before at the same time, etc., was and still is the dwelling-house and freehold of him the said *Richard Roe*, wherefore he the said *Richard Roe*, at the said time when, etc., broke and entered the said dwelling-house as being the dwelling-house and freehold of him the said *Richard Roe* and stayed and continued in the said dwelling-house for the said space of time in the said declaration mentioned as it was lawful for him to do for the cause aforesaid, which are the supposed trespasses in the introductory part of this plea mentioned, whereof the said *John Doe* hath above complained of the said *Richard Roe*, and this he is ready to verify, wherefore he prays judgment if the said *John Doe* ought to have the aforesaid action maintained against him.

Jeremiah Mason, Attorney for Defendant.

Form No. 6014.

John Doe, plaintiff, against *Richard Roe*, defendant. } In the Circuit Court *Barton* County, *January* Term, 1898.

Defendant, for answer to plaintiff's petition, admits the allegations therein contained as to the receipt by defendant of the said wheat, but says that at the time of the alleged conversion of the same defendant was engaged in the business of conducting a warehouse and selling and shipping grain, and that in the course of his business he deposited all grain received from depositors in a common bin with wheat bought by defendant, and from this bin wheat was taken and sold by him; that the plaintiff knew of this custom; that the defendant had in the common bin at all times before the *eighth* day of *October*, 1897, sufficient wheat of the kind deposited by the plaintiff to replace that received, and on that day the warehouse and all of its contents was destroyed by fire and without any fault or negligence on the part of defendant.[2]

Jeremiah Mason, Attorney for Defendant.

(*Verification.*)[3]

1. **Under the codes** and practice acts of the various states, this answer is good as one of confession and avoidance. 2 Mo. Rev. Stat. (1889), p. 2238.

2. **The facts set out** in this answer were held to constitute a good plea in confession and avoidance in Bottenberg *v.* Nixon, 97 Ind. 106.

3. **Verification.** — For the necessity for and form of a verification, generally, consult the title VERIFICATIONS.

II. BY REPLICATION OR REPLY.[1]

Form No. 6015.[2]

In the *King's Bench.*

Trin. Term, *51 Geo. III.*

John Doe against *Richard Roe.*

And the said *John Doe*, as to the said plea of the said *Richard Roe* by him *secondly* above pleaded as to the several trespasses in the introductory part of that plea mentioned and therein attempted to be justified, saith that he the said *John Doe*, by reason of anything by the said *Richard Roe* in that plea alleged, ought not to be barred from and having and maintaining his aforesaid action thereof against him the said *Richard Roe*, because he saith that whilst the said dwelling-house was the dwelling-house and freehold of the said *Richard Roe*, and before the said time when the several trespasses in the introductory part of the said plea mentioned were committed, to wit, on the *tenth* day of *June*, A. D. 1824, at *London* aforesaid, he the said *Richard Roe* demised the said dwelling-house with the appurtenances to the said *John Doe* to have and to hold the same to him the said *John Doe* for and during and unto the full end and term of *one year* from thence next ensuing and fully to be complete and ended and so from year to year and for so long a time as they the said *John Doe* and *Richard Roe* should respectively please. By virtue of which said demise, he the said *John Doe* afterwards and before the said time when the above trespasses were committed, entered into the said dwelling-house and became and was possessed thereof and continued so thereof possessed from thence until the said *Richard Roe* afterwards and during the continuance of said demise, to wit, at the said time when the said *Richard Roe* of his own wrong broke and entered the said dwelling-house and committed the said several trespasses in the introductory part of the said plea mentioned in the manner and form as the said *John Doe* hath thereof complained against him the said *Richard Roe*, and this the said *John Doe* is ready to verify. Wherefore the said *John Doe* prays judgment and his damages by him sustained by reason of the committing of said trespasses to be adjudged to him.

1. **For the formal parts** of a replication, generally, see the title REPLICATIONS; for the formal parts of a reply, generally, see the title REPLIES.

By rejoinder or other subsequent pleading new matter may be pleaded in confession and avoidance. The form of such rejoinder or other subsequent pleading may be drawn by consulting the title REJOINDERS, etc., for the formal parts, and alleging such new matter in like manner as the same is set out in the pleas and replications given in the text, Forms Nos. 6011 to 6015.

2. **At common law,** this replication is good as setting up facts in confession and avoidance. 2 Chit. Pl. 696.

Form No. 6016.[1]

In the *King's Bench.*

The *9th* day of *February*, 1838.

John Doe against *Richard Roe.* } The plaintiff as to the plea of the defendant by him *secondly* above pleaded says, that whilst the said close was the close and freehold of the defendant, and before the time, when, etc., to wit, on, etc., the defendant demised the said close, with the appurtenances, to the plaintiff, to have and to hold the same to him the plaintiff for and during and unto the full end and term of *seven years* from thence next ensuing and fully to be complete and ended. By virtue of which said demise, the plaintiff afterwards, and before the said time, when, etc., entered into the close and became and was possessed thereof and continued so thereof possessed from thence until the defendant afterwards and during the continuance of such demise, to wit, at the time, when, etc., of his own wrong broke and entered the close in which, etc., and committed the several trespasses in the plea mentioned, in manner and form as the plaintiff has above thereof complained against the defendant, and this the plaintiff is ready to verify.

Oliver Ellsworth, attorney for *John Doe*, plaintiff.

Form No. 6017.[2]

John Doe against *Richard Roe.* } In *Washington* County Court, *September* Term, A. D. 1898.

(*Similiter — joining issue to first plea.*)[3]

And as to the plea by the said *Richard Roe secondly* above pleaded as to the several trespasses in the introductory part of that plea mentioned thereby attempted to be justified, the said *John Doe* says that by reason of anything by the said *Richard Roe* in that plea above alleged, ought not to be barred from having his aforesaid action thereof against him, because he says that just before the said time when, etc., the said cattle in the said declaration mentioned were wrongfully turned and driven by the said *Richard Roe* from and out of the said highway into and upon the said close or piece and parcel of land in which, etc., and upon that occasion by means and consequence thereof the said cattle were at the said first time, when, etc., in the said close in which, etc., depasturing on the grass there then growing and doing damage there, in manner and form as the said *John Doe* hath above thereof complained against him the said *Richard Roe*, and this the said *John Doe* is ready to verify; wherefore the said *John Doe* prays judgment and his damages by him sustained by reason of the committing of the said trespasses to be adjudged to him, etc.

Oliver Ellsworth, Plaintiff's Attorney.

1. **Under Hilary rules,** this replication is good as setting up facts in confession and avoidance. Petersdorf's Prec. 267.

2. **In common-law states** this form is an illustration of a replication setting up matter in confession and avoidance. Aiken's Prac. F. (Vt.) 311.

3. **Similiter joining issue,** in common-law states, as in *Vermont*, may be as follows: "And the said *John Doe*, as to the *first* plea of the said *Richard Roe* above pleaded and whereof he hath put himself upon the country, doth so likewise." Aiken's Prac. F. (Vt.) 299.

Form No. 6018.[1]

The State of *Alabama*, *Dale* County. } In the *Circuit* Court, *January* Term, 1898.

John Doe, plaintiff, against *Richard Roe*, defendant.

The plaintiff, for reply to defendant's answer, saith that defendant knew of plaintiff's dangerous position at the time of said collision and was guilty of wanton recklessness or gross negligence in running the said locomotive engine across, over, upon or against plaintiff as aforesaid.

Oliver Ellsworth, Attorney for Plaintiff.

III. BY NOTICE OF SPECIAL DEFENSE.

Form No. 6019.[2]

In the *King's Bench*.

Between *John Doe*, plaintiff, and *Richard Roe*, defendant.

Mr. *Oliver Ellsworth*, attorney for *John Doe*, take notice that the above named defendant on trial of this cause will give in evidence and insist that the above named plaintiff, before and at the time of the commencement of this suit, was and still is indebted to the said defendant in the sum of *one hundred* pounds of lawful money of Great Britain upon and by virtue of a certain bill of exchange bearing date the *twenty-first* day of *January*, A. D. 1824, heretofore, to wit, on the day and year last aforesaid, at *London*, made and drawn by the said *Richard Roe* upon, and then and there accepted by the said *John Doe*, whereby he the said *Richard Roe* requested the said *John Doe two* months after date thereof to pay him the said *Richard Roe* or his order the sum of *one hundred* pounds for value received, and that the said defendant will set off and allow to the said plaintiff on the said trial so much of the said *one hundred* pounds so due and owing from the said plaintiff to the said defendant against any demand of the said plaintiff to be proved on the said trial according to the form of the statute in such case made and provided. Dated this *twelfth* day of *November*, A. D. 1824.

Yours truly,

Jeremiah Mason, Defendant's Attorney.

1. Under the codes and practice acts, this is an illustration of a reply which is good as setting up matter in confession and avoidance. This reply is based upon that in Lee *v.* De Bardeleben Coal, etc., Iron Co., 102 Ala. 628, in which case the court held that the replication confessed the facts averred in the plea of contributory negligence and that the averment that defendant knew of plaintiff's dangerous position, etc., was in avoidance of their effect and that the burden of proof was not on defendant to show plaintiff's contributory negligence, but that the plaintiff, having confessed the facts averred in the plea, must make good the allegations in his replication.

2. This notice of set-off subscribed at the foot of the general issue is good at common law. 3 Chit. Pl. 490 *et seq.*

By rules Hilary Term, 4 Wm. IV, set-off cannot be made available by way of such notice, but must be specially pleaded.

Form No. 6020.[1]

(*First plead the general issue;*[2] *then subjoin to the plea the following notice:*) And the defendant gives notice, according to the form of the statute in such case made and provided, that on the trial of this cause he will give in evidence and rely upon in defense or justification the following special matters, to wit, that: (*Here set out concisely, succinctly and intelligibly all the facts relied upon in such defense or justification in a manner similar to their averments in a pleading.*)[3]

By *Jeremiah Mason*, Defendant's Attorney.

1. This notice is substantially the form set out in Aiken's Prac. F. (Vt.) 309.

In Common-law states the defendant may plead the general issue, and give notice in writing under the same of the special matters intended to be relied on for a defense on the trial.

Illinois. — Starr & C. Anno. Stat. (1896), c. 110, § 29.

Similiar or analogous statutes exist in the other common-law states, such as —

Michigan. — How. Anno. Stat. (1882), § 7363.

New Hampshire. — Pub. Stat. (1891), c. 223, § 3.

New Jersey. — Gen. Stat. (1895), p. 2553, § 117.

Vermont. — Stat. (1894), §§ 1149, 1150.

The Notice *stands in place of a special plea* and fills the same office. Sherman *v.* Dutch, 16 Ill. 283.

Must apprise opposite party of facts relied upon as a defense in such a manner that he may be prepared to meet it and to avoid surprise on the trial. Liggett Spring, etc., Co. *v.* Michigan Buggy Co., 106 Mich. 451; Briesenmeister *v.* Supreme Lodge, etc., 81 Mich. 531; Browne *v.* Moore, 32 Mich. 254. But it is not required that the facts be stated with that certainty and formality required of the special plea. Randall *v.* Preston, 52 Vt. 198. See Chit. Pl. (16th Am. ed.) 491.

2. For form of general issue in common-law states consult the title PLEAS.

3. For such a statement of facts set up by way of confession and avoidance in a plea see *supra*, Form No. 6017.

Precedent. — In Randall *v.* Preston, 52 Vt. 198, the following notice was held sufficient: "On the *13th* day of *January*, A. D. 1873, *Oscar F. Merrill*, of *Cabot*, took out a justice writ against *Ebenezer Thompson*, returnable on the *30th* day of *January*, A. D. 1873, before *M. P. Wallace*, a justice of the peace, at the office of *J. P. Lamson*, in *Cabot*, in an action on a note, which writ was put into the hands of *W. H. Preston*, this defendant, who was a deputy sheriff, which writ was served on the *15th* day of *January*, 1873, on *Ebenezer Thompson* by attaching a white horse, which horse is the one in controversy in this suit. Said writ was returned to the said justice and on the returnable day of said writ it was by said justice continued for notice to the defendant under the statute until the *6th* day of *February*, same place and time of day. And on the *6th* day of *February*, 1873, notice having been proved, a judgment by said justice was rendered against said *Ebenezer Thompson* for the sum of $*105.40* damages and $*7.30* cost of suit. And on the *6th* day of *February*, 1873, execution by said justice was issued on said judgment for the same sum and put into the hands of this defendant as a deputy sheriff, and on the *17th* day of *February*, A. D. 1873, said execution was levied on said horse and the same was advertised on the *17th* of *February* to be sold at sheriff's sale by defendant, as sheriff, on the *3d* day of *March*, 1873, at *one* o'clock *p.* m., at the grist mill in *North Danville*. Said notice was posted on said grist mill for the sale of said horse, and on the *3d* day of *March* said sale was adjourned to the *5th* day of *March*, at the same time and place, and on the *5th* day of *March* said horse was, at said public sale, sold by this defendant, as a deputy sheriff, to *A. H. Smith*, of *Danville*, he being the highest bidder for the same, which execution was duly returned to said justice; which horse so attached and sold is the one in controversy, and was the property of said *Ebenezer* duly and legally attached and sold by the defendant as a deputy sheriff."

CONFESSION OF JUDGMENT.

By Thomas E. O'Brien.

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CROSS-REFERENCES.

For other Forms of Confessions of Judgment, see the title FRIENDLY SUIT; and see also the GENERAL INDEX to this work.
For Forms of Judgments, generally, see the title JUDGMENTS.
For matters of Procedure relating to Confession of Judgment, see the title COGNOVIT, 4 ENCYCLOPÆDIA OF PLEADING AND PRACTICE, p. 560, *and JUDGMENTS,* 11 ENCYCLOPÆDIA OF PLEADING AND PRACTICE.

I. OFFER TO CONFESS JUDGMENT.

1. Notice of Offer.

Form No. 6021.[1]

To *John Doe*: You will take notice that on the *twenty-fourth* day of *November*, A. D. 1897, at *ten* o'clock in the *fore*noon, or as soon thereafter as the matter may be taken up and heard, in the *Sedgwick District* Court in the city of *Wichita*, county of *Sedgwick*, state of *Kansas*, I will offer to confess judgment in favor of you for the sum of *three hundred* dollars on a claim you have against me for *medical services rendered.*

Yours, etc.,
Richard Roe.

Dated this *third* day of *November*, A. D. 1897.
(*Proof of service.*)[2]

2. The Offer.

Form No. 6022.[3]

State of *Kansas*, } ss. In the *District* Court in and for the county
Sedgwick County. } and state aforesaid.

John Doe
against } Offer to Confess Judgment.
Richard Roe.

The above named *Richard Roe*, this *twenty-fourth* day of *November*, 1897, pursuant to a notice heretofore, to wit, on the *fifth* day of

1. *Kansas.* — 2 Gen. Stat. (1897), c. 95, § 447. Like forms may be drawn for use in jurisdictions in which similar statutes exist. Consult list of statutes cited *infra*, note 2, p. 48.

Kentucky. — In Maxwell *v.* Dudley, 13 Bush (Ky.) 404, it appears that on the day on which the answer was filed, but whether before or after is not apparent, defendant appellant caused the following notice to be served upon plaintiff appellee: "The plaintiff is notified that the defendant will allow judgment to be taken against him for the sum of $55.00. *E. H. Maxwell*, by *Stevenson & O'Hara*, Att'ys. *September 11th*, 1876." This notice was defective in not specifying when the offer would be made, and it is doubtful whether or not if it had so specified it would have been within the statute.

A notice which does not specify when the answer containing the offer will be filed was held to be insufficient. Maxwell *v.* Dudley, 13 Bush (Ky.) 404.

2. **Proof of Service.** — For forms of acknowledgments of service or affidavits of service consult the title SERVICE OF WRITS AND PAPERS.

3. *Kansas.* — 2 Gen. Stat. (1897), c. 95, § 447. Like forms may be drawn under similar statutes in other jurisdictions. Consult list of statutes cited *infra*, note 2, p. 48.

Under Iowa Code (1897), § 3818, an offer to confess judgment may be made orally. Barlow *v.* Buckingham, 68 Iowa 169.

November, 1897, duly served upon the above named *John Doe*, hereby in open court offers to confess judgment in favor of the said *John Doe* for the sum of *three hundred and fifteen* dollars, together with costs that have accrued and may accrue,[1] upon a claim of *four hundred* dollars, which the said *John Doe* has against the said defendant for *goods, wares and merchandise sold and delivered* by the said *John Doe* to the said *Richard Roe*.

Richard Roe.

II. CONFESSION.[2]

Precedents. — In Chicago, etc., R. Co. *v.* Townsdin, 45 Kan. 771, the defendant, in accordance with 2 Kan. Gen. Stat. (1897), § 447, offered in open court to confess judgment, making the offer in writing, which, omitting the title, was as follows: "Now comes the above named appellee and offers in writing to allow judgment to be taken against it for $*206.25*, with accrued costs. *F. W. Sturges*, Attorney for Appellee."

In Wichita, etc., R. Co. *v.* Beebe, 38 Kan. 427, the offer to confess judgment, omitting the formal parts, was as follows: "Now comes the defendant railroad company, by *Houston & Bentley*, its attorneys, and offers in court to confess judgment in the above cause for the sum of *two hundred and thirteen and one one-hundredth* dollars, and for the costs of this action to date. *Houston & Bentley*, Defendant's Attorneys."

Necessity for Notice. — Under 2 Kan. Gen. Stat. (1897), c. 95, both § 445 and § 447 require notice of some kind to be given to plaintiff, in the one case, of the offer to allow judgment; in the other case, of the offer to confess judgment. Under the first section, a written offer must be served upon the plaintiff to render him liable for costs; under the latter section, plaintiff must either be present in court when the offer is made or he must have notice thereof to render him liable for costs. If he is present in court and the attention of the court is called to the offer at the time it is made, that will be sufficient, but it will not be sufficient, even if plaintiff is present in court, to file a written offer with the clerk of the court without calling the attention of the court, or the plaintiff, or his attorney. Van Bentham *v.* Osage County, 49 Kan. 30.

Must be made in court, either when the plaintiff is present or at a time when he has been notified that it will be made. So held under *Kentucky* statute in Maxwell *v.* Dudley, 13 Bush (Ky.) 403.

1. Must Embrace Costs. — Harter *v* Comstock, 11 Ind. 527. An offer in writing to confess judgment for a certain sum with costs accrued to the present time, made before trial in a pending action, is sufficient. Rose *v.* Grinstead, 53 Ind. 203; Holland *v.* Pugh, 16 Ind. 23; Petrosky *v.* Flanagan, 38 Minn. 27.

In *Iowa*, however, this does not seem to be necessary. An offer by defendant "to confess judgment against himself in favor of plaintiff for the sum of *two hundred and sixteen* dollars" was held to be sufficient, for the reason that an offer of this character in a pending case carries with it as incident, if accepted, a liability for all costs accrued in the case up to the time the offer is made. Manning *v.* Irish, 47 Iowa 650.

Offer to Confess in Part. — After action brought, defendant may offer in court to confess judgment for part of the amount claimed or part of the causes involved.

Kansas. — Gen. Stat. (1889), § 4627. For similar provisions consult the list of statutes cited *infra*, note 2, p. 48.

Offer to confess part of payments demanded may be made, in *Kentucky*, when the only matter in dispute is the amount of recovery to which the plaintiff is entitled. Maxwell *v.* Dudley, 13 Bush (Ky.) 403.

2. Statutory provisions relating to confessions of judgments exist in the following jurisdictions:

Arizona. — Rev. Stat. (1887), §§ 802, 803, 1444, 1445.

Arkansas. — Sand. & H. Dig. (1894), §§ 4379, 5872, 5873, 5906.

California. — Code Civ. Proc. (1897), § 112, subs. 6, §§ 889, 1132–1135.

Connecticut. — Gen. Stat. (1888), §§ 663, 1058.

Delaware. — Laws (1893), p. 795, c. 106, § 32, p. 811, c. 110, § 14.

District of Columbia. — Comp. Stat. (1894), c. 34, § 13.

1. In General.

a. Before Action Commenced.

(1) In Courts of Record.

(a) *Generally.*

Form No. 6023.[1]

(*Venue, title of court and cause.*)[2]

I, the above named *Richard Roe*,[3] do hereby confess judgment in

Florida. — Rev. Stat. (1892), §§ 1178, 1609, subs. 6, §§ 1623, 1634.

Georgia. — 2 Code (1895), §§ 5359, 5360.

Idaho. — Rev. Stat. (1887), § 3851, subs. 6, §§ 4725, 5061–5063.

Illinois. — Starr & C. Anno. Stat. (1896), p. 3083, par. 66.

Indiana. — Horner's Stat. (1896), §§ 515, 587, 588, 1490.

Iowa. — Anno. Code (1897), §§ 3813, 3815, 3817, 3818, 4536.

Kansas. — 2 Gen. Stat. (1897), c. 95, §§ 399–405, 447; Gen. Stat. (1889), §§ 4498–4501, 4504, 4851.

Kentucky. — Bullitt's Civ. Code 1895), §§ 382, 640.

Maryland. — Pub. Gen. Laws (1888), art. 17, § 50, art. 52, § 33.

Massachusetts. — Pub. Stat. (1882), c. 167, § 65, c. 193, §§ 1–9.

Michigan. — How. Anno. Stat. (1882), §§ 6816, 7662.

Minnesota. — Stat. (1894), §§ 1383, 4959, subs. 6, §§ 5019–5021, 6077–6082.

Mississippi. — Anno. Code (1892), §§ 747, 753.

Missouri. — Rev. Stat. (1889), §§ 2230–2232, 6273, 6274; Burns' Anno. Pr. Code (1896), § 605.

Montana. — Code Civ. Proc. (1895), §§ 1620, 2041–2043.

Nebraska. — Comp. Stat. (1897), §§ 6013, 6015, 6016.

Nevada. — Gen. Stat. (1885), §§ 3382, 3383, 3531, subs. 7, § 3534.

New Hampshire. — Pub. Stat. (1891), c. 223, § 2, c. 247, §§ 16, 17.

New Jersey. — Gen. Stat. (1895), pp. 172–174, § 1 *et seq.*, p. 1873, § 43, p. 2534, §§ 1–12.

New York. — Code Civ. Proc. (1891), §§ 1274, 3010–3012 (Birds. Rev. Stat. (1896), pp. 1738–1740, §§ 72–77, p. 1803, §§ 154–156).

North Carolina. — Code (1883), §§ 570, 571.

North Dakota. — Rev. Codes (1895), §§ 6130–6132, 6701.

Ohio. — Bates' Anno. Stat. (1897), §§ 588, 5321, 5325.

Oklahoma. — Stat. (1893), §§ 4293–4298.

Oregon. — Hill's Anno. Laws (1892), §§ 250–256.

Pennsylvania. — Bright. Pur. Dig. (1894), p. 1093, § 1, p. 1740, § 72, subs. 3.

South Carolina. — Code Civ. Proc. (1893), § 71, subs. 8, §§ 383–385.

South Dakota. — Dak. Comp. Laws (1887), §§ 5537–5539, 6102.

Tennessee. — Code (1896), §§ 4705–4707, 7214.

Texas. — Rev. Stat. (1895), arts. 1348–1352, 1648–1650.

Utah. — Rev. Stat. (1898), §§ 3213–3216, 3723.

Vermont. — Stat. (1894), §§ 829–831, 1448.

Virginia. — Code (1887), § 3283.

Washington. — Ballinger's Anno. Codes and Stat. (1897), § 4681, subs. 7, §§ 5093–5099.

West Virginia. — Code (1887), p. 787, § 43.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), §§ 2895, 2896, 3657.

Wyoming. — Rev. Stat. (1887), §§ 2668–2672, 3483–3485.

Amendment. — Such irregularity in a confession of judgment as might be corrected by amendment in cases of ordinary judgments is subject to amendment. Merchants Nat. Bank *v.* Newton Cotton Mills, 115 N. Car. 507.

1. Consult list of statutes cited *supra*, note 2, p. 48.

2. Venue, title of court and cause must be so stated as to conform to the practice in the particular jurisdiction. For statement of these formal parts consult the titles Answers in Code Pleading; Complaints; Declarations; Pleas.

3. A clerk of court may confess judgment against himself in favor of his

favor of the above named *John Doe* for the sum of *five hundred* dollars,[1] and do hereby authorize (*name of proper official*)[2] of the (*name of court*) court, in and for the county of (*name of county*), and state of (*name of state*), to enter judgment for said sum against me, the said *Richard Roe*, and in favor of him the said *John Doe*. This confession of judgment is for money justly due (or *to become due*)[3] to him the said *John Doe*,

creditors when he acts in a purely ministerial capacity. Smith *v.* Mayo, 83 Va. 910.

An infant cannot confess judgment in his own name. Soper *v.* Fry, 37 Mich. 236; Bennett *v.* Davis, 6 Cow. (N. Y.) 393; Knox *v.* Flack, 22 Pa. St. 337.

The managing agent of a corporation has authority to confess judgment against it. Sharp *v.* Danville, etc., R. Co., 106 N. Car. 308.

A married woman may confess judgment upon a contract relating to her sale of separate estate, or upon other contracts which she may legally make. Tanner *v.* State, 92 Ala. 53; Koechling *v.* Henkel, 144 Pa. St. 215; Birds. Rev. Stat. N. Y. (1896), p. 1738, § 72; N. Y. Code Civ. Proc., § 1273, as *amended* Laws (1877), c. 416. See also *infra*, Form No. 6046 and annotations thereto.

A partner cannot confess judgment for his copartner. Soper *v.* Fry, 37 Mich. 236; Fairbanks *v.* Kraft, 43 Mo. App. 121; McCleery *v.* Thompson, 130 Pa. St. 443.

A public officer may confess judgment for an amount for which he is liable to be sued as such officer. Gere *v.* Cayuga County, 7 How. Pr. (N. Y. Supreme Ct.) 255.

The confession of one does not authorize a judgment against two. Clark *v.* Holmes, 1 Dougl. (Mich.) 390.

One of several joint debtors cannot confess judgment so as to bind those not joining. Tripp *v.* Saunders, 59 How. Pr. (N. Y. Supreme Ct.) 379; Ballinger *v.* Sherron, 14 N. J. L. 144. But see N. Y. Code Civ. Proc., § 1278; Kantrowitz *v.* Kulla, 20 Abb. N. Cas. (N. Y. City Ct.) 321; Harbeck *v.* Pupin, 55 Hun (N. Y.) 335.

1. Judgment for a specific sum must be authorized by the statement.

California.—Code Civ. Proc. (1897), § 1133. See also list of statutes cited *supra*, note 2, p. 48.

2. Confession of judgment in the clerk's office during vacation may be valid. Weinges *v.* Cash, 15 S. Car. 44. See also list of statutes cited *supra*, note 2, p. 48.

A judgment may be confessed either in court or in the clerk's office. Virginia Valley Ins. Co. *v.* Barley, 16 Gratt. (Va.) 363.

3. Only for money due or to become due or to secure against contingent liability on behalf of defendant can judgment be confessed.

Iowa.—Code (1897), § 3814. See also list of statutes cited *supra*, note 2, p. 48.

Forms for confession of judgment for money to become due may easily be drawn by so altering the language of the forms of confession of judgment for money due as to adapt the wording to the facts of the particular case.

Forms of confession of judgment to secure against contingent liability are given *infra*, Form No. 6036.

"Justly Due."—The statement must state that the amount is justly due or to become due. Edgar *v.* Greer, 7 Iowa 139. See also list of statutes cited *supra*, note 2, p. 48.

The statute does not require that the confession must state in terms that the sum is justly due. The particular facts must be set forth in such a manner as to show not only a just debt, but the amount thereof; that being done, an additional averment in general terms of the justice of the debt and its amount is not required. Claflin *v.* Dodson, 111 Mo. 200, *following* Lanning *v.* Carpenter, 20 N. Y. 459.

A statement which fails either to allege or to set out facts which would show that the amount for which judgment is confessed was still justly due is insufficient. Smith *v.* Smith, 117 N. Car. 351.

A confession which states the amount for which the judgment is confessed and states the same to be due on a certain promissory note due and payable on a day named, and that the consideration of the same was an article sold and delivered, sufficiently alleges that the amount "is justly due." Merchants Nat. Bank *v.* Newton Cotton Mills, 115 N. Car. 507.

Due from Judgment Debtor.—A statement that the confession of judgment is for money "due to the said plaintiff,"

arising from the following facts, viz: (*Here set out the facts out of which the indebtedness arose.*)[1]

Richard Roe.[2]

(*Venue.*)[3]

I, *Richard Roe*, being duly sworn, say, that I am the person whose name is subscribed to and who executed the above statement and confession, and that the matters of fact set forth in said statement and confession are true.[4]

Richard Roe.

(*Jurat.*)[5]

(*Venue, title of court and cause.*)[6]

but not stating that the money was due from the judgment debtor, is insufficient. Citizens' Nat. Bank *v.* Allison, 37 Hun (N. Y.) 137.

1. The Statement. — *Must be in writing* and state concisely the facts in such terms as will make it known to the common understanding how the indebtedness arose. Stern *v.* Mayer, 19 Mo. App. 511; Edgar *v.* Greer, 7 Iowa 139. See also list of statutes cited *supra*, note 2, p. 48.

Must be filed with the clerk of the court in which the judgment is to be entered.

California. — Code Civ. Proc. (1897), § 1134. See also list of statutes cited *supra*, note 2, p. 48, for similar statutory provisions in *Idaho*, *Minnesota*, *Missouri*, *Montana*, *Nevada*, *South Carolina*, *Utah*, and other states.

Object of Statutory Requirement. — It is not the object of the statutes, however, to compel the debtor to state sufficient of the transaction to enable other creditors to form an opinion, from the facts stated, as to the integrity of the debtor in confessing a judgment, but all that is required is to state facts sufficient to enable them to investigate the transaction and form their opinion of the honesty of the judgment from the facts thus ascertained. Atwater *v.* Manchester Sav. Bank, 45 Minn. 351, *following* McDowell *v.* Daniels, 38 Barb. (N. Y.) 143; Harrison *v.* Gibbons, 71 N. Y. 58; Kern *v* Chalfant, 7 Minn. 487; Cleveland Co-operative Stove Co. *v.* Douglas, 27 Minn. 177; Wells *v.* Gieseke, 27 Minn. 478.

2. Statement should be signed by the defendant.

California. — Code Civ. Proc. (1897), § 1133. See also list of statutes cited *supra*, note 2, p. 48.

The statement must be signed by the parties personally against whom the judgment by confession is to be rendered. A statement signed by the attorneys of such persons is not sufficient. Reynolds *v.* Lincoln, 71 Cal. 184.

Signing the affidavit of verification has been held to be a sufficient signing of the statement for judgment by confession. Kern *v.* Chalfant, 7 Minn. 487.

3. Venue of affidavits, generally, see the title AFFIDAVITS, vol. 1, p. 554 *et seq.*

4. The confession should be verified by the oath of the defendant.

California. — Code Civ. Proc. (1897), § 1133. See also list of statutes cited *supra*, note 2, p. 48.

A confession of judgment must strictly pursue the statute, and the judgment entered thereon without the sworn statement required by law is void as to creditors of the defendant not made parties to the action. Bacon *v.* Raybould, 4 Utah 357.

Insufficient Affidavit. — An affidavit that defendant "believes the confessed statement is true" is insufficient. He must swear positively to the truth of the facts so far as they are within his own knowledge. Ingram *v.* Robbins, 33 N. Y. 409, *overruling* Delaware *v.* Ensign, 21 Barb. (N. Y.) 85.

The confession must be acknowledged, in some states, by the parties making the same before some officer authorized to take acknowledgments of deeds.

Oregon. — Hill's Anno. Laws (1892), § 253.

Washington. — Ballinger's Codes and Stat. (1897), § 5096.

But acknowledgment is not required when the parties or their attorneys appear in court or before the clerk in vacation.

Oregon. — Hill's Anno. Laws (1892), § 253.

5. Jurat of affidavits, generally, see the title AFFIDAVITS, vol. 1, p. 560 *et seq.*

6. See *supra*, note 2, p. 49.

(*Itemized statement of disbursements.*)[1]
(*Venue.*)[2]

I, *Oliver Ellsworth*, being duly sworn, say, that I am (*one of*) the attorney(*s*) for the said *John Doe* above named, and that the disbursements above mentioned have been made, or will be necessarily paid or incurred therein.

Oliver Ellsworth.

(*Jurat.*)[3]

(*b*) *Illustrations.*

aa. UPON ACCOUNT.

Form No. 6024.[4]

In the *District* Court in and for *Harrison* County, *Iowa.*

John Doe, plaintiff,
against
Richard Roe, defendant.
} Confession of Judgment.

I, *Richard Roe*, of *Harrison* county, *Iowa*, defendant above named, do hereby confess that I am justly indebted to *John Doe* of said *Harrison* county, state of *Iowa*, plaintiff above named, in the sum of *five hundred* dollars; and I do hereby authorize the clerk of the *District* Court in and for said county and state to enter a judgment in said court in favor of the said *John Doe* and against me, said *Richard Roe*, for the sum of *five hundred* dollars, with interest and costs.*

This confession of judgment is for a debt justly due and owing from me to the plaintiff for goods, wares and merchandises, being *groceries*, *dry goods*, *salt*, *calico*, *muslin*, *molasses*, *sugar*, and other articles sold and delivered by them to me at various times within the last *two* years, as per schedule annexed to this statement and made a part thereof.[5]

Dated at *Logan*, *Iowa*, the *ninth* day of *February*, 1898.

Richard Roe.

State of *Iowa*,
Harrison County.
} ss.

Richard Roe, being first duly sworn, deposes and says, that he is the person named in and who made and subscribed to the foregoing confession of judgment; that he has read the same and knows the contents thereof, and that the same and the statements therein contained are true.

Richard Roe.

Subscribed in my presence and sworn to before me by *Richard Roe*, this *ninth* day of *February*, 1898.

(SEAL) *Norton Porter*, Notary Public.

1. **Statement of disbursements,** following the practice in *Minnesota* and *New York*, consult Forms Nos. 6031, 6034, *infra*.
2. See *supra*, note 3, p. 51.
3. See *supra*, note 5, p. 51.
4. *Iowa.* — Code (1897), § 3813 *et seq.*
5. This statement was upheld in Clements *v.* Gerow, 1 Abb. App. Dec. (N. Y.) 370, *reversing* 30 Barb. (N. Y.) 325.

Another form of statement for confessing judgment upon an account may be as follows: (*Commencing as in Form No. 6024, and continuing to* *) "This confession of judgment is for a debt justly

Form No. 6025.[1]

(Miss. Anno. Code (1892), § 753.)

The State of *Mississippi*, } In the *Circuit* Court of said county, *tenth*
De Soto County. } day of *December*, A. D. 1897.

John Doe states, on oath, that *Richard Roe* is justly indebted to him for the amount of *sixty* dollars on an instrument of writing in the following words and figures, viz: (*Here set out a copy of the same*), [and (*in case of indorsement say*) indorsed as follows: (*Here copy the indorsement*)]; (or *on open account, of which a copy is hereunto attached*), which remains due and unpaid, and that said sum of money is not due or claimed upon a fraudulent or usurious consideration.

John Doe.

Sworn to and subscribed the *tenth* day of *December*, A. D. 1897, before me, *Calvin Clark*, Clerk.

I do hereby acknowledge myself indebted to the said *John Doe* in the sum of *sixty* dollars, which includes interest up to the *first* day of the next term of the said *Circuit* Court; and I give my consent for judgment to be rendered against me in favor of said *John Doe* at the next term of the said *Circuit* Court for said amount, and all legal costs accruing thereon, [with stay of execution (*if any*) until (*as may be agreed upon*).]

Richard Roe.

Taken and acknowledged the *tenth* day of *December*, A. D. 1897, before me, *Calvin Clark*, Clerk.

bb. UPON NOTE.

Form No. 6026.[2]

In the *Superior* Court of the County of *San Diego*, State of *California*.

due and owing from me to the said plaintiff for the following causes:

1. I have received from the said plaintiff, for my benefit, the following money, goods and services, of the value and at the times stated as follows:

1897.

June 1.	Wheat delivered at my store in *Logan*.....	$402 12
July 6.	Barrels delivered at *Logan*.....	124 25
" *18.*	Flour delivered at *Logan*.....	505 00
Aug. 10.	Cash.....	50 00
" *20.*	Transportation of my goods from *Woodbine* to *Logan*.....	37 63

2. I have paid or delivered to the plaintiff, on account thereof, the following moneys, or goods, of the value and at the times stated as follows:

1897.

Aug. 18.	Cash.....	$527 00
Oct. 10.	Groceries.....	92 00"

(*Signed, dated and verified as in Form No. 6024.*)

The omission of the schedule referred to in the statement as being annexed thereto and made a part of the same does not invalidate the judgment rendered upon the confession. So held in Clements *v.* Gerow, 1 Abb. App. Dec. (N. Y.) 370, *reversing* 30 Barb. (N. Y.) 325.

1. *Mississippi.* — Anno. Code (1892), § 753. This section provides that if the evidence of the debt be in writing, the same shall be filed with said statement, and if not in writing, then a copy of the open account shall be filed, and the party indebted shall sign before the clerk an acknowledgment, written upon or annexed to said statement, to the effect as given in the text.

2. *California.*—Code Civ. Proc.(1897), § 1133. See also list of statutes cited *supra*, note 2, p. 48.

Another form of statement for confes-

James E. Corbett, plaintiff, against *Noel Davenport*, defendant. } Confession of Judgment without Action.

Noel Davenport, the defendant in the above entitled action, does hereby confess judgment therein in favor of *James E. Corbett*, the plaintiff in the said action, for the sum of *ten hundred and thirty-seven and fifty-five one-hundredths* dollars, and authorizes judgment to be entered therefor against him with *six* per cent. interest thereon from this date.

This confession of judgment is for a debt justly due to the said plaintiff, arising upon the following facts, to wit:* The said defendant, on the *fifteenth* day of *September*, 1871, made, executed and delivered to the said plaintiff his certain promissory note of that date for the sum of *ten hundred and thirty-seven and fifty-five one-hundredths* dollars, due and payable *one* year after date, said note having been made, executed and delivered as aforesaid to secure the payment of the purchase price of certain goods, to wit, *one thousand* bushels of wheat, which said wheat was sold and delivered by said plaintiff to said defendant on the said *fifteenth* day of *September*, 1871.[1] No part

sion of judgment on note may be as follows: (*Commencing as in Form No. 6026, and continuing to* *) "1. (*State the consideration of the note as fully as if judgment were confessed upon that instead of upon the note*). 2. On the *fifteenth* day of *September*, 1871, in consideration whereof, I made to the plaintiff my promissory note for the sum of *ten hundred and thirty-seven and fifty-five one-hundredths* dollars, payable on the *fifteenth* day of *September*, 1872." (*Dated, signed and verified as in Form No. 6026.*)

By an Indorser to his Indorsee. — (*Commencing as in Form No. 6026, and continuing down to* *) "1. In consideration of *one thousand* dollars guarantee commission paid to me by the said plaintiff on the *fifth* day of *November*, 1871, I indorsed to him before its maturity a promissory note made by one *Samuel Short* on the *fifteenth* day of *September*, 1871, at the *city and* county of *San Francisco*, state of *California*, for the sum of *ten hundred and thirty-seven and fifty-five one-hundredths* dollars, payable to my order on the *fifteenth* day of *September*, 1872. 2. The same has been dishonored." (*Signed, dated and verified as in Form No. 6026.*)

By Indorser to a Remote Indorsee. — (*Commencing as in Form No. 6026, and continuing down to* *) "1. I indorsed and negotiated before its maturity a certain bill of exchange made by one *Samuel Short* on the *fifteenth* day of *September*, 1871, at the *city and* county of *San Francisco*, state of *California*, requiring one *John Smith* to pay to my order *ten hundred and thirty-seven and fifty-five one-hundredths* dollars *three* days after sight thereof. 2. The same was afterward transferred to the plaintiff. 3. The same has been dishonored." (*Signed, dated and verified as in Form No. 6026.*)

1. Must State Facts of the Indebtedness. — In Pond *v.* Davenport, 44 Cal. 482, upon the facts of which case this statement is based, the statement actually used therein was held to be substantially defective in omitting to set forth the consideration of the note and the facts out of which the indebtedness arose. The court held that it was not sufficient in such a statement to merely say that the promissory note was given for money due to the plaintiff from the defendant.

Sufficiency of Statement on Promissory Note. — If the debt is a note and it was given for money loaned, it is enough to say so, describing the note. Mechanics Bank *v.* Mayer, 93 Mo. 421; Hard *v.* Foster, 98 Mo. 312. The following statements have been held to be sufficient:

"On one promissory note given by me to the said *Lanning* on the *eighth* day of *December*, 1854, for *one hundred* dollars borrowed money on which is indorsed *eleven* dollars and *sixty* cents, said note due when given. Also, one promissory note of *three hundred and forty* dollars made by me and dated the

of said note or interest thereon has been paid, and the whole thereof, together with interest thereon,[1] is now justly due and owing by said defendant to said plaintiff.

Dated the *nineteenth* day of *September*, 1872.

Noel Davenport.

State of *California*, }
County of *San Diego.* } ss.

Noel Davenport, being duly sworn, says, that he is the person who signed the above statement, and that he is indebted to the said *James E. Corbett* in the sum of *ten hundred and thirty-seven and fifty one-hundredths* dollars, in said statement mentioned, and that the facts stated in the above confession and statement are true.

Noel Davenport.

Subscribed and sworn to before me this *nineteenth* day of *September*, 1872.

(SEAL) *G. N. Hitchcock*, Notary Public.

Form No. 6027.[2]

(Precedent in Jarosh *v.* Easton, 57 Iowa 569.)[3]

James H. Easton v. *John Kavorek*, *Jean Suchan*, Def'ts. } Confession of judgment in *Circuit* Court, *Winneshiek* county, *Iowa*.

We, *John Kavorek* and *Jean Suchan* of *Blank* township, in the

seventeenth day of *October*, 1854, due when given, and now owned by said *Lanning*, the same being given for borrowed money." Lanning *v.* Carpenter, 20 N. Y. 448.

"For a debt arising on a promissory note made by the defendant to plaintiff, and upon which there is this day due the sum of *seven hundred and eighty-two* dollars and *forty-seven* cents, together with *eighty* dollars and *forty-one* cents now due the plaintiff from the defendants, and costs in an action brought against the defendants by the plaintiff on said promissory note in supreme court, which suit is now discontinued by the plaintiff upon this confession of judgment to him by the defendants. And we hereby state that the sum hereby by us confessed is justly due to the said plaintiff, without any fraud whatever." Freligh *v.* Brink, 22 N. Y. 418.

"The defendant has from time to time borrowed of the plaintiff money, and there is now due to the plaintiff from the defendant the sum of $*1,500* for cash borrowed, for which the plaintiff holds the note of defendant, bearing date the *twelfth* day of *November*, 1850, and payable *six* months after date. The plaintiff has assumed for the defendant the payment of the sum of *two thousand* dollars, for which the defendant has given to the plaintiff *two* notes, made by said defendant, of *one thousand* dollars each; one payable in *sixty* days from the *twelfth* of *November* aforesaid, and the other in *ninety* days from said date." Ely *v.* Cooke, 28 N. Y. 365.

But *compare* the insufficient statements discussed in the following cases: Pond *v.* Davenport, 44 Cal. 486; Kennedy *v.* Lowe, 9 Iowa 580; Edgar *v.* Greer, 7 Iowa 136; Butts *v.* Schieffelin, 5 Civ. Proc. Rep. (N. Y. Supreme Ct.) 415; Chappel *v.* Chappel, 12 N. Y. 215.

1. **Confession for a greater rate of interest** than the note upon which it is based bears will not invalidate the judgment in the absence of fraud shown. Merchants Nat. Bank *v.* Newton Cotton Mills, 115 N. Car. 507.

2. *Iowa.* — Code (1897), § 3815. See also list of statutes cited *supra*, note 2, p. 48.

Cases on appeal from an award made by commissioners in assessing damages for right of way are within the provisions of Iowa Code (1897), § 3818. Harrison *v.* Iowa Midland R. Co., 36 Iowa 323.

3. **Signed by One as Surety.** — In this

county of *Winneshiek*, and State of *Iowa*, defendants above named, do hereby confess that we are jointly and severally justly indebted to *James H. Easton* of *Decorah*, *Iowa*, plaintiff above named, in the sum of *one hundred and forty* (and $*15* attorney's fees as provided for in said note) dollars, with interest at *ten* per cent. per annum, from the *22d* day of *February*, 1*878*, and we do hereby authorize the clerk of the *Circuit* Court of said county and state to enter a judgment in said court in favor of said plaintiff, and against us and each of us as defendants, for the sum of *one hundred and forty* (and $*15* attorney's fees and $*3.50* costs) dollars, with interest at *ten* per cent. per annum, from the *22d* day of *February*, A. D. 1*878*, and costs. It is stipulated and agreed that the interest on said judgment shall be paid semi-annually, so long as the said judgment remains unpaid, and if default be made in the payment of said interest, or any part thereof, at the time the same becomes due, then at any time thereafter on application of the plaintiff to the clerk therefor, execution shall immediately issue for the whole amount of said judgment, principal, interest and costs.

This confession of judgment is for a debt justly owing and now due to said plaintiff, and the following is a concise and true statement of the facts, out of which the said debt arose, to wit: On the *22d* day of *February*, 1*878*, at our request, *James H. Easton*, the plaintiff herein, loaned us the sum of *one hundred and forty* dollars, for which we did on that day execute to said plaintiff a promissory note for the whole amount, payable *November 15th*, 1*878*, and interest at *ten* per cent. per annum, payable *quarterly*. Said note is now unpaid and this judgment is confessed to secure payment of said note and interest, $*15* attorney's fees and $*3.50* costs, and we further state that the said sum, above confessed, is justly owing and now due to said plaintiff from us, and each of us, without any fraud or illegal consideration whatever. And it is further understood that execution is not to issue on this judgment until the *1st* day of *November*, A. D. 1*879*, provided that default be not made in the payment of interest when due, as above provided.

Dated *Spillville*, Iowa, *December 26*, 1*878*.

John Kavorek.
Jean Suchan.

State of *Iowa*, } ss.
Winneshiek Co. }

John Kavorek, and *Jean Suchan*, being first duly sworn, depose and say, each for himself, that he is the person named in, and who made and subscribed to, the foregoing confession of judgment; that they have read the same and know the contents thereof, and that the same and statements therein contained are true.

John Kavorek.
Jean Suchan.

case the confession was signed also by one Albert Jarosh, as surety, who also acknowledged and verified the same. The court held, however, that the cognovit did not authorize judgment to be entered against Jarosh, but merely against the principals Kavorek and Suchan, for the reason that Jarosh was only bound as surety for the payment of the judgment, not a word appearing in the confession to authorize the entry of a judgment against him.

Subscribed in my presence and sworn to before me by *John Kavorek* and *Jean Suchan* this *26th* day of *December*, A. D. 1878.
[(SEAL)] *O. Kalper*, Notary Public.

Form No. 6028.[1]

(Precedent in Burnham *v.* Blank, 49 Mo. App. 57.)

In the *Circuit* Court of *Jackson* County, *Missouri*, at *Kansas City*.
Mary Samter, Plaintiff,
against } *No. 10860.*
Max Blank, Defendant.

First. The amount for which judgment may be rendered against me in favor of *Mary Samter* is $*500*, and interest accrued thereon, $*12.45*, making in all $*512.45*, and I authorize judgment to be entered against me for $*512.45* in the above cause.

Second. The facts out of which the above indebtedness arose are as follows: I, *Max Blank*, being in the mercantile business, at number *1428 East Eighteenth* Street, *Kansas City*, *Missouri*, borrowed from *Mary Samter* the sum of $*500* to pay certain liabilities I had incurred in said business; that the said sum of $*500* was used in paying for goods that were purchased and used by me in said business at the above number; that at the time I borrowed said sum of $*500* from *Mary Samter* I executed and delivered to her *five* $*100* notes, due in *one*, *two*, *three*, *four* and *five* months from their date, viz., *September 1*, 1887; that none of said notes have been paid by me, or any part of said sum of $*500*, and that the same is now justly due the said *Mary Samter*; that all of said notes are not now due; that said notes bear interest from date at the rate of *ten* per cent. per annum.[2]

Max Blank.

Witness: *Eugene Schilling.*

1. *Missouri.* — Rev. Stat. (1889), §§ 2229–2231. See also list of statutes cited *supra*, note 2, p. 48.

2. **This statement** was sustained against objection that it did not state concisely the manner in which the indebtedness arose, in that it did not show that the sum confessed was justly due, that there was no description of the note on which the judgment was confessed, that there was no allegation that plaintiff paid any consideration for it, that the note was not filled with the statement, and that the amount of the judgment confessed was in excess of the amount due according to the statement.

In Stern *v.* Mayer, 19 Mo. App. 513, the statement was as follows:

"State of *Missouri*, }
City of *St. Louis*. }

Whereas, I, *J. I. Mayer*, of the city of *St. Louis*, doing business under the name and style of *J. I. Mayer & Co.*, am indebted to *Levi Stern*, of the city of *Philadelphia*, state of *Pennsylvania*, in the sum of $*1,500* on account of my certain negotiable promissory note, by me made in my firm name to the order of *Levi Stern*, and indorsed by *A. Mayer & Son* for my accommodation, and negotiated and delivered by me for value before maturity to said *Levi Stern*.

The facts out of which this indebtedness arose are as follows: On *january 31*, 1895, I made and executed my promissory note under the firm name of *J. I. Mayer & Co.*, by which I promised to pay, *ninety* days after date, to the order of *Levi Stern*, $*1,500* at our office, *900 Olive* street, *St. Louis*; that thereupon said note was indorsed by *A. Mayer & Son* for my accommodation, and by me delivered to said *Levi Stern* for money which he then and there gave me for said note as a loan for said sum of $*1,500*. And desiring to secure the payment of said indebtedness, I do hereby authorize the *circuit*

State of *Nebraska*, } ss.
County of *Saline*. }

Max Blank, being duly sworn, on his oath deposes and says: That the facts set forth in the foregoing statement are true.

Max Blank.

Subscribed and sworn to before me this *third* day of *December*, A. D. 1887.

(SEAL) *Eugene Schilling*, Notary Public.

My commission expires *October 26*, 1892.

(*Indorsement.*)[1]

cc. UPON SEALED INSTRUMENT.

Form No. 6029.[2]

(Precedent in Uzzle *v.* Vinson, 111 N. Car. 138.)

In the *Superior* Court — *Johnston* County.

Esther Vinson }
v. } Judgment by Confession.
A. B. Vinson. }

I, *A. B. Vinson*, hereby confess judgment in favor of the above named plaintiff for the sum of *twenty-two hundred and fifty* ($2250) dollars, and authorize the entry of judgment therefor against me, with interest at *six* per cent. from *November 2*, 1876. This confession is for the amount due on a bond under seal executed by the defendant to plaintiff, dated *November 1*, 1876, and the defendant *A. B. Vinson* maketh oath —[3]

court, of the *city* of *St. Louis*, to enter judgment against me for the said sum of $1,500, which sum is justly due and owing according to the tenor and effect of said note herein described, to *Levi Stern*, and costs in favor of said *Levi Stern*. *Jacob I. Mayer.*

Jacob I. Mayer, being sworn, says that he believes the facts set forth in the foregoing statement to be true, and the same are true, and that the debt herein mentioned is bona fide and for a fair and valuable consideration as herein stated. *Jacob I. Mayer.*

Subscribed and sworn to," etc.

1. **Indorsement of filing** upon the confession was: "No. *10,860*. *Mary Samter* v. *Max Blank*. Confession of Judgment. Filed *December 5*, 1887. *L. F. McCoy*, Clerk."

2. *North Carolina.* — Code (1883), § 571. See also list of statutes cited *supra*, note 2, p. 48.

3. **The statement of indebtedness** in this confession was held to be a sufficient compliance with the statute describing the manner of confessing judgments, *distinguishing* Davidson *v.* Alexander, 84 N. Car. 621; Davenport *v.* Leary, 95 N. Car. 203.

Confession before Clerk of the Superior Court. — The following is the ordinary *North Carolina* form of confession of judgment before a clerk of the superior court:

"*Mecklenburg* County — Clerk of *Superior* Court.

John Doe }
against } Before *Calvin Clark*,
Richard Roe. } Clerk C. *S.* C.

I. I, *Richard Roe*, defendant in the above entitled case, hereby confess judgment in favor of *John Doe*, plaintiff in the above entitled case, for the sum of *three hundred* dollars, and do hereby authorize the entry of judgment for such sum against me on this *ninth* day of *February*, 1898.

II. This confession of judgment is for a debt now justly due from me, said defendant, to the said plaintiff, arising from the following facts: (*Here insert concise and accurate statement of facts out of which the indebtedness arose*); which said sum is now due to said plaintiff over and above all just demands that I, the said defendant, have against him, the said plaintiff.

Richard Roe."

(*Verification as in Form No. 6029.*)

1. That said amount of $*2250*, with interest at *six* per cent. from *November 2*, 1876, is justly due by him to the plaintiff.

2. That said amount is due by him to the plaintiff on a bond under seal for borrowed money due and payable *November 2*, 1876.

A. B. Vinson.

North Carolina—*Johnston* County.

A. B. Vinson being sworn, says that the facts set forth in the foregoing confession are true.

A. B. Vinson.

Sworn to and subscribed before me, *October 31*, 1891.

W. S. Stevens, C. *S.* C.

dd. FOR GOODS SOLD.

Form No. 6030.[1]

In the *District* Court of the *First* Judicial *District* of the State of *Idaho*, in and for the County of *Shoshone*.

John Doe, plaintiff, against *Richard Roe*, defendant. } Confession of Judgment without Action.

Richard Roe, of *Murray*, county of *Shoshone*, state of *Idaho*, defendant in the above entitled action, does hereby confess judgment

In the justice's court, the confession of judgment before a justice of the peace in *North Carolina* follows the same form used in confession before the clerk of the superior court, substituting the words "*Justice's* Court" for the words "clerk of *Superior* Court" and "J. P." for "C. *S.* C."

Authorizing Clerk to Enter Judgment.—If the confession does not contain words expressly authorizing the clerk to enter judgment, and the record shows that the confession was sworn to and filed and judgment thereon entered, the filing is equivalent to an expressed authority for its entry and sufficiently conforms to the statute. Merchants Nat. Bank *v.* Newton Cotton Mills, 115 N. Car. 507. In this case the confession of judgment was as follows:

"State of *North Carolina*—County of *Catawba*.

In the *Superior* Court.

The Merchants National Bank of Richmond, Va., v. *The Newton Cotton Mills.*

The Newton Cotton Mills, by *W. H. Williams*, president, being thereunto duly authorized by the *Newton Cotton Mills*, hereby confesses judgment in favor of *The Merchants National Bank of Richmond, Va.*, the plaintiff above named, for the sum of *five thousand three hundred and seventy-one* dollars and *sixty* cents, with interest at *8* per cent. from *July 19th*, 1893. This confession of judgment is to secure the plaintiff the sum above named, which is due by a certain promissory note made by the *Newton Cotton Mills* to the firm of *Heath, Springs & Co.*, and the said *Heath, Springs & Co.* indorsed to the plaintiff for value, which said note became due and payable on the *19th* day of *July*, 1893. That the consideration of this note was for cotton sold and delivered to the *Newton Cotton Mills* by *Heath, Springs & Co.*

Newton Cotton Mills,
by *W. H. Williams*, President.

North Carolina — *Catawba* County.

Before me, *J. F. Herman*, Clerk of the *Superior* Court of *Catawba* County, personally appeared *W. H. Williams*, President of the *Newton Cotton Mills*, who, being duly sworn, maketh oath that the statement above signed by him is true.

W. H. Williams.

Subscribed and sworn to before me *July 31*, 1893. *J. F. Herman*, Clerk *Superior* Court."

1. *Idaho.* — Rev. Stat. (1887), § 5061. See also list of statutes cited *supra*, note 2, p. 48.

therein in favor of *John Doe*, of *Murray*, county of *Shoshone*, state of *Idaho*, the plaintiff in said action, for the sum of *five hundred* dollars *in gold coin of the United States*, and authorize judgment to be entered therefor against him with *six* per cent. interest thereon from this date.

This confession of judgment is for a debt justly due to the said *John Doe*, plaintiff, arising from the following facts, to wit: The said plaintiff, at divers and various dates and times in the year of 1897, sold and delivered certain goods to said defendant, to wit: *One hundred* sacks of flour, at *one* dollar and *fifty* cents per sack; *six hundred* pounds of bacon, at *twelve and one-half* cents per pound; *four hundred* pounds of sugar, at *ten* cents per pound, and upon such sales there is now justly due and owing to the said plaintiff a balance amounting to *two hundred* dollars.[1] Also the said plaintiff, on the *first* day of *February*, 1897, loaned to said defendant the sum of *three hundred* dollars in gold coin of the United States, which said sum of *three hundred* dollars is now justly due and owing to the said plaintiff from the said defendant.

Dated the *ninth* day of *February*, 1898.

Richard Roe, Defendant.

State of *Idaho*, }
County of *Shoshone*. } ss.

Richard Roe, being duly sworn, says that he is the person who signed the above statement and that he is indebted to the said *John Doe* in the sum of *five hundred* dollars *in gold coin of the United States*, in said statement mentioned; that there are no offsets to the same, and that the facts stated in the above confession and statement are true. That said confession is not made to defraud any creditor of the defendant, but in good faith for a bona fide indebtedness.

Richard Roe.

Subscribed and sworn to before me this *ninth* day of *February*, 1898.
(SEAL) *Norton Porter*, Notary Public.

1. Sufficiency of Statement for Goods Sold. — The requirement of "a concise statement of the facts out of which the debt arose" could never have been intended to call for as much as a bill of particulars. Bryan *v.* Miller, 28 Mo. 35; Schoolcraft *v.* Thompson, 9 How. Pr. (N. Y. Supreme Ct.) 61. The specification as to when the indebtedness arose may be indefinite, but a statement otherwise sufficient will not be invalidated for this reason alone. Harrison *v.* Gibbons, 71 N. Y. 62. Nor need the statement aver in express terms to whom or by whom the goods were sold, where the words used plainly imply these facts. Read *v.* French, 28 N. Y. 293. But a reasonably specific bill of goods showing the dates of sale should be given. Mechanics Bank *v.* Mayer, 93 Mo. 421.

The following statements have been held to be sufficient: That "the sum of $500, being the amount of a bill of goods this day purchased of him the said plaintiff by him the said defendant." Hoppock *v.* Donaldson, 12 How. Pr. (N. Y. Supreme Ct.) 141.

That the judgment debtor "had obtained" groceries, provisions, money, etc., to an amount stated, specifying in a general way the time when the indebtedness arose. Harrison *v.* Gibbons, 71 N. Y. 62.

That the indebtedness was for "sundry articles of dry goods" and "a bill of groceries," without further detail as to the consideration of the indebtedness. Daniels *v.* Claflin, 15 Iowa 152.

That the indebtedness was for "grain purchased of the said plaintiff, *W. H.*

ee. FOR MONEY LOANED.

Form No. 6031.[1]

Supreme Court, *Albany* County.

John Doe, plaintiff,
against
Richard Roe, defendant.

I, *Richard Roe*, the defendant above named, do hereby confess judgment in favor of *John Doe*, plaintiff above named, for *one thousand* dollars and authorize judgment to be taken against me for that sum with costs. This confession of judgment is for a debt justly (*to become*) due from me to the above plaintiff, said indebtedness arising upon the following facts, to wit:* between the *first* day of *March*, 1893, and the *first* day of *October*, 1895, the plaintiff loaned and advanced me divers and sundry sums of money which I agreed to repay him with interest, and also did and performed work, labor and service in selling merchandise upon commission and guaranteeing the amounts for the same, and on the *first* day of *October*, 1895, there was an adjustment of the accounts between said plaintiff and defendant concerning the said matters and the sum of *one thousand* dollars was found due to the former, which the latter agreed to pay with interest.[2]

Richard Roe, defendant.

Healy, by the said *Othniel Preston*, on or about the *1st* day of *April*, 1856." Healy *v.* Preston, 14 How. Pr. (N. Y. Supreme Ct.) 21.

That the indebtedness arose for "goods sold and delivered" without stating the time of sale, quantity, price and value of the goods. Merchants Nat. Bank *v.* Newton Cotton Mills, 115 N. Car. 507.

1. *New York.* — Code Civ. Proc., § 1274 (Birds. Rev. Stat. (1896), p. 1738, § 73). See also list of statutes cited *supra*, note 2, p. 48.

Another form of statement of confession of judgment for money loaned may be as follows: (*Commencing as in Form No. 6031, and continuing to* *) "1. On the *ninth* day of *February*, 1897, at the city of *Albany*, in the state of *New York*, the said plaintiff loaned to me the sum of $*1,000*, payable on demand with interest. 2. On the *fifth* day of *July*, 1897, at the city of *Albany*, in the state of *New York*, the said plaintiff loaned to me the sum of $*500* on the same terms. 3. On the *first* day of *September*, 1897, I paid to the said plaintiff the sum of $*500* on account." (*Signed, dated and verified as in Form No. 6031.*)

For Money Loaned, Not Yet Due. — (*Commencing as in Form No. 6031, and continuing down to* *) "1. On the *ninth* day of *February*, 1898, at the city of *Albany*, in the state of *New York*, the said plaintiff loaned to me the sum of $*1,000*. 2. I promised to repay the same on the *first* day of *July*, 1898." (*Signed, dated and verified as in Form No. 6031.*)

2. The statement in this confession is in substance that reported in the case of Critten *v.* Vredenburgh, 4 N. Y. App. Div. 216. The statement in that case, besides the general averment as to money loaned and labor and services performed by the plaintiffs for the defendants, alleged facts showing an account stated. The court held that the statement therefore had as much force as if it had averred an adjustment of accounts on October 1, 1895, and the giving of a note by the defendants to the plaintiffs, and was therefore sufficient. This view of the case is supported by Freligh *v.* Brink, 22 N. Y. 418; Ely *v.* Cooke, 28 N. Y. 365. And these cases are cited with approval by Andrews, J., in Harrison *v.* Gibbons, 71 N. Y. 62. The case of Wood *v.* Mitchell, 117 N. Y. 439, was considered by the court and said not to be in conflict with the above decisions. *Compare* also the confession of judgment discussed in Healy *v.* Preston, 14 How. Pr. (N. Y. Supreme Ct.) 21.

Sufficiency of Statement for Money Loaned. — The following statements have been held to be sufficient:

A statement which alleges that the

Albany County, ss.

Richard Roe, being duly sworn, says that he is the defendant who has made the above confession of judgment, and that all the matters of fact mentioned and stated therein are true.

Richard Roe.

Sworn before me this *twelfth* day of *January*, 1896.

Norton Pomeroy,
(SEAL) Notary Public, *New York* County.

Supreme Court, *Albany* County.

John Doe, plaintiff,
against
Richard Roe, defendant.

Costs allowed by Code Civ. Proc., § 1275	$15 00
Affidavits	$——
Entering judgment	$——
Transcript and filing	$——
Postage	$——
Sheriff's fees on execution served, etc	$——
Satisfaction, etc	$——
Total	$——

Albany County, ss.

Oliver Ellsworth, being duly sworn, says that he is one of the attorneys of the plaintiff in the above named cause, and that the disbursements above mentioned have been made herein or will be necessarily made or incurred herein, as he verily believes.

Sworn to before me this *twelfth* day of *January*, 1895.

Norton Porter,
(SEAL) Notary Public, *New York* County.

moneys were loaned and advanced in various and divers sums between two dates, which are specified, no uncertainty existing as to the aggregate amount of the loans, which is stated, or as to how much of the amount is interest and how much is principal. Wood *v.* Mitchell, 117 N. Y. 439.

A statement that in certain years, naming them, the plaintiff advanced to the defendant, at his request, a certain sum, naming it, which the defendant promised to pay, and has not paid in whole or in part, and that such sum is due and owing by the defendant to the plaintiff, and that the money loaned, without interest, amounts to a certain sum, naming it. Miller *v.* Kosch, 74 Hun (N. Y.) 52, *supported* by Freligh *v.* Brink, 22 N. Y. 418; Harrison *v.* Gibbons, 71 N. Y. 58, and not in conflict with Wood *v.* Mitchell, 117 N. Y. 439.

A statement "That at the time I began business as a producer of milk and farmer the plaintiff furnished me with cows, horses, wagons, and other articles and utensils required in the business, and hired a farm for me, paying the rent therefor, and has since that time advanced me moneys to enable me to conduct said business and to support my family, down to the present time, which said money so advanced, and the horses, cattle, wagons and utensils furnished as aforesaid, were worth upwards of *eight thousand dollars*." Weil *v.* Hill, 71 Hun (N. Y.) 135.

A statement, in *Iowa*, reciting that the indebtedness is money borrowed of plaintiff by defendant, which is evidenced by a promissory note, set out in the statement. Marvin *v.* Tarbell, 12 Iowa 94; Vanfleet *v.* Phillips, 11 Iowa 558. And to the same effect, substantially, Kendig *v.* Marble, 58 Iowa 530; Miller *v.* Clarke, 37 Iowa 325.

ff. FOR PURCHASE MONEY OF REALTY.

Form No. 6032.[1]

State of *North Dakota*, } ss. In *District* Court,
County of *Barnes*. } *Fifth* Judicial District.

John Doe, plaintiff, against *Richard Roe*, defendant. } Confession of Judgment — Statement.

I, *Richard Roe*, defendant in the above entitled action, do hereby confess judgment therein in favor of *John Doe*, the plaintiff in said action, for the sum of *five hundred* dollars, and authorize judgment to be entered therefor against me with legal interest thereon from this date.

This confession of judgment is for a debt justly due and owing to the said plaintiff and for costs herein arising upon the following facts, to wit: On the *first* day of *February*, 1897, the said plaintiff sold and conveyed unto the said defendant at *Valley City* in *Barnes* county, state of *North Dakota*, certain real estate, to wit: Lot 5 in block 3 of *Noman's* addition to the town of *Valley City* in said county and state, for which said real estate the said defendant promised to pay the sum of *five hundred* dollars to the said defendant. Neither the whole nor any part of said sum has been paid to the said plaintiff, but is now justly due and owing from said defendant to said plaintiff.[2]

Richard Roe.

State of *North Dakota*, } ss.
County of *Barnes*. }

Richard Roe, being duly sworn, says that he is the person who signed the above statement and that he is indebted to *John Doe* in the sum of *five hundred* dollars, in said statement mentioned; and the facts stated in the above confession and statement are true.

Richard Roe.

1. *North Dakota.* — Codes (1895), § 6131. See also list of statutes cited *supra*, note 2, p. 48.

2. **Sufficiency of Statement for Purchase Money for Real Estate.** — In Thorp *v.* Platt, 34 Iowa 315, in an action between the immediate parties to a judgment, the following statement was held sufficient:

"I, *J. N. Platt*, hereby confess judgment in favor of *Milton Thorp*, the plaintiff herein, for the sum of $400, and authorize the clerk of said court to enter judgment against me for said sum, with costs. This confession of judgment is for the sum agreed upon between the parties hereto, in settlement of the contract price of the farm sold by said *Thorp* to said *Platt*, and conveyed by deed, dated *September 11*, 1871, and said indebtedness arose out of the sale of said farm, and this confession of judgment is for the whole amount due to said *Thorp* on said farm. If this judgment is paid within *thirty* days, the plaintiff herein hereby authorizes the clerk of said court to discount the same *ten* per cent. and cancel the same of record, defendant to have *thirty* days' stay without security; and that there is now justly due the plaintiff the sum first above named."

The court was not required to pass upon its sufficiency as between a party to a judgment and a third party, but infers that in such case it would not have been sufficient.

Subscribed and sworn to before me this *ninth* day of *February*, A. D 1*898*.

(SEAL) *Norton Porter*, Notary Public.

(*Judge's order for judgment.*)[1]

Form No. 6033.[2]

(Precedent in Weinges *v.* Cash, 15 S. Car. 47.)

The State of *South Carolina*, } Court *of Common Pleas.*
County of *Chesterfield.* }

Allen E. Cash }
v. }
Robert E. Ellerbe. }

I hereby confess myself to be indebted to *Allen E. Cash*, the plaintiff, in the sum of *fifteen thousand* dollars, and consent to and authorize the entry of judgment therefor. The said judgment arises from the fact that I am indebted to her on account of the purchase and rental by me of lands to which she was entitled to an interest as an heir of her father's estate, and also to the interest of her mother therein, which she has transferred to the plaintiff and directed me to pay to her, the same not exceeding the amount aforesaid, and the said amount is now justly due to the plaintiff.[3]

27th January, 1879. *R. G. Ellerbe.*

[The State of *South Carolina*, }
County of *Chesterfield.* }

The defendant above named, being duly sworn, says that the above

1. Order of Judge or Court. — The statement must be presented to the district court or a judge thereof, and if the same is found sufficient the court or judge shall make an order that judgment be entered by the clerk. N. Dak. Rev. Codes (1895), § 6132; Wash. Stat. (1897), § 5099. Such order may be as follows:

"In *District* Court, *Fifth* Judicial District.

State of *North Dakota*, } ss.
County of *Barnes.* }

John Doe, plaintiff, } Order for
against } Judgment on
Richard Roe, defendant. } Confession.

The written statement and confession of judgment of the defendant, herein duly verified by his own signature and oath, having been presented to the court and the court having found the same sufficient:

It is now, on motion of *Oliver Ellsworth*, attorney for said plaintiff, ordered, that plaintiff have judgment against the defendant *Richard Roe* for the sum of *five hundred* dollars, together with *ten* dollars for costs and disbursements, amounting in the whole to the sum of *five hundred and ten* dollars.

Let judgment be entered accordingly.

Dated this *ninth* day of *February*, A. D. 1*898*.

By the court,
John Marshall, Judge."

Or indorsed upon the confession, thus:

"*Richard Roe* }
to }
John Doe. }

The within confession of judgment having this *ninth* day of *February*, 1*898*, been presented to me, and having been found sufficient, let judgment be entered as per statute provided.

Carroll Johnson, District Judge."

2. *South Carolina.* — Code Civ. Proc. (1893), § 384. See also list of statutes cited *supra*, note 2, p. 48.

3. This confession was for an amount less than that which was actually due, and was held to contain a sufficient statement to comply with statutory requirements.

statement and confession of judgment and the facts therein mentioned are true to his knowledge, and further he says not.

R. G. Ellerbe.

Sworn to before me this *27th* day of *January*, 1879.
Norton Porter, Notary Public, *Chesterfield* County, *South Carolina*.][1]

gg. FOR SERVICES RENDERED.

Form No. 6034.[2]

State of *Minnesota*, } ss. *District* Court,
County of *Hennepin*. } *Fourth* Judicial District.

Sampson A. Reed, Plaintiff,
against
Maria B. Nell, Defendant.

I, *Maria B. Nell*, above named, do hereby confess judgment in favor of *Sampson A. Reed*, above named, for the sum of *five hundred* dollars, and hereby authorize the clerk of the *District* Court in and for the county of *Hennepin* and state of *Minnesota*, to enter judgment therefor against me, said *Maria B. Nell*, and in favor of said *Sampson A. Reed*.

This confession of judgment is for money justly due to the said *Sampson A. Reed*, arising from the following facts, viz.: The said indebtedness is due from the said *Nell* to said *Reed* on account of services and money paid out by *Seagraves Smith* and said *Reed*, late copartners as *Smith and Reed*, and performed at my special instance and request between the *first* day of *October*, 1887, and the *first* day of *March*, 1889, and that said amount has not been paid, but is now all justly due and owing; that the said *Smith and Reed*, for a valuable consideration to them paid prior to confession of this judgment, sold, assigned and set over to the said *Reed*.[3]

Maria B. Nell, Defendant.

1. This affidavit is inserted instead of the one found in the precedent, as being better and more in conformity with the usual practice. The affidavit in the reported case appended to the statement of R. G. Ellerbe shows that he swore "that the above statement is true; that he justly owes the plaintiff the amount stated above on account of the facts stated."

2. *Minnesota.* — Stat. (1894), § 6077. See also list of statutes cited *supra*, note 2, p. 48.

3. This statement is based upon the facts in Atwater *v.* Manchester Sav. Bank, 45 Minn. 350. The statement in that case was held to be good even as against subsequent creditors.

In Kellogg *v.* Cowing, 33 N. Y. 408, the confession, omitting the formal parts, was as follows: "This confession of judgment is for a debt justly to become due from me to the above plaintiff, *Aaron J. Kellogg*, on or about the *15th* day of *December*, 1859; and the following are the facts upon which said indebtedness arises: The plaintiff had been in the employ of the defendant for several years, upon a salary; from year to year defendant has settled with plaintiff, allowing him interest upon such amount or amounts as remained unpaid. That on the *15th* day of *December*, 1857, the plaintiff and defendant settled, and there was then due to the plaintiff $4,300, for which sum defendant then gave his note, payable in two years, with interest; that the amount of said note, with interest, on the *15th* day of *December*, 1859, will be the sum of $4,902; and no payments have been made on the said note, or the interest thereon."

State of *Minnesota*, } ss.
County of *Hennepin*. }

Maria B. Nell, being duly sworn, says that she is the defendant above named, and that the matters of fact set forth in the within statement and confession are true.

Maria B. Nell.

Subscribed and sworn to before me this *fourteenth* day of *December*, A. D. 1889. *Calvin Clark*, Clerk of *District* Court.

State of *Minnesota*, } ss. *District* Court,
County of *Hennepin*. } *Fourth* Judicial District.

Sampson A. Reed, plaintiff,
against
Maria B. Nell.

Costs allowed by statute	$5 00
Clerk's fees	$—
Affidavits	$—
Postage	$—
Docketing	$—
Total	$—

State of *Minnesota*, } ss.
County of *Hennepin*. }

Oliver Ellsworth, being duly sworn, says he is the attorney for the plaintiff above named; that the disbursements above mentioned have been made or will be necessarily paid or incurred therein.

Oliver Ellsworth.

Subscribed and sworn to before me this *fourteenth* day of *December*, 1889. *Calvin Clark*, Clerk of the *District* Court.

Form No. 6035.[1]

State of *South Dakota*, } In *Circuit* Court.
County of *Hughes*. }

John Doe, plaintiff,
against
Richard Roe, defendant. } Statement and Confession of Judgment.

I, the subscriber hereto, do hereby confess judgment in favor of *John Doe* for the sum of *five hundred* dollars, and authorize judgment to be entered against me for that sum, besides costs.

This confession of judgment is for a debt at this time justly due to said *John Doe*, and the following is a statement of the facts upon which said confession of judgment is founded:

On the *first* day of *February*, 1897, at *Pierre* in the county of *Hughes*, state of *South Dakota*, I hired and retained the said *John Doe*, who now is and then was an attorney at law licensed and regularly practicing in all the courts within said county, to defend me in a certain prosecution pending in the *Circuit* Court of said county,

1. *South Dakota.* — Dak. Comp. Laws (1883), §§ 5538, 5539. See also list of statutes cited *supra*, note 2, p. 48.

wherein the *State of South Dakota* was plaintiff and myself defendant, which said prosecution was for *murder*, and during the *May* Term of the *Circuit* Court of said county the said *John Doe* did defend me in said prosecution, and as a result of his professional services so rendered I was regularly acquitted of said charge, as appears from the records and the entry of the verdict in said cause appearing in the office of the clerk of the *Circuit* Court of said county. Said professional services of said *John Doe* were reasonably worth the sum of *five hundred* dollars, which said sum has never been paid by me to the said *John Doe* for his said services, but is now justly due and owing to him.

State of *South Dakota*,
County of *Hughes*.

Richard Roe, being duly sworn, says that he is the defendant above named, and that the matter of fact set forth in the within statement and confession are true.

Richard Roe.

Subscribed and sworn to before me this *ninth* day of *February*, 1898. *Calvin Clark*, Clerk of *Circuit* Court.

(*Indorsement of judge's order.*)[1]

hh. To Secure against Contingent Liability.

Form No. 6036.[2]

In the *Circuit* Court for the State of *Oregon*, for the County of *Benton*.

Thomas M. Reed, plaintiff,
against
Jacob Allen, defendant.

I, *Jacob Allen*, the defendant above named, do hereby confess judgment in favor of * *Thomas M. Reed*, the plaintiff above named, for the sum of *two thousand eight hundred* dollars *in gold coin of the United States*, and authorize judgment to be rendered against me therefor, and in favor of said plaintiff for the said sum of *two thousand eight hundred* dollars *in gold coin* as aforesaid.

This confession of judgment is made for the purpose of securing

1. **Order of judge** indorsed upon the confession should be as follows:

"Order of Judge.

On filing the within statement and confession it is ordered that judgment be entered by the clerk of this court in accordance therewith.

Dated the *ninth* day of *February*, 1898.

Carroll Johnson, *Circuit* Judge,
Sixth Judicial Circuit."

2. *Oregon.*— Hill's Anno. Laws (1892), §§ 250–256. See also list of statutes cited *supra*, note 2, p. 48.

For Liability Incurred as Accommodation Indorser. — (*Commencing as in Form No. 6036, and continuing down to* *) "*Thomas M. Reed*, for the sum of *two thousand eight hundred* dollars, to secure him against any liability for the following cause: On the *nineteenth* day of *January*, 1861, at *Corvallis*, in *Benton* county, *Oregon*, the said plaintiff indorsed for my accommodation a certain promissory note made by me, dated the *nineteenth* day of *January*, 1861, at *Corvallis*, *Benton* county, *Oregon*, to the order of *Samuel Short*, for the sum of *two thousand eight hundred* dollars, payable *one* year after date and delivered the same to me." (*Signed, dated and verified as in Form No. 6036.*)

the said *Thomas M. Reed* against any liability which may accrue to him in consequence of his having signed a bond as security for me, bearing date the *seventh* day of *November*, A. D. 1854, for the sum of *three thousand six hundred* dollars; said bond was given by me as guardian of the infant heirs of *George W. Stewart*, deceased, to wit, *Mary J. Stewart*, *Amanda Stewart* and *George W. Stewart*.[1]

Dated at *Corvallis*, in *Benton* county, *Oregon*, the *nineteenth* day of *January*, 1861. *Jacob Allen*, Defendant.

State of *Oregon*, } ss.
County of *Benton*. }

I, *Jacob Allen*, being first duly sworn, say that I am the defendant named in the foregoing confession of judgment, and that said confession of judgment is true, as I verily believe.

Jacob Allen.

Subscribed and sworn to before me the *nineteenth* day of *January*, 1861. *A. J. Thayer*, Notary Public.

State of *Oregon*, } ss.
County of *Benton*. }

On the *nineteenth* day of *January*, 1861, personally appeared before me, a *justice of the peace* in and for said county and state, the within named *Jacob Allen*, to me personally known to be the identical defendant described in and who executed the within confession of judgment, and acknowledged to me that he executed the same freely, and for the uses and purposes therein named.

1. **This statement** is based on the confession set out in Allen *v.* Norton, 6 Oregon 345.

Sufficiency of Statement to Secure against Contingent Liability. — The statement must state concisely the facts constituting such liability and show that the sum confessed therefor does not exceed the same.

California. — Code Civ. Proc. (1897), § 1133. See also list of statutes cited *supra*, note 2, p. 48.

The following statements have been held to be sufficient:

A statement describing the notes, naming the respective amounts, dates and place of demand, without stating the consideration or that the notes had been discounted, where such facts were plainly inferable. Marks *v.* Reynolds, 12 Abb. Pr. (N. Y. Supreme Ct.) 403.

"For the purpose of securing the plaintiff against his liability arising from the facts hereinafter set forth, and does not exceed the amount of such liability. Said plaintiff has this day indorsed my notes, payable at bank, for $6,000 in all; which indorsements are made by said plaintiff for my accommodation, and to enable me to negotiate said notes; and this confession and judgment is given him to secure him against his liability as such indorser, and for no other purposes." Hopkins *v.* Nelson, 24 N. Y. 518.

"The said *Lanning* assuming the payment of the sum of *one thousand* dollars at the *Bank of Havana*, on the *14th* day of *July*, 1855, by which a note of *one thousand* dollars, made by me, payable to the order of *Samuel Carpenter* at the said *Havana Bank*, dated on *31st* day of *May*, 1855, and indorsed by the said *Samuel Carpenter* and *D. J. Sunderlin*, was paid and taken up." Lanning *v.* Carpenter, 20 N. Y. 448, *affirming* 23 Barb. (N. Y.) 402.

But in *Minnesota* a statement to the effect that "this confession is for $700 for a liability incurred by plaintiff for indorsing a bond for defendant, which bond is for that amount," was held to be insufficient. Kern *v.* Chalfant, 7 Minn. 487.

"**In an action pending**" the statement mentioned in section 252 of the *Oregon* code is not required. Miller *v.* Oregon City Paper Mfg. Co., 3 Oregon 26.

Witness my hand (*and seal*) the day and year in this certificate first above written.

Abraham Kent, Justice of the Peace.[1]

State of *Oregon*, } ss.
County of *Benton.* }

I, *Thomas M. Reed*, the plaintiff named in the foregoing confession of judgment, do hereby assent to the rendition of judgment in my favor and against the defendant *Jacob Allen*, therein named, for the sum of *two thousand eight hundred* dollars in United States gold coin, according to the terms of said confession of judgment.

Thomas M. Reed, plaintiff.

State of *Oregon*, } ss.
County of *Benton.* }

On the *nineteenth* day of *January*, 1861, personally appeared before me, *Abraham Kent*, a *justice of the peace* in and for said county and state, the above named plaintiff *Thomas M. Reed*, to me personally known to be the identical person described in and who executed the above assent to rendition of judgment upon confession, and acknowledged to me that he executed the same freely, and for the uses and purposes therein named.

Witness my hand (*and seal*) the day and year in this certificate first above written.

Abraham Kent, Justice of the Peace.[1]

(*Indorsement of judgment.*)[2]

ii. FOR BALANCE DUE ON JUDGMENTS.

Form No. 6037.[3]

(Precedent in Union Bank *v.* Bush, 36 N. Y. 631.)

[*Supreme* Court, *Sullivan* County.

Nathan S. Hammond, President of the Union Bank of Sullivan County, plaintiff,
against
Abial P. Bush, Luther Bush and *Obediah H. Bush, composing the firm of A. P. Bush & Company*, defendants.

We, *Abial P. Bush, Luther Bush* and *Obediah H. Bush*, composing the firm of *A. P. Bush & Company*, of the county of *Sullivan* and

1. **This acknowledgment** is not necessary when the parties appear before the clerk in person. Hill's Anno. Laws Oregon (1892), § 253.

2. **Judgment was indorsed** upon the statement in Allen *v.* Norton, 6 Oregon 345, as follows: "*Thomas M. Reed* v. *Jacob Allen*. Confession of judgment. The said *Jacob Allen* having confessed judgment in favor of *Thomas M. Reed* for the sum of *two thousand eight hundred* dollars, it is therefore adjudged that the said *Reed* have and recover of said *Allen* the sum of *two thousand eight hundred* dollars, and *five* dollars costs, this *nineteenth* day of *January*, 1861. *E. L. Perham*, Clerk."

3. *New York.*—Code Civ. Proc., § 1274 (Birds. Rev. Stat. (1896), p. 1738, § 73). See also list of statutes cited *supra*, note 2, p. 48.

state of *New York*, defendants above named,][1] do hereby confess judgment in this cause, in favor of the above named plaintiff, *Nathan S. Hammond*, President of the *Union Bank* [*of Sullivan County*],[1] for the sum of *six thousand two hundred* dollars, and authorize judgment to be entered therefor against us. This confession of judgment is for a debt justly due to the plaintiff arising upon the following facts: For balance due upon three several judgments in the *Supreme* Court, in favor of plaintiff against these defendants, which judgments were docketed [in the clerk's office of *Sullivan* County, *February 13th*, 1857,][1] and were obtained upon notes discounted by the *Union Bank of Sullivan County*, for the defendants and the avails paid to us and also for money this day loaned by the *Union Bank of Sullivan County* to the defendants, for which, in addition to the above balance, this judgment is confessed.[2]

[*Obediah H. Bush.*
Luther Bush.
Abial P. Bush.

Sullivan County, ss.

Abial P. Bush, *Luther Bush* and *Obediah H. Bush*, being first duly and severally sworn, each for himself, says that he is one of the defendants whose name is subscribed to and who joined in the above confession of judgment, and that all the matters of fact mentioned and stated therein are true.

Abial P. Bush.
Luther Bush.
Obediah H. Bush.

Sworn before me by each of the affiants this *twenty-seventh* day of *July*, 1857. *Calvin Clark*,
County Clerk of *Sullivan* County.][1]

(2) In Justice's Court.

Form No. 6038.[3]

John Doe
against
Richard Roe.

State of *Florida*,
Taylor County.

I hereby confess judgment before *Abraham Kent*, a justice of the peace of the county of *Taylor* aforesaid, for the sum of *fifty* dollars and *fifty* cents for money due to the said *John Doe* from me as purchase money for a certain *mule* by the said *John Doe* to me sold and delivered at *Perry*, in said county and state, on the *first* day of *Janu-*

1. The words and figures enclosed by [ ] are not found in the reported case, but are inserted to complete the form.

2. **This statement** was upheld against objection thereto; the court holding that it was in conformity with the requirements of the *New York* statute under which it was drawn.

3. *Florida.* — Rev. Stat. (1892), §§ 1609, 1623. See also list of statutes cited *supra*, note 3, p. 48.

For statutory form of confession of judgment in *Florida* see Rev. Stat. (1892), p. 548, par. 15.

ary, 1898, which said purchase money, the amount of which is above mentioned, has never been paid by me to the said *John Doe*, but is now justly due and owing to him; and the said justice is hereby authorized to enter a judgment against me in favor of the said *John Doe* for said sum with costs.

Dated the *second* day of *February*, 1898.

Richard Roe.

Witness: *Abraham Kent*, Justice of the Peace.

(*Annex indorsement of justice's judgment.*)[1]

Form No. 6039.[2]

John Doe
against
Richard Roe.

State of *Indiana*, *Posey* County. } ss:

Judgment to be confessed before *Abraham Kent*, justice of the peace of *Mt. Vernon* township, *Posey* county, for *ninety-two* dollars and *sixty* cents, and the said *Richard Roe* swears that he owes the above mentioned debt of *ninety-two* dollars and *sixty* cents, and that he does not confess judgment therefor to defraud his creditors.[3]

Richard Roe.

Sworn and subscribed before me, the undersigned, a justice of the peace of said township and county, the *tenth* day of *December*, 1897.

Abraham Kent, Justice of the Peace.

Form No. 6040.[4]

John Doe, plaintiff,
against
Richard Roe, defendant.

In the *Justice's* Court, before *Abraham Kent*, Justice of the Peace in and for *Logan* Township, *Harrison* County. Confession of Judgment.

I, *Richard Roe*, of *Logan* in *Harrison* county, in the state of *Iowa*, do hereby confess judgment in favor of *John Doe*, the plaintiff herein, for the sum of *eighty-seven* dollars, and authorize the said justice to enter judgment for the said sum against me with interest at *six* per cent. per annum from the *twelfth* day of *December*, 1897, with costs, and state that said sum of money, with said interest and costs, is justly due the plaintiff from me, and that the facts out of which the said indebtedness arose are as follows, to wit: *Eighty-seven* dollars for money loaned by the plaintiff to me, the said defendant, and that the amount for which judgment is hereby confessed does not exceed the amount due upon said indebtedness.[5]

Dated this *twelfth* day of *December*, A. D. 1897.

Richard Roe.

1. For this judgment see *infra*, Form No. 6075.

2. *Indiana.* — Horner's Stat. (1896), § 1490. See also list of statutes cited *supra*, note 2, p. 48.

3. **Without affidavit,** judgment by confession in a justice's court is good as to parties but not as to creditors, preceding or subsequent. Campbell *v.* Baldwin, 6 Blackf. (Ind.) 364; Mavity *v.* Eastridge, 67 Ind. 211.

4. *Iowa.* — Code (1896), § 4536. See also list of statutes cited *supra*, note 2, p. 48.

5. **Sufficient Statement.** — Where the record showed that "the defendant"

State of *Iowa*, } ss.
Harrison County. }

Richard Roe, being duly sworn on oath, states that he is the defendant in the foregoing entitled confession of judgment, and that he has read the said confession of judgment, and that the statements therein contained are true and correct, as he verily believes.

Richard Roe.

Subscribed and sworn to before me, a justice of the peace in and for said county, by the said *Richard Roe*, this *twelfth* day of *December*, A. D. 1897. *Abraham Kent*, Justice of the Peace.

Form No. 6041.[1]

State of *Kansas*, } ss.
County of *Cowley*. }

John Doe, plaintiff, against *Richard Roe*, defendant. } In *Justice's* Court, before *Abraham Kent*, Justice of the Peace of *Winfield*, in *Cowley* County, *Kansas*.

Now comes *Richard Roe* and personally appears before said justice of the peace, without process being issued or served upon him, and voluntarily confesses that he is indebted to *John Doe* of said *Winfield* for the sum of *fifty-four* dollars for goods, wares and merchandise purchased by him from the said *John Doe* during the year 1896, and that said indebtedness bears interest at the rate of *six* per cent. per annum, and the said *Richard Roe* hereby authorizes the said justice of the peace, on the application of said *John Doe*, plaintiff, to render judgment against him for the sum of *fifty-four* dollars and *three* dollars interest, said judgment to bear interest from date at the rate of *six* per cent. per annum and for the costs hereof.

Dated the *first* day of *November*, 1897.

Abraham Kent, Justice of the Peace.

Form No. 6042.[2]

To *Abraham Kent*, one of the justices of the peace in the township of *Canton*, in the county of *Montcalm*, I hereby confess judgment on a demand arising upon (*Here state the nature of the demand*), in favor of *John Doe*, for the sum of *twenty-five* dollars and *fifty* cents damages,

(naming him) "appeared and confessed the following note" (setting out the note), "and says that he is justly indebted for the same," the confession was held to be sufficient. Barnett *v.* Juday, 38 Ind. 87.

1. *Kansas.* — 2 Gen. Stat. (1897), c. 95, §§ 399-401. See also list of statutes cited *supra*, note 2, p. 48.

2. *Michigan.* — How. Anno. Stat. (1882), § 6816. See also list of statutes cited *supra*, note 2, p. 48.

For sufficient confession of judgment in a justice's court see Kinyon *v.* Fowler, 10 Mich. 16; Dodge *v.* Bird, 19 Mich. 518.

Technicality and form are neither required nor expected in the proceedings of justices' courts. If the action and judgment of the court can be ascertained clearly from inspection of the files and the docket entries required by statute to be made, no technicalities, imperfections or omissions in the entry of the proceedings and judgment will avail to reverse or avoid the judgment. All that is requisite is that the language used shall be such as will inform a person of ordinary intelligence and mental capacity of the action of the court. Kinyon *v.* Fowler, 10 Mich. 17.

besides costs, and authorize you to enter judgment against me accordingly. Dated the *twenty-second* day of *December*, 1897.

Richard Roe.[1]

Signed in my presence,
Abraham Kent, Justice of the Peace.

Form No. 6043.[2]

State of *Minnesota*, } ss.
County of *Goodhue*. }

To *Abraham Kent*, a justice of the peace of said county:

I hereby confess judgment in favor of *John Doe* and against myself for the sum of *seventy-five* dollars, which is honestly due the said *John Doe* from me at this date; and I hereby authorize you to enter judgment therefor against me. This confession is for a debt now justly due from me to the said *John Doe* arising from the following facts: That at *Red Wing* in the state of *Minnesota*, on the *twelfth* day of *September*, 1896, the said *John Doe* sold and delivered to me *one* black horse of the value of *seventy-five* dollars, and which said sum I agreed to pay to said *John Doe* as the purchase price of said horse; that no part thereof has been paid, and that the whole thereof is now due.

Dated at *Red Wing* this *fourteenth* day of *November*, 1897.

Richard Roe.

County of *Goodhue*, ss.

Richard Roe, being duly sworn, says that the facts stated in the above confession are true.

Subscribed and sworn to before me this *fourteenth* day of *November*, 1897. *Abraham Kent*, Justice of the Peace.

Form No. 6044.[3]

John Doe, plaintiff, against *Richard Roe*, defendant. } Before *Abraham Kent*, Justice of the Peace, *Lamar* Township, *Barton* County, *Missouri*.

I, *Richard Roe*, hereby authorize[4] *Abraham Kent*, Esq., justice of the peace within and for *Lamar* township, county of *Barton*, state of *Missouri*, to enter a judgment on his docket against me in favor of *John Doe*, the above named plaintiff, in the sum of *fifty* dollars,

1. **Must be in writing, signed** by the defendant in the presence of the justice. Wilson *v.* Davis, 1 Mich. 157; Beach *v.* Botsford, 1 Dougl. (Mich.) 199; Crouse *v.* Derbyshire. 10 Mich. 479; Cox *v.* Crippen, 13 Mich. 509.

2. *Minnesota.*—Stat. (1894), §§ 5019–5021. See also list of statutes cited *supra*, note 2, p. 48.

3. *Missouri.*— Rev. Stat. (1889). § 6274. See also list of statutes cited *supra*, note 2, p. 48.

Must be in Writing.—Oyster *v.* Shumate, 12 Mo. 580; Semple, etc., Mfg. Co. *v.* Thomas, 10 Mo. App. 459; Mo. Rev. Stat. (1889), § 6274; Hunter *v.* Eddy, 11 Mont. 251. Unless defendant has been served with process and appears in open court and confesses judgment. Loth *v.* Faconesowich, 22 Mo. App. 72; Chamberlin *v.* Mammoth Min. Co., 20 Mo. 96; Franse *v.* Owens, 25 Mo. 334; Davis *v.* Wood, 7 Mo. 162.

Defendant must personally appear before the justice in open court. Mo. Rev. Stat. (1889), § 6274.

4. **Containing no authority to enter up judgment** is not a confession of judgment. Loth *v.* Faconesowich, 22 Mo. App. 68.

due on account (or *by note*, as the case may be), which is now on file with said justice. Dated the *twenty-fourth* day of *January*, 1897.

Richard Roe.

Witness: *Banks Belk*, and
Abraham Kent, Justice of the Peace.[1]

Form No. 6045.[2]

To *Abraham Kent*, one of the Justices of the Peace in and for the County of *Cheshire*.

I, *John Doe*, do hereby confess that I am indebted to *Richard Roe* in the sum of *fifty* dollars, and consent that record thereof be made against me in favor of the said *Richard Roe* and execution issue accordingly (or *be stayed for three months*, or as the parties may agree).

John Doe.
Richard Roe.

Form No. 6046.[3]

John Doe, plaintiff, against *Sarah Roe*, defendant. } Confession of Judgment before Justice of the Peace.

To *Abraham Kent*, Esq., one of the Justices of the Peace of the County of *Suffolk*:

Sarah Roe of *Northport*, town of *Huntington*, county of *Suffolk*, state of *New York*, hereby confesses judgment in favor of *John Doe*, the above named plaintiff, for the sum of *fifty* dollars, besides costs, and authorizes you, the said justice of the peace, to enter up judgment against her accordingly. And the said *Sarah Roe* states and says, that the indebtedness for which the said judgment is hereby confessed arose upon a demand upon a certain contract, to wit: The said *Sarah Roe*, at *Northport* in said county and state, on the *second* day of *January*, 1898, bought of and purchased from the said *John Doe* certain goods, to wit, *three hundred* yards ribbon at *five* cents per yard and *seven* rolls of imitation lace trimmings at *five* dollars per roll, making a total indebtedness of *fifty* dollars, which defendant promised to pay plaintiff. Said goods were sold and delivered by the said *John Doe* to the said *Sarah Roe* at the time and place aforesaid; no part of the said *fifty* dollars has been by the said *Sarah Roe* paid to the said *John Doe*, but the whole of said amount is now justly due and owing from the said *Sarah Roe* to the said *John Doe*; [and the said indebtedness was contracted by the said *Sarah Roe* in the

1. **Must be signed** by defendant or some person by him, for that purpose authorized. Mo. Rev. Stat. (1889), § 6274.

2. *New Hampshire.* — Pub. Stat. (1891), c. 247, § 16.

3. **Confession by Married Woman** — *New York.* — Code Civ. Proc., § 1273 (Birds. Rev. Stat. (1895), p. 1738, § 72). In justices' courts, see Code Civ. Proc., §§ 3010, 3011 (Birds. Rev. Stat. (1895), p. 1803, §§ 154, 155).

Must be in writing and filed with the justice. N. Y. Code Civ. Proc., §§ 3010, 3011 (Birds. Rev. Stat. (1896), p. 1803, § 155). And by the justice indorsed as follows: "Filed this *ninth* day of *February*, 1898. *Abraham Kent*, Justice of the Peace."

Defendant must personally appear before the justice. N. Y. Code Civ. Proc., §§ 3010, 3011 (Birds. Rev. Stat. (1896), p. 1803, § 155).

course of her trade or business of dressmaker and milliner, which said business was at the time and year above mentioned by her carried on in said village of *Northport* on her sole and separate account.][1]

Dated at *Northport* in said county this *ninth* day of *February*, 1898.

Sarah Roe.[2]

Witness: *Abraham Kent*, Justice of the Peace of the Town of *Huntington*, in said county.

[State of *New York*, } ss.
County of *Suffolk*. }

Sarah Roe, being first duly sworn, says that she is one of the parties in the above and foregoing confession of judgment; that she is honestly and justly indebted to the said *John Doe* in the sum of *fifty* dollars over and above all just demands which she has against the said *John Doe*, and that the above and foregoing confession is not made or taken with intent to defraud any creditor.

Sarah Roe.

Sworn to before me this *ninth* day of *February*, 1898.

Abraham Kent, Justice of the Peace of *Suffolk* County, *N. Y.*

(*Affidavit of John Doe.*)][3]

(*Agreement to stay execution.*)[4]

Form No. 6047.[5]

State of *North Dakota*, } ss.
County of *Burleigh*. }

To *Abraham Kent*, a Justice of the Peace of said County:

I hereby confess judgment in favor of *John Doe* and against

1. That indebtedness was contracted in course of married woman's trade or business, or for the benefit of her separate estate, was necessary to be stated prior to N. Y. L. (1884), c. 381. Since the passage of that act, however, and subsequent acts (Laws (1892), c. 594, Laws (1896), c. 272, § 21), the matter enclosed by [ ] does not seem to be necessary.

2. Must be signed by the defendant. N. Y. Code Civ. Proc., §§ 3010, 3011 (Birds. Rev. Stat. (1896), p. 1803, § 155).

3. Confession for more than fifty dollars must be accompanied with the affidavits as indicated by matter within [ ] in the text. N. Y. Code Civ. Proc., § 3011 (Birds. Rev. Stat. (1895), p. 1803, § 155).

Plaintiff's affidavit must also accompany the confession when the judgment confessed is for more than fifty dollars, which affidavit must state that the defendant is honestly and justly indebted to the plaintiff in the sum specified therein over and above all just demands which the defendant has against the plaintiff, and that the confession is not made or taken with intent to defraud any creditor. N. Y. Code Civ. Proc., §§ 3010, 3011 (Birds. Rev. Stat. (1896), p. 1803, § 155).

In *Arizona* and *Texas*, the plaintiff, his agent or attorney, shall make and file an affidavit in writing, signed by him as to the justness of his claim. Rev. Stat. Ariz. (1887), § 1444; Tex. Rev. Stat (1895), art. 1648. See also Montgomery *v.* Barnett, 8 Tex. 144.

4. Stay of execution by agreement is provided for by N. Y. Code Civ. Proc., § 3010 (Birds. Rev. Stat. (1895), p. 1803, § 154). This agreement may be evidenced by a writing as follows, annexed to or indorsed upon the confession of judgment:

"We, *John Doe* and *Sarah Roe*, hereby agree that no execution shall be issued upon the judgment which may be rendered under and by virtue of the annexed confession, and that execution shall be stayed thereon for *six* months from the date of the judgment. *February 9th*, 1898. *John Doe*,
Sarah Roe."

5. *North Dakota.*— Rev. Codes (1895), §§ 6131, 6701.

See also list of statutes cited *supra*, note 2, p. 48.

myself for the sum of *eighty-seven* dollars and *twenty* cents, which is justly due to the said *John Doe* from me, and I hereby authorize you to enter judgment therefor against me. This confession is for a debt now justly due from me to the said *John Doe* arising upon the following facts: (*Here set out the facts*); that no part thereof has been paid and that the whole thereof is now due.

Dated at *Bismarck* this *twenty-first* day of *December*, 1897.

Richard Roe.

State of *North Dakota*, } ss.
County of *Burleigh*. }

Richard Roe, being duly sworn, says that the facts stated in the within confession are true.

Richard Roe.

Subscribed and sworn to before me this *twenty-first* day of *December*, 1897. *Abraham Kent*, Justice of the Peace.

b. After Action Commenced[1] — Cognovit.[2]

(1) GENERALLY.

Form No. 6048.[3]

In the *Queen's Bench* (or *Common Pleas* or *Exchequer of Pleas*).

Between *John Doe*, plaintiff, and
Richard Roe, defendant.

I confess this action, and that the plaintiff hath sustained damages to the amount of *one thousand* pounds (*the damages laid in the declara-*

1. *Louisiana.* — In Dawson *v.* Babin, 9 La. Ann. 357, the confession was held to be sufficient to authorize a judgment against the obligors and to dispense with service of citation and petition. Omitting formal parts, the confession was as follows:

"We waive citation and service of petition, and confess judgment according to the prayer of the petition of *M. V. Babin* within for the sum of *three hundred and thirty-five* dollars and *ninety-two* cents, with interest thereon at the rate of *eight* per cent. per annum from the *first* day of *January*, 1849, until paid, and costs of suit, with stay of execution until the *1st* of *December*, 1849. *March 16th*, 1849.

James C. Dawson,
Mary Ann Dawson.

Signed in presence of
Enos Herbert."

A confession of judgment by way of supersedeas of a judgment or decree in the court of record shall, in *Maryland*, be a lien on the lands of the persons therein named from the time such supersedeas is filed, in like manner as judgments rendered in any court of law, but the confession shall not defeat the lien of the original judgment. Pub. Gen. Laws (1888), art. 52, §§ 64, 65. Such a supersedeas may be in the following form:

"State of *Maryland*, *Allegany* County, to wit:

We, *Charles Smith* and *John Jones*, do confess judgment to *John Doe* for the sum of *one hundred and fifty* dollars and *forty* cents, damages and costs, which were recovered by the said *John Doe* on the *tenth* day of *April*, 1896, before *Abraham Kent*, a justice of the peace of the state of *Maryland* in and for the county of *Allegany* aforesaid, the debt and costs to be levied on our goods, chattels, lands or tenements for the use of the said *John Doe* in case the said *Richard Roe* shall not pay and satisfy to the said *John Doe* the aforesaid judgment and costs with any additional costs thereon at the expiration of *six* months from the date of said judgment. Dated this *fifteenth* day of *April*, 1896. *Charles Smith.* (SEAL)
John Jones. (SEAL)

Test: *Samuel Short.*
William West."

2. *Illinois.* — For form of narr and cognovit in *Illinois* see the title BILLS AND NOTES, vol. 3, Form No. 4181.

3. **Cognovit in Assumpsit.** — This is the

tion, or sum indorsed as the debt on the back of the writ, if the cognovit be given before the declaration), besides his costs and charges in this behalf, to be taxed by one of the masters (*or, if already taxed or agreed on, say*, "to the amount of *one thousand* pounds"); and in case I shall make default in payment of the sum of *one thousand* pounds (*the real debt*), being the debt in this action, together with the said costs, on the ——— day of ——— next, the plaintiff shall be at liberty to enter up judgment for the said sum of *one thousand* pounds (*the sum confessed; or, if in debt and the whole debt be confessed, say*, "the said debt"), together with the said costs and also the costs of entering up such judgment, and shall also be at liberty thereupon forthwith to sue out execution for the said sum of *one thousand* pounds (*the real debt*) and the said costs, together with the amount of the costs of such execution, officers' fees, sheriff's poundage, costs of levying, and all other incidental expenses: And I do hereby undertake not to bring any writ of error, nor file any bill in equity,

form set out in full in Chit. F. (1847), p. 308, and may be readily adapted for use in such states as have no statutory provisions governing confessions of judgment where the common law, as recognized in the United States, is the rule of practice.

Cognovit in Debt. — The form of this cognovit as given in Chit. F. (1847), p. 309, is as follows: (*Title of court and cause as in Form No. 6048.*) "I confess the debt in this cause to the amount of £*1,000* (*or, if part only, say*, 'I confess that I owe to the above mentioned plaintiff £*1,000*, parcel of the debt by him in his declaration in this action demanded'), and that the plaintiff hath sustained damages to the amount of *one* shilling on occasion of the detaining thereof, besides his costs." (*Concluding as in Form No. 6048.*)

Cognovit in Ejectment. — The form of this cognovit as given in Chit. F. (1847), p. 362, is as follows:

(*Title of court as in Form No. 6048.*)

Between *John Doe*, on the demise of
Samuel Short, plaintiff, and
John Styles, defendant.

I confess this action, and that the said *John Doe* is entitled to recover his term (or *terms*) yet to come of and in —— messuages, etc. (*as in the declaration, or part of them*), with the appurtenances, situate in ——, in the county of ——, [*part of*] the tenements mentioned in the declaration in this cause; and also that the said *John Doe* hath sustained damage by reason of the trespass and ejectment (or *trespasses and ejectments*) in the said declaration mentioned, to *one* shilling, besides his costs of suit in this behalf to £*1,000* (or *to be taxed by one of the masters*). (*If the defendant confesses mesne profits, proceed thus:* "And also that the said *John Doe* hath sustained damage to £*1,000* for the mesne profits of the [*said parcel of the*] premises aforesaid, which have or might have accrued or shall or may accrue, from the —— day of —— (*the day of the demise in the declaration*) down to the —— day of —— next.") And in case I shall make default in delivering up possession of the [*said parcel of the*] premises aforesaid, or in the payment of the said sum of £*1,000* for damages and costs as aforesaid (or *for damages as aforesaid, together with the costs to be taxed as aforesaid*) on the —— day of —— next, then the said *John Doe* shall be at liberty to enter up judgment for his term (or *terms*) of and in the [*said parcel of the*] premises aforesaid, and for his said damages and costs above acknowledged, as also for the costs of entering up such judgment and of suing out execution, and that he shall also be at liberty thereupon forthwith to sue out execution for the same, together with sheriff's poundage, costs of levy, and all other incidental expenses. And I do hereby agree (*if defendant have pleaded, say*, "to withdraw the plea by me pleaded in this action, and") not to bring any writ of error, or file any bill in equity, and that it shall not in any case be necessary to revive the judgment entered upon this cognovit, either by scire facias or otherwise, notwithstanding execution thereon may not have issued within a year after the signing thereof.

Dated" (*concluding as in Form No. 6048*).

nor do any other matter or thing to delay the said plaintiff from entering up his judgment or suing out execution thereon, as aforesaid; also that it shall not at any time or in any event be necessary, previous to issuing the said execution, to revive the said judgment, or to sue out or execute any writ of scire facias. Dated this ——— day of ——— 18—.

Richard Roe.

Signed by the above named *Richard Roe* in the presence of me, the undersigned *Jeremiah Mason*, one of the attorneys of the court of ———, at *Westminster*, expressly named by the said *Richard Roe*, and attending at the execution thereof at his request, to inform him of the nature and effect hereof before the same was executed; and I hereby declare myself to be attorney for the said *Richard Roe*, and that I subscribe this attestation as such his attorney.

Jeremiah Mason.

Form No. 6049.[1]

John Doe against *Richard Roe.* } In the Court *of Common Pleas* of *Allegheny* County, *February* Term, 1898. No. *102.*

On this *ninth* day of *February*, 1898, comes now the defendant *Richard Roe* and hereby confesses judgment in the above action in favor of *John Doe*, the plaintiff, against himself for the sum of *five hundred* dollars and costs of suit, with a release of errors and with a stay of execution according to law.

Richard Roe, Defendant.

(2) With a Relicta Verificatione.

Form No. 6050.[2]

In the *Queen's Bench* (or *Common Pleas* or *Exchequer of Pleas*).

Between *John Doe*, plaintiff, and *Richard Roe*, defendant.

I do hereby agree to withdraw the plea (or *demurrer*) by me pleaded in this cause, and do confess this action (or *the debt in this cause*). (*Concluding as in Form No. 6048.*)

1. *Pennsylvania.* — 1 Troub. & H. Pr., §§ 424-433. See also list of statutes cited *supra*, note 2, p. 48.

Written order for confession of judgment in McCalmont *v.* Peters, 13 S. & R. (Pa.) 196, was as follows:

"*Common Pleas* of *Venango* County, of the *February* Term, 1822. Debt *ten thousand* dollars.

Richard Peters, Jr., v. *Thomas R. Peters.* }

I do hereby confess judgment in favor of the plaintiff above named for the sum of *ten thousand* dollars, and authorize the prothonotary of said court to enter the same as of *February* Term, 1822. Dated *April 24th*, 1822.

Thomas R. Peters, defendant."

(*Addressed to F. A. McCalmont, Esq., Prothonotary.*)

2. Cognovit with a Relicta Verificatione. — This is the form set out in Chit. F. (1847), p. 309, and may be readily adapted for use in jurisdictions where the common law is the rule of practice.

Relicta Verificatione to a Rejoinder and Plea. — The following form is given in Chit. F. (1847), p. 310:

"*Richard Roe* ats. *John Doe.* } And thereupon the defendant, inasmuch as he cannot deny that the rejoinder to said replication of the plaintiff to the said plea of the said defendant by him (*secondly*) above pleaded in bar, and the matters therein contained, in manner and form as the

2. By Attorney.[1]

Form No. 6051.[2]

Circuit Court of *Cook* County. *February* Term, A. D. 1898.

same are above stated and set forth, are not sufficient in law, freely here in court relinquishes the said rejoinder and the said plea of the defendant by him (*secondly*) above pleaded in bar, and wholly abandons all verification thereof: Therefore let no regard whatever be further had to the said plea of the defendant by him (*secondly*) above pleaded in bar, or to the said rejoinder to the said replication to the said (*second*) plea."

Cognovit by Two Defendants in Debt, the Debt Payable by Instalments, with a Relicta Verificatione. — The form of this cognovit as given in Chit. F. (1847), p. 309, is as follows:

(*Title of court and cause as in Form No. 6050.*) "We confess the debt in this cause amounting to £1,000, and that the plaintiff has sustained damages to the amount of *one* shilling on occasion of the detaining thereof, besides his costs and charges in this behalf, amounting to £1,000 (or *to be taxed*, etc., as in Form No. 6048), and judgment may be forthwith entered up for the said debt and costs, and the costs of entering up the said judgment; and we and each of us hereby agree to pay the said debt and costs by the following instalments, that is to say, the sum of £1,000, part thereof, on the —— day of —— now next ensuing; the further sum of £1,000, other part thereof, on the —— day of every succeeding month, until the whole of the said debt and costs be fully paid and satisfied; it being hereby understood and agreed that no execution is to issue on the said judgment until default be made by us, or either of us, in the payment of the said instalments, or any or either of them, on the days and at the times they respectively become due and payable as aforesaid, when the plaintiff shall be at liberty thereupon forthwith to sue out execution for the same, and for the whole of the said debt and costs that remain unpaid, together with the amount of officers' fees, sheriff's poundage, costs of levying, and all other incidental expenses. And we hereby agree to withdraw the plea (or *demurrer*) pleaded by us in this action, and undertake not to bring any writ of error in this cause, or file any bill in equity, or do any other matter or thing whereby the plaintiff may be delayed in entering up his judgment or suing out execution thereon as aforesaid, also that it shall not at any time or in any event be necessary, previous to issuing the said execution, to revive the said judgment, or to sue out or execute any writ of scire facias.

Dated this —— day of ——, A. D. ——.

Richard Roe.
Edward Fox.

Signed" (*concluding as in Form No. 6048*).

1. Delaware. — When judgment is confessed by virtue of a warrant of attorney for a penalty, the attorney confessing the judgment shall, in a written direction to the officer entering the judgment, set down the real debt, and the time from which interest is to be calculated; which shall be entered by the said officer upon the docket of the judgment. Del. Laws (1893), p. 811, c. 110, § 14.

No declaration shall be necessary, nor shall any cognovit be required for the confession of any judgment. Del. L. (1893), p. 795, c. 106, § 32.

Tennessee. — The debtor may authorize any person to confess judgment for him. Tenn. Code (1896), § 4706.

For other states in which provisions exist relating to confession of judgment by attorneys see list of statutes cited *supra*, note 2, p. 48.

Conclusiveness of Confession. — A confession of judgment by an attorney of record is conclusive until traversed and found untrue. Devant *v.* Carlton, 57 Ga. 489. The confession in that case was: "We confess judgment to the plaintiffs for the sum of *two thousand and twenty* dollars principal, *nine hundred and fifty-four* dollars and *fifty-nine* cents interest and costs of suit.

P. B. & T. W. Robinson,
Defendant's Attorneys."

2. *Illinois.* — Starr & C. Anno. Stat. (1896), p. 3083, par. 66. See list of statutes cited *supra*, note 2, p. 48. Consult also the title BILLS AND NOTES, vol. 3, Form No. 4181.

In Keith *v.* Kellogg, 97 Ill. 151, the

Richard Roe ads *John Doe.* } Cognovit.

And the said *Richard Roe*, defendant in the above entitled suit, by *Jeremiah Mason*, his attorney, comes and defends the wrong and injury, when, etc., and waives service of process, and says that he cannot deny[1] the action of the said plaintiff, nor but that he, the said defendant, did undertake and promise, in manner and form as the said plaintiff has above complained against him, nor but that the said plaintiff has sustained damages on occasion of the nonperformance of the several promises and undertakings in the said declaration mentioned, including the sum of *one hundred* dollars, for his reasonable attorney's fees for entering up this judgment, over and above his other costs and charges by him about his suit in this behalf expended to the amount of *one thousand* dollars and *fifty* cents;[2] and the said defendant further agrees that no writ of error or appeal shall be prosecuted on the judgment entered by virtue hereof, nor any bill in equity filed to interfere, in any manner, with the operation of said judgment, and that he hereby releases all errors that may intervene in entering up the same, or issuing the execution thereon, and consents to immediate execution upon such judgment.

Jeremiah Mason, Defendant's Attorney.

cognovit, omitting the formal parts, was as follows:

"And the said *Harley M. Lyford*, defendant in the above entitled suit, by *George J. Munroe*, his attorney, comes and defends the wrong and injury, when, etc., and waives service of process, and says that he cannot deny the action of the said plaintiffs, nor but that he, the said defendant, did undertake and promise in manner and form as the said plaintiffs have above complained against him, nor but the said plaintiffs have sustained damages on occasion of the nonperformance of the several promises and undertakings in the said declaration mentioned, including the sum of $*100* for their reasonable attorney's fees for entering up this judgment, over and above their other costs and charges by them about their suit in this behalf expended, to the amount of $*4,221.02*."

1. Cognovit containing words "I cannot deny" is sufficient to authorize the clerk to enter up the judgment. Lewis *v.* Barber, 21 Ill. App. 638.

2. Confession ought to be for a specified sum, and there is no power to enter a judgment on a cognovit for an uncertain and unliquidated amount. Little *v.* Dyer, 138 Ill. 272.

Declaration. — Under the *Illinois* statute authorizing judgments to be confessed in vacation, plaintiff must file a declaration on his cause of action. Stein *v.* Good, 16 Ill. App. 516. The following form of declaration may be used:

"*Circuit* Court of *Cook* County. *November* Term, 1897.

State of *Illinois*, } ss.
Cook County. }

John Doe, the plaintiff in this suit, by *Jeremiah Mason*, his attorney, complains of *Richard Roe*, defendant in this suit, in a plea of trespass on the case on promises, for that whereas, the said defendant heretofore, to wit, on the *first* day of *September*, in the year of our Lord one thousand eight hundred and *ninety-six*, at *Chicago*, to wit, at *Chicago* in the county aforesaid, made a certain note in writing, commonly called a promissory note, bearing date the day and year last aforesaid, and then and there delivered the said note to the said plaintiff, in and by which said note the said defendant by the name, style and description of *Richard Roe*, promised to pay to the order of said plaintiff, by the name, style and description of *John Doe*, after the date thereof, the sum of *seven hundred* dollars for value received, with interest at *six* per cent. from date thereof. And whereas, also, the said defendant afterward, to wit, on the same day and at the place aforesaid, to

Form No. 6052.[1]

John Doe against *Richard Roe.* } In the *Circuit* Court of *Allegany* County, *Maryland.*

To the Clerk of the *Circuit* Court of *Allegany* County:

This case is to be docketed by consent as of the *February* term, 1897, the appearance of *Daniel Webster*, attorney for the defendant, entered, and a judgment by confession entered in favor of the plaintiff for the sum of *twelve hundred* dollars with interest from the *first* day of *December*, 1897, together with costs of suit.

Jeremiah Mason, Attorney for Plaintiff.
Daniel Webster, Attorney for Defendant.

(*Order of court.*)[2]

Form No. 6053.[3]

State of *Michigan*, *Circuit* Court for the County of *Montcalm*

John Doe against *Richard Roe.* }

And the said *Richard Roe*, defendant in the above entitled suit, by *Daniel Webster*, his attorney, comes and defends the wrong and injury, when, etc., and says that he cannot deny the action of the said plaintiff, nor but that he the said defendant did undertake and promise in manner and form as the plaintiff in his complaint complains against him, nor but that the said plaintiff has sustained damages on account of the nonperformance of the several promises and under-

wit, at said county, made and executed a power of attorney, and attached the same to said note, by which power of attorney *Richard Roe*, the said defendant, authorized any attorney of any court of record to appear for him in said court at any time after the date of said note and confess a judgment, without process in favor of the holder of said note, for such amount as may appear to be due thereon, with costs and *five* per cent. attorney's fees. By reason whereof and by force of the statute in such case made and provided the said defendant became liable to pay to the said plaintiff the said sum of money in the said note specified, according to the tenor and effect of the said note and power of attorney, and, being so liable, the said defendant in consideration thereof afterward, to wit, on the same day and year last aforesaid, and at the place last aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money in the said note specified, according to the tenor and effect of said note and power of attorney; yet the said defendant, although often requested, etc., has not yet paid the said sum of money or any part thereof to the said plaintiff, but so to do has heretofore wholly refused and still does refuse, to the damage of the said plaintiff of the sum of *one thousand* dollars, and therefore he brings suit, etc.

Oliver Ellsworth,
Plaintiff's Attorney."

1. *Maryland.* — Pub. Gen. Laws (1888), art. 17, § 50.

2. **Order of court** for entry of judgment upon order of counsel may be in the following words: "This *ninth* day of *February*, 1898, it is ordered by the court that the clerk of the *Allegany Circuit* Court enter a judgment by confession, as agreed to by the attorneys of the respective parties in this case, as shown by their accompanying order and agreement."

3. *Michigan.* — Judgments may be entered in any circuit court in vacation as well as in term, upon a plea of confession, signed by an attorney of such court, although there be no suit then pending between the parties. How. Anno. Stat. (1882), § 7662.

takings in the said declaration mentioned in the sum of *twelve hundred* dollars damages, together with all costs and charges by him about his suit in this behalf expended; and the said defendant further agrees that no writ of error or appeal shall be prosecuted on the judgment entered by virtue hereof, and he hereby releases all errors that may intervene in entering up the same or issuing execution thereon and consents to immediate execution on such judgment.

Dated this *ninth* day of *February*, 1898.

Daniel Webster, Defendant's Attorney.

Form No. 6054.[1]

State of *New Jersey*, *Circuit* Court of the Term of *December*, 1897.
Essex County.

John Doe against *Richard Roe.* } In *Case.*

The said defendant comes and relinquishes his said plea by him above pleaded* and confesses the action of the said plaintiff and consents that judgment be entered against him for the sum of *five hundred and fifty* dollars of damages, together with costs of suit to be taxed.

Daniel Webster, Attorney of Defendant.

1. *New Jersey.* — Gen. Stat. (1895), p. 2534, § 3. See also list of statutes cited *supra*, note 2, p. 48.

Another form of cognovit, which may be used in *New Jersey*, is as follows:

"*Essex* County *Circuit* Court.

Of the *February* Term, 1898.

Richard Roe against *John Doe.* } In *Case.*

And the said defendant, *Richard Roe*, by *Jeremiah Mason*, his attorney, comes and defends the wrong and injury, when, etc., and confesses the action of the plaintiff and that he has sustained damages by reason of the nonperformance of the promises and undertakings in the plaintiff's declaration mentioned to the amount of *five hundred* dollars, and he hereby confesses judgment in favor of the said plaintiff for the sum of *five hundred* dollars, besides costs of suit to be taxed. *Jeremiah Mason*,

Defendant's Attorney."

In Covenant — In New Jersey. — (*Commencing as in Form No. 6054, and continuing down to,* except the substitution of word "Covenant" for "Case" in the title*) "and confesses that the said agreement or guarantee in the declaration set forth is his deed and that the plaintiff has sustained damages by reason of the breaches in the declaration assigned, over and above his costs and charges by him about his suit in this behalf expended, to *eight hundred and fifty* dollars, and consents that judgment be entered in said action in favor of the plaintiff and against him, the said defendant, for the sum of *eight hundred and fifty* dollars, besides costs of suit to be taxed.

Daniel Webster,

Defendant's Attorney."

Affidavit of Plaintiff — *Form of.* — The affidavit required by New Jersey Gen. Stat. (1896), p. 174, § 11, to authorize the entry of a judgment by confession may be as follows, to wit:

"*John Doe* against *Richard Roe.* } In *Debt.* *Essex Circuit* Court. On Bond and Warrant of Attorney.

Essex County, ss.

John Doe, of full age, being duly sworn, on his oath, saith that the true consideration of a certain promissory note made by *Richard Roe*, the defendant in this cause, dated *July 1st*, A. D. 1897, payable on demand to the said *John Doe* or order, for value received, without defalcation or discount, for the sum of *five hundred* dollars with interest, a copy whereof is annexed to the declaration in this cause, and for the amount due on which, being *five hundred and ten* dollars, judgment is about to be confessed to the plaintiff in said cause, by the defendant therein, by

Form No. 6055.[1]

The State of *Ohio*, *Hamilton* County, ss. } In the Court *of Common Pleas.*

John Doe, plaintiff, against *Richard Roe*, defendant. } Defendant's answer.

I, *Daniel Webster*, an attorney at law duly admitted to practice in the several courts of record in the state of *Ohio*, by virtue of the warrant of attorney attached to the foregoing petition, hereby enter an appearance for the said defendant in the suit of *John Doe*, plaintiff, against *Richard Roe*, defendant, and do hereby waive the issuance and service of process herein, and do confess judgment in favor of said *John Doe* against the said *Richard Roe*, for the sum of *one hundred and four* dollars,[2] and *ten* cents, damages, being the amount due as principal and interest on the said promissory note, and also for costs of suit. I do hereby release all errors and waive all right of appeal.

Daniel Webster, Defendant's Attorney.

Daniel Webster, his attorney, by virtue of a special warrant of attorney, made and executed by the said defendant, dated the *first* day of *November*, A. D. 1897, is as follows: For goods, wares and merchandise sold and delivered to the said *Richard Roe* by said *John Doe* during the months of *May* and *June*, 1897, and this deponent further saith that the said sum of *five hundred and ten* dollars is justly and honestly due and owing by the said defendant to the said plaintiff, and that the said judgment is not confessed to answer any fraudulent intent or purpose, or to protect the property of the said defendant from his other creditors. *John Doe.*

Sworn and subscribed before me this *ninth* day of *February*, 1897, at *Newark*.

(SEAL) *Norton Porter*, Notary Public.

This affidavit was produced before me at the time of confessing judgment in this action.

John Marshall, Circuit Judge."

The affidavit is a prerequisite to the entry of judgment and essential to its validity. Clapp *v.* Ely, 27 N. J. L. 555.

The consideration must be shown in the affidavit. Latham *v.* Lawrence, 11 N. J. L. 322; Scudder *v.* Coryell, 10 N. J. L. 340; Woodward *v.* Cook, 6 N. J. L. 160.

It is not a sufficient setting forth a consideration of a bond on which judgment is confessed to state that it is a promissory note given by the defendant to A, and by him indorsed to plaintiff. Reading *v.* Reading, 24 N. J. L. 359.

Stating debt to be justly due is sufficient without stating that it is justly owing. Reading *v.* Reading, 24 N. J. L. 358; Mulford *v.* Stratton, 41 N. J. L. 466.

1. *Ohio.* — Bates' Anno. Stat. (1897), §§ 5321–5325.

Defendant must personally appear in court to authorize a judgment by confession under Bates' Anno. Stat. (Ohio, 1897), § 5231.

2. Judgment for a greater sum than shown to be the amount due under the cause of action as stated in the record is erroneous. Rosebrough *v.* Ansley, 35 Ohio St. 107.

A petition duly verified should be filed when a judgment by confession under a warrant of attorney is sought. Sidney First Nat. Bank *v.* Reed, 31 Ohio St. 435. Such petition may be as follows: "The State of *Ohio*, *Hamilton* County, ss. } In the Court *of Common Pleas.*

John Doe, plaintiff, against *Richard Roe*, defendant. } Plaintiff's Petition.

Said *John Doe*, plaintiff, complains of said *Richard Roe*, defendant, for that the said defendant, on the *first* day of *February*, 1897, at *Cincinnati*, in the state of *Ohio*, for value received, made his certain promissory note in writing of that date, together with a warrant of attorney, which said promissory note, together with all the indorsements thereon, and said warrant of attorney are hereto attached, marked Exhibit *A* and hereby made a part of this petition; and that the said defendant then and there delivered the said promissory

Form No. 6056.[1]

(*Title of court and cause as in Form No. 6094.*) I, *Jeremiah Mason*, attorney for *Richard Roe*, above named defendant, on this *ninth* day of *February*, 1898, do hereby enter an appearance for the said defend-

note and warrant of attorney to the said plaintiff, and thereby promised to pay to the said plaintiff, or order, *one* year after the date thereof, the sum of *five hundred* dollars, with interest thereon, at the rate of *four* per cent. per annum, which period has since elapsed, yet said defendant has not paid said sum of money or any part thereof to said plaintiff, although often requested so to do; and said plaintiff further says that the full amount of *five hundred* dollars, with interest as aforesaid, is now due thereon and wholly unpaid; that he has never parted with the ownership of said promissory note, and that he is still the legal owner and holder thereof.

Wherefore, said plaintiff prays judgment against said defendant for the sum of *five hundred* dollars, with interest thereon, at the rate of *four* per cent. per annum, from the *first* day of *February*, 1897.

Oliver Ellsworth,
Plaintiff's Attorney.

The State of *Ohio*, } Plaintiff's attor-
Hamilton County, ss. } ney's affidavit.

Oliver Ellsworth, being duly sworn, says, that he is the attorney of record of the plaintiff named in the above and foregoing petition; that this suit is brought upon an instrument of writing for the payment of money only, to wit, upon a promissory note; that said instrument of writing is in possession of him, the said *Oliver Ellsworth*, and that he verily believes the statements contained in the foregoing petition are true in substance and in fact.

Oliver Ellsworth.

Sworn to before me, and subscribed in my presence, by said *Oliver Ellsworth*, this *ninth* day of *February*, 1898,

(SEAL) *Norton Porter*,
Notary Public."

Defects in verification of such a petition will be considered waived where the judgment was under a warrant authorizing the waiving of process and release of all errors. Sidney First Nat. Bank *v.* Reed, 31 Ohio St. 435.

1. *Pennsylvania.*—1 Troub. & H. Pr., §§ 424-433.

Under a warrant in the usual form in Hageman *v.* Salisberry, 74 Pa. St. 280, empowering "any attorney of any court, etc., to appear before me, and after one or more declarations filed for the above penalty, thereupon to confess judgment," etc., a declaration was filed on the bond in suit by T. J. Bigham, Esq., as attorney for plaintiff. A confession of judgment was also filed as follows:

"By virtue of a warrant of attorney, authorizing me thereto, I appear for the defendant above named, and confess judgment against him for the sum of *six hundred* dollars, with costs of suit, release of errors; to be released on payment of *three hundred* dollars, with interest and attorney's commission, and with leave to take out execution for said sum, with interest from the *first* day of *December*, 1856. Hereby waiving inquisition and condemnation on all real estate and appraisement on all property, real or personal, taken in execution by virtue hereof.

T. J. Bigham,
Attorney for the Defendant."

Docket entry of the confession was as follows:

"*W. O. Leslie* v. *A. Rowland.*	*164*, *January* Term, 1857. *D. S. B.*, $600. Real debt, $300. Interest from *December 1st*, 1856.

And now, *December 17th*, 1856, comes *T. J. Bigham*, Esq., and confesses judgment in favor of the plaintiff, *W. O. Leslie*, against the defendant, *A. Rowland*, for the sum of *six hundred* dollars, to be released on payment of *three hundred* dollars on the *1st December*, 1856, with interest from said *December 1st*, 1856, with waiver of inquisition, and condemnation and appraisement, and with attorney's commission, etc.

John Birmingham, Pro.

W. O. Leslie v. *A. Rowland.*	*136*, *January* Term, 1857. Fi. fa. on *164*, *January* Term, 1857. Penalty, $600. Real Debt, $300. Interest from *December 1st*, 1856.

Inquisition and condemnation waived.

ant and confess judgment against him, the said *Richard Roe*, and in favor of the plaintiff above named, *John Doe*, for the sum of *five hundred* dollars and costs of this suit, with a release of errors and with stay of execution according to law.

Jeremiah Mason, Attorney for Defendant.

Form No. 6057.[1]

(Precedent in Rogers *v.* Cherrier, 75 Wis. 57.)

N. McKie, Plaintiff, against, *Henry E. Rogers*, Defendant. } Answer of defendant.

And now comes the above named defendant by *J. C. Officer*, his attorney, and by virtue of the power of attorney hereto annexed waives the service of process upon the said defendant and enters his appearance herein and confesses all the allegations in the plaintiff's complaint, and that there is due from the defendant to the plaintiff on the note described therein *four thousand two hundred and seven* dollars and *twenty-three* cents, and hereby confesses and authorizes judgment for that amount, together with costs, and now here releases all errors which may intervene in entering up judgment hereon and in issuing execution on such judgment and waives notice of the taxation of said costs and consents that the same may be taxed and allowed at the sum of *fourteen and three one-hundredths* dollars.

J. C. Officer, Defendant's Attorney.

Appraisement waived."

Return: "Levy made on the real estate described in the schedule annexed. Sale advertised according to law, and property sold *January 26th*, to *Wm. O. Leslie*, Esq., for $*32*, and applied to the costs of this writ. So answers *R. Patterson*, Sheriff."

1. *Wisconsin.* — Sanb. & B. Anno. Stat. (1889), § 2894 *et seq.*

The Affidavit of Plaintiff — *Form of.*— The affidavit required by the *Wisconsin* statutes may be as follows:

"State of *Wisconsin*, } ss. Affidavit of
County of *Vernon*. } Plaintiff.

John Doe, being duly sworn, says that he is the plaintiff named in the annexed complaint; that the contents of said complaint are known to him, and that the same are true in substance and in fact; that this action is brought upon an instrument in writing for the payment of money only; that the said instrument in writing is in the possession of said plaintiff, and that his knowledge is derived from said instrument; that the plaintiff is the legal holder of said instrument of writing, and that there is now due upon said instrument of writing to the said plaintiff, from the defendant *Richard Roe*, the sum of *five hundred* dollars.

John Doe.

Subscribed and sworn to before me this *ninth* day of *February*, 1898.

Norton Porter, Notary Public.
Vernon County, *Wisconsin.*"

Where affidavit is not made by plaintiff himself, the fact that it is made on his behalf must be stated, and the affidavit must further show why it is not made by the plaintiff. Sloane *v.* Anderson, 57 Wis. 123; McCabe *v.* Sumner, 40 Wis. 386.

Whether the debt is due or not, and what part, if any, is not due, should be shown in the affidavit, complaint, answer and judgment. Sloane *v.* Anderson, 57 Wis. 123.

An affidavit which does not state the amount due, but states that the facts averred in the complaint are true to the knowledge of the affiant, and the complaint referred to specifies the amount due on the note, is probably sufficient. Rogers *v.* Cherrier, 75 Wis. 59.

Plaintiff must make the affidavit, it seems, in *Texas*. An affidavit made by his attorney is not sufficient. Montgomery *v.* Barnett, 8 Tex. 144.

3. By Corporation.

Form No. 6058.[1]

(Precedent in Sharp *v.* Danville, etc., R. Co., 106 N. Car. 310.)

State of *North Carolina*, *Rockingham* County. } *Superior* Court.

Thomas R. Sharp, Plaintiff,
v.
The Danville, Mocksville and Southwestern Railroad Company, Defendant.

The Danville, Mocksville and Southwestern Railroad Company, by *E. C. Winstanley*, secretary of said company, being thereunto duly authorized by said company, hereby confesses judgment in favor of *Thomas R. Sharp*, the plaintiff above named, for *sixteen thousand eight hundred and sixty-seven* dollars and *sixty* cents, with interest on $8,017.60 thereof from the *14th* day of *November*, 1881, and $4,600 thereof from the *26th* day of *November*, 1885, until paid, [and authorizes the entry of judgment therefor against the said *Danville, Mocksville and Southwestern Railroad Company* on this *seventh* day of *November*, 1885.][2]

This confession of judgment is to secure the plaintiff against divers liabilities on behalf of the *Danville, Mocksville and Southwestern Railroad Company*, amounting, in the aggregate, exclusive of interest, to the principal sum above stated, the several liabilities arising upon the following facts, to wit:

1. The said *Thomas R. Sharp*, as president of said company, accepted the draft of *Burnham, Parry, Williams & Co.*, in the sum of $8,016.35, and indorsed the same individually, of which the following is a copy, to wit: (*Copy of draft.*)[3]

The consideration of said draft was the purchase money for the railroad engine or locomotive "*Lilly C. Morehead*," bought for use upon roadway of said company, and the same went to protest at the cost of $1.25, and on this draft the drawers have brought suit in the State of *Virginia* against the *Danville, Mocksville and Southwestern Railroad Company*, and the said *Thomas R. Sharp* individually, and have also brought suit in the State of *North Carolina*, which is now pending (coupled with an attachment of said *Sharp's* real estate in *North Carolina*) against the said *Thomas R. Sharp* individually, as indorser of said draft.[4]

1. *North Carolina.* — Code (1883), § 571. See also list of statutes cited *supra*, note 2, p. 48.

2. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

3. **Draft mentioned in text** was in words and figures following, to wit:

"$8,016.35.

Philadelphia, Oct. 12th, 1881.

Thirty days after date, pay to the order of *Thos. R. Sharp eight thousand and sixteen* dollars and *thirty-five* cents, value received, and charge to account of *Burnham, Parry, Williams & Co.*

To *Thos. R. Sharp*, Esq., President *Danville, Mocksville and Southwestern Railway*, No. *115 Broadway, New York.*"

(*Indorsed* "*Thos. R. Sharp.*")

4. **A statement** made to the effect that "defendant is indebted to plaintiff in a sum certain arising from the acceptance of the draft of which the following is a copy," setting out a copy of the draft, falls far short of the demands of

2. On or about the *24th* day of *October*, 1885, the said *Thomas R. Sharp* became individually liable, by indorsement of a draft, drawn by *E. C. Winstanley*, secretary of the said railroad company, drawn upon *Thomas R. Sharp*, president of said company, and by said *Thomas R. Sharp* individually indorsed, and thereafter passed to *Johnson & Cheek*, bankers, for full value, who are now the holders thereof. The consideration of said draft was money loaned by *Johnson & Cheek* upon said draft, so indorsed, for the use and benefit of said railroad company, and the same will become due and payable on *November 26th*, 1885, and the said *Thomas R. Sharp* will thereafter be under contingent liability to pay the same.

3. In the month of *September*, 1885, in *seventeen* suits now pending in the *Superior* Court of *Rockingham* County, upon petitions for recordari and supersedeas in the matter of *J. Turner Morehead & Co.*, v. *The Danville, Mocksville and Southwestern Railroad Company*, the said *Thomas R. Sharp* became liable as surety to said company in *seventeen* penal bonds, each in the sum of *two hundred and fifty* dollars, required by the court to be filed by said company, the aggregate of which *seventeen* penal bonds is the sum of *forty-two hundred and fifty* dollars, as may be seen by reference to the records of the *Superior* Court of *Rockingham* County, in which said suits are pending, and the object of which petitions for recordari is to prevent the forced sale and sacrifice of said company.

A statement of said *Thomas R. Sharp's* account against said company by reason of said contingent liability, duly sworn to, is hereto attached, and is hereby made a part of this statement, which said exhibit was, on this *7th* day of *November*, 1885, submitted to the Board of Directors of said company, and by them approved, as showing the amount of the said *Thomas R. Sharp's* contingent liability for and in behalf of said company, and the said sum for which entry of judgment is hereby authorized is correct, and does not exceed the amount of said contingent liabilities.

Witness, the signature of *E. C. Winstanley*, Secretary of said com-

the statute. In consideration of the draft, the time and manner of its creation should be stated. Davidson *v.* Alexander, 84 N. Car. 625.

The confession and plea filed by the corporation in Hackett *v.* Boston, etc., R. Co., 35 N. H. 391, omitting the formal parts, was as follows:

"The defendants come and defend the wrong and injury, when, etc., and confess the plaintiff's said action and that he is entitled to recover damages thereon to the amount of *twenty* dollars and no more, and as to the residue of the claim the defendants say they are not guilty," etc.

The municipal corporation in Kelley *v.* Dover, 18 N. H. 566, pleaded as follows, omitting the formal parts:

"And the said town of *Dover* comes and defends, and when, etc., and confesses the cause of action in the plaintiff's declaration aforesaid mentioned and set forth to the extent and amount hereinafter mentioned, and that the said plaintiff hath, from the causes in said declaration mentioned, sustained damages to the amount of *ten* dollars, and no more; which sum of *ten* dollars the said town of *Dover* hath always been ready and willing to pay to the said plaintiff, and bring the same into our court here, for that purpose; and as to the rest and residue of said declaration, and of the causes of action therein set forth and alleged, and all damages therein claimed by said plaintiff, over and above the amount aforesaid, they, the said town of *Dover*, say that they are not guilty in manner and form as the plaintiff hath thereof alleged against them, the said town," etc.

pany, and the corporate seal thereof, hereto affixed, under the specific authority of the Board of Directors of said company, duly granted by resolution, a certified copy whereof is herewith filed. This *Nov. 7, 1885.*

Danville, Mocksville and S. W. R. R. Co.,
by *E. C. Winstanley*, Secretary.

State of *North Carolina*, }
Rockingham County. }

Before me, *John T. Pannill*, Clerk of the *Superior* Court of *Rockingham* County, personally appeared *E. C. Winstanley*, Secretary of the *Danville, Mocksville and Southwestern Railroad Company*, who, being duly sworn, maketh oath that he is the Secretary of said company, and that the statement above signed by him is true.

This *November 7th, 1885.*

John T. Pannill, C. *S.* C.

4. By Executor.

Form No. 6059.[1]

In the *Queen's Bench* (or *Common Pleas* or *Exchequer of Pleas*).

Between *Thomas Davis*, plaintiff, and *John Doe*, executor of the last will and testament of *Peter Barlow*, deceased, defendant.

I confess this action, and that the plaintiff hath sustained damages to the amount of *one thousand* pounds, besides his costs and charges (*as between attorney and client*) to be taxed by one of the masters, [and I do also acknowledge that goods and chattels that were of the said *Peter Barlow* at the time of his death of the value of the damages and costs aforesaid, and wherewith I am liable to pay, and ought to have paid the same, have come to my hands, as executor as aforesaid to be administered, and that I have eloined, wasted and disposed thereof to mine own use;] and in case I shall make default in the payment of the debt and costs agreed on in this action, and interest thereon, in manner following, that is to say, (*Here set out*

1. Cognovit by Executor Admitting Assets, etc. — This form is set out in Chit. F. (1847), p. 310, and may readily be adapted for use in jurisdictions where the common law is the rule of practice.

In Action of Debt. — In *Virginia*, omitting the formal parts, the confession of judgment by an executor may be as follows: "This day came as well the plaintiff by his attorney as the defendant in his own proper person, and the said defendant acknowledges the plaintiff's action for the sum of *five hundred* dollars, the debt in the declaration mentioned, with interest thereon at the rate of *six* per centum per annum from the *ninth* day of *February*, 1897, till paid, and the costs. Therefore, it is considered" (*concluding with the judgment in the usual manner*).

In Action on the Case. — In *Virginia*, omitting the formal parts, the confession of judgment by an executor may be as follows: "This day came as well the plaintiff by his attorney as the defendant in his own proper person, and they do agree that the plaintiff hath sustained damages by occasion of the nonperformance by the defendant's testator, *Samuel Short*, of the assumptions in the declaration mentioned to the sum of *five hundred* dollars, with interest thereon at the rate of *six* per centum per annum from the *ninth* day of *February*, 1897, till paid, besides his costs. Therefore, it is considered by

mode of payment agreed on), the plaintiff shall be at liberty to enter up judgment for the said debt, interest and costs, or so much thereof as shall remain due at the time of entering up such judgment, and also for the costs of entering up such judgment and suing out execution thereupon, and shall be at liberty to sue out execution thereon, together with the amount of sheriff's poundage, officers' fees, costs of levy, and all other incidental expenses, [and I undertake that the plaintiff may in every respect hold me as personally liable for the said debt and costs, and enter up and enforce this judgment accordingly.] And I undertake and agree that it shall not be necessary for the plaintiff to issue out any writ or writs of scire facias upon the said judgment for the purpose of reviving the same, or of suggesting a devastavit, or to bring any action upon that judgment in order to enforce satisfaction thereof, and that I will not file any bill in equity, nor sue out any writ of error, nor do any other act, matter or thing, whereby the said plaintiff may be delayed from entering up such judgment and suing out execution upon default made as aforesaid. Dated this ——— day of ———, A. D. ———.

John Doe.

Signed (*concluding as in Form No. 6048*).

5. By Guardian of Lunatic.

Form No. 6060.[1]

(Precedent in McAden *v.* Hooker, 74 N. Car. 26.)

R. Y. McAden vs. *O. Hooker*, *guardian of J. Turner, Sen.*, *and J. Turner, Jr.* } In the *Superior* Court, *Orange* County. Statement and affidavit and confession of judgment.

The defendants allege:

1. That *Josiah Turner, Sen.*, is a lunatic, and *O. Hooker* is his guardian.

2. That there is due the plaintiff from these defendants, by bond, *five thousand* dollars, with interest at *eight* per cent. from the *26th* of *October*, 1868.

3. That the money, $*5,000*, was borrowed from the assignee of the plaintiff by the defendants, and a bond was given therefor, and is justly due the plaintiff.

4. These defendants authorize the entry of judgment against them for *five thousand* dollars, with interest thereon from the *26th October*, 1868.

Josiah Turner, Jr.
O. Hooker, Guardian.

[State of *North Carolina*, *Orange* County.][2] } ss.

Personally appeared before me, *George Laws*, Clerk of the *Superior* Court of *Orange*, *J. Turner, Jr.*, and *O. Hooker*, guardian of *J.*

the court" (*concluding with the judgment in the usual manner*).

1. *North Carolina.*—Code (1883), § 571. See also list of statutes cited *supra*, note 2, p. 48.

2. The words enclosed by [ ] are not found in the reported case, but are inserted to complete the form. The date of the proceedings does not appear.

Turner, Sen., who being duly sworn, maketh oath that the above statement is true.

Josiah Turner, Jr.
O. Hooker, Guardian.

[Dated this ——— day of ———, 18—.

George Laws, C. *S.* C.][1]

III. RECOGNIZANCE FOR DEBT.

Form No. 6061.[2]

(Mass. Pub. Stat. (1882), p. 1107, § 2.)

Worcester, ss.

Be it remembered that on this *thirteenth* day of *December*, 1897, *Richard Roe*, of *Worcester* county, personally appeared before the *Superior* Court now held at *Worcester* within and for the county of *Worcester* (or "before *Calvin Clark*, the clerk of the *Superior* Court for the county of *Worcester*"),[3] and acknowledged himself indebted to *John Doe*, of *Worcester* county, in the sum of *three hundred* dollars to be paid to said *John Doe* on the *first* day of *December*, 1897 (or "in *two* years, or in *six* months, from this day"), with interest from this day;[4] and, if not then paid, to be levied upon his goods, chattels, lands and tenements, and, for want thereof, upon his body. In witness whereof said *Richard Roe* hath hereto set his hand.

Richard Roe.

Calvin Clark Clerk of the *Superior* Court for the County of *Worcester*.[5]

1. The words enclosed by [ ] are not found in the reported case, but are inserted to complete the form. The date of the proceedings does not appear.

2. **Recognizance for Payment of Debt — Massachusetts.** — Any person who is by law capable of binding himself by a common bond may enter into a recognzance for the payment of a debt, and may thereby subject his person, goods and estate to be taken on execution. Mass. Pub. Stat. (1882), c. 193, § 1.

3. **May be taken before superior court** in any county in term time, or before the clerk of said court in vacation. Mass. Pub. Stat. (1882), c. 193, § 2.

4. **Clause as to the payment of interest** may be altered or wholly omitted, according to the agreement of the parties; but interest shall always be allowed for any delay after the time of payment, unless the recognizance contains an express agreement to the contrary. Mass. Pub. Stat. (1882), c. 193, § 3.

5. **Shall be attested by the clerk,** whether taken in term time or vacation and shall be recorded at length by him among the records of the court. Mass. Pub. Stat. (1882), c. 193, § 4.

If the conusee dies before the debt is paid, his executor or administrator may, upon exhibiting to the clerk or justice his letters testamentary or of administration, sue out execution in the same manner as the conusee might have done, and the form of the execution shall be altered accordingly. Mass. Pub. Stat. (1882), c. 193, § 9.

Execution shall recite the recognizance, state the amount then due, and otherwise be in the usual form of an execution on a judgment for debt. Such execution may be issued by the clerk without any special order of the court. Mass. Pub. Stat. (1882), c. 193, § 7.

Maine Stat. (1883), c. 112, § 1, provided for a somewhat similar recognizance and furnished a statutory form for the same. This statute, however, was repealed by Me. L. (1895), c. 83.

IV. JUDGMENT.[1]

I. Upon Confession of Defendant.

a. In Courts of Record.

(1) In General.

Form No. 6062.[2]

The State of *Alabama*, *Dale* County. } *Circuit* Court, *December* Term, 1897.

John Doe against *Richard Roe.*

And now at this day comes the plaintiff *John Doe*, by his attorney, and comes also the defendant *Richard Roe* in his own proper person, and the said defendant confessing that there is due from him to the said *John Doe* the sum of *fifty* dollars [as the plaintiff in his complaint claims],[3] and authorizes judgment to be entered against him in favor of the said *John Doe* for that sum. It is therefore considered and adjudged by the court that the plaintiff recover against the said defendant the sum of *fifty* dollars aforesaid by him confessed, and the further sum of *ten* dollars costs, and for which let execution issue.

Form No. 6063.[4]

In the *Superior* Court of the *City and* County of *San Francisco*, State of *California.*

1. For forms of judgment, generally, consult the title JUDGMENTS.

Pennsylvania. — In James *v.* Crownover, (Pa. 1886) 6 Atl. Rep. 42, the defendant authorized and confessed judgment in a promissory note, as follows:

"*Mifflintown, Pa., October 1*, 1885.

On *January 1*, 1886, after date, I promise to pay to the order of *John Crownover* $545, without defalcation, value rec'd, and waiving the benefit of all laws exempting property from levy and sale by execution, and confess judgment for the said amount of $545.

Watkin James."

The note not being paid at maturity, the attorneys of John Crownover, by virtue thereof, appeared for James, and confessed judgment against him, whereupon the prothonotary made the following entry on the record: "I hereby enter judgment against *Watkin James* for $545, which entry is founded on a judgment note dated *October 1*, 1885, and payable *January 1*, 1886, with costs of suit, and waiving exemption."

Stipulating Against Issuance of Execution.—A stipulation in the confession that no execution shall issue within a time specified does not necessarily vitiate the judgment. Merchants Nat. Bank *v.* Newton Cotton Mills, 115 N. Car. 507.

Judgment with stay of execution is given in Robinson's F., p. 100, thus:

(*After the judgment add these words:*) "and the plaintiff agrees to stay the execution of this judgment until the *first* day of *July*, 1898."

2. *Alabama.* — See list of statutes cited *supra*, note 2, p. 48, for similar provisions in other states.

3. If no suit has been instituted, insert in place of the words "as the plaintiff in his complaint claims" the words "due by account," or as the case may be.

4. *California.* — Code Civ. Proc. (1897), § 1132. See also list of statutes cited *supra*, note 2, p. 48, for similar provisions in *Idaho*, *Iowa*, *Montana*, *Nevada*, *South Carolina*, *Utah*, *Washington*, and other states.

John Doe, plaintiff,
against
Richard Roe, defendant.

In this action the defendant, *Richard Roe*,[1] having filed his confession of judgment wherein he authorizes and consents that judgment be entered in favor of the plaintiff, *John Doe*, for the sum of *one thousand* dollars; it is therefore, by reason of the law in the premises aforesaid, ordered, adjudged and decreed that *John Doe*, the said plaintiff, do have and recover of and from *Richard Roe*, the said defendant, the sum of *one thousand* dollars, with interest thereon at the rate of *six* per cent. from the date hereof until paid, together with the sum of *ten* dollars, costs herein.

Calvin Clark, Clerk,
By *Daniel Clark*, Deputy Clerk.

Dated the *ninth* day of *February*, 1897.

Form No. 6064.[2]

In the *District* Court of the *First* Judicial District for the State of *Idaho*, in and for the County of *Shoshone*.

In the matter of the Judgment
by Confession
Richard Roe
to
John Doe.

In this action, the defendant having filed his confession of judgment (*continuing and concluding as in Form No. 6063*).

Form No. 6065.[3]

District Court, *Second* Judicial District, County of *Ramsey*.

John Doe, plaintiff,
against
Richard Roe, defendant.

On filing the within confession and statement made by *Richard Roe*, it is adjudged by the court that *John Doe*, in whose favor said

1. **Record must show** that all of the defendants who are to be bound have actually confessed judgment, or that some of them particularly named have done so. Elledge *v.* Bowman, 5 J. J. Marsh. (Ky.) 595.

2. *Idaho.* — Rev. Stat. (1897), § 5060.

3. *Minnesota.* — Stat. (1894), § 6077. See also list of statutes cited *supra*, note 2, p. 48.

Similar judgments are indorsed upon confessions in code states of the *New York* class; thus in *New York* the judgment, omitting the formal parts, may be as follows:

"On filing the within statement and confession, it is adjudged by the court that the plaintiff do recover against the defendant the sum of *five hundred* dollars, with *three* dollars costs and *fifteen* dollars disbursements, making in all the sum of *five hundred and eighteen* dollars. *Calvin Clark*, Clerk.

Oliver Ellsworth, Plaintiff's Attorney.

Dated the *ninth* day of *February*, 1898."

In *South Carolina*, thus:

"The State of *South Carolina*, County of *York*.

John Doe, plaintiff,
against
Richard Roe, defendant.

On filing the within statement and confession, it is adjudged by the court that the plaintiff do recover against the defendant the sum of *five hundred* dollars, with *five* dollars costs and *fifteen* dollars disbursements, making in

confession is made, recover against the said *Richard Roe*[1] the sum of *five hundred* dollars, and *ten* dollars costs and disbursements, amounting in all to the sum of *five hundred and thirty* dollars.

Dated the *ninth* day of *February*, 1898.[2]

Calvin Clark, Clerk of *District* Court.

Form No. 6066.[3]

In the *Circuit* Court of *Jackson* County, *Missouri*, at *Kansas City*, *Monday*, *December 5*, A. D. 1887.

Mary Samter, plaintiff, against *Max Blank*, defendant. } *No. 10,860.*

Now at this day comes plaintiff, by attorney, and files a statement in writing for confession of judgment made and signed by the defendant and verified by his affidavit to the following effect: Stating that the amount of $*512.45* for which judgment may be rendered, and authorizing the entry of judgment thereon, and stating concisely the facts out of which the money due or to become due arose, and showing that the sum confessed therefor is justly due or to become due. And the court being satisfied that the defendant executed the said statement in writing and made the affidavit required thereto, it is, therefore, considered and adjudged by the court that the said plaintiff have and recover from the said defendant the sum so confessed, with interest thereon at the rate of *ten* per cent. per annum, the rate specified in the notes mentioned in the statement, together with the costs of the suit incurred and expended, and have thereof execution.

all the sum of *five hundred and twenty* dollars. *Calvin Clark*, Clerk.

Oliver Ellsworth, Plaintiff's Attorney.

Dated the *ninth* day of *February*, 1898."

In Weinges *v.* Cash, 15 S. Car. 48, indorsement appeared upon the paper containing the statement and affidavit as follows: "*Allan E. Cash* v. *Robert G. Ellerbe*. *Prince*, Plaintiff's Attorney. Confession. *South Carolina*, *Chesterfield* County. Roll *844*. On filing the within statement and confession, it is adjudged by the court that the plaintiff do recover against the defendant the sum of *fifteen thousand* dollars, with *five* dollars costs and *fifteen* dollars disbursements, making the sum of *fifteen thousand and twenty-five* dollars. *28th January*, 1879.

Thomas F. Malloy, Clerk.

Judgment signed and entered *28th January*, 1879.

Thomas F. Malloy, clerk."

1. Where all the joint debtors do not unite in the confession of judgment for a joint debt, the judgment must be entered against those only who confessed it. Birds. Rev. Stat. N. Y. (1896), p. 1740, § 77.

When the action is against one or more persons jointly liable, judgment may be given on the confession of one or more defendants against all the defendants thus jointly liable, whether such defendants have been served with the summons or not, to be enforced only against their joint property, and against the joint and separate property of the defendant making the confession. Hill's Anno. Laws Oregon (1892), § 252. See also list of statutes cited *supra*, note 2, p. 48.

2. Time of Entering. — At any time within three years after the statement is verified it may be filed with the county clerk. Thereupon the clerk must enter in like manner, as a judgment is entered in an action, a judgment for the sum confessed, with costs, which he must tax, to the amount of fifteen dollars, besides disbursements taxable in an action. But a judgment shall not be entered upon such a statement after the defendant's death. Birds. Rev. Stat. N. Y. (1896), § 74.

3. *Missouri.*—Rev. Stat. (1889), § 2229. See list of statutes cited *supra*, note 2, p. 48, for similar provisions in other states.

Form No. 6067.[1]

In the *District* Court of *Colfax* County, in the State of *Nebraska.*

John Doe, plaintiff,
against
Richard Roe, defendant. } Judgment.

Now on this *ninth* day of *February*, 1898, comes the plaintiff by his attorney; also comes *Jeremiah Mason*, one of the attorneys of this court, on behalf of the defendant, *Richard Roe*, and by virtue of a warrant of attorney for that purpose duly executed by the said *Richard Roe*, in this action filed and now produced to the court, and waives the issuing and serving of process, and, with the consent of the plaintiff, confesses that the said *Richard Roe* is justly indebted to the said plaintiff in the sum of *five hundred* dollars, with interest thereon at the rate of *six* per cent. per annum from the *ninth* day of *February*, 1897, as claimed in the petition.

It is therefore considered and adjudged by the court that the plaintiff *John Doe* recover of and from the defendant *Richard Roe* said sum of *five hundred* dollars, with interest thereon at the rate of *six* per cent. per annum from the *ninth* day of *February*, 1897, together with his costs herein expended, taxed at *ten* dollars.

John Marshall, Judge.

Form No. 6068.[2]

(Precedent in Sharp *v.* Danville, etc., R. Co., 106 N. Car. 313.)

State of *North Carolina*,
Rockingham County, } *Superior* Court.

Thomas R. Sharp, Plaintiff,
v.
The Danville, M. and S. W. R. R. Co., Deft. } Judgment.

On filing the foregoing statement and confession, duly verified, together with the exhibits therein referred to, it is ordered and adjudged by the court that the plaintiff, *Thos. R. Sharp*, do recover against the defendant, *The Danville, Mocksville and Southwestern Railroad Company*, the sum of *sixteen thousand eight hundred and sixty-seven* dollars and *sixty* cents, with interest on $8,017.60 thereof from the *14th* day of *November*, 1881, and on $4,600 thereof from the *26th* day

1. *Nebraska.* — Every attorney who shall confess judgment in any cause shall, at the time of making such confession, produce the warrant of attorney for making the same to the court, and the original, or a copy thereof, shall be filed with the clerk. Neb. Comp. Stat. (1897), § 6015. See also list of statutes cited *supra*, note 2, p. 48.

2. *North Carolina.* — Code (1883), § 570. See also list of statutes cited *supra*, note 2, p. 48.

Precedent of such a judgment in Merchants Nat. Bank *v.* Newton Cotton Mills, 115 N. Car. 521, was as follows:

"Upon filing the foregoing statement and confession, it is ordered and adjudged by the court that the plaintiff, *The Merchants National Bank of Richmond, Va.*, do recover of the defendant, *The Newton Cotton Mills*, the sum of *five thousand three hundred and seventy-one* dollars and *sixty* cents, with interest at *8* per cent. from *July 19*, 1893, and costs of action.

J. F. Herman, Clerk *Superior* Court.
July 31, 1893."

For other precedents consult McAden *v.* Hooker, 74 N. Car. 26; Uzzle *v.* Vinson, 111 N. Car. 139.

of *November*, 1885, until paid, according to the terms of said confession, as a security for the plaintiff's contingent liability in said amount, together with $3 cost thereof [and $15 disbursements].[1]

John T. Pannill, C. *S.* C.

This *November 7th*, 1885.

Form No. 6069.[2]

State of *North Dakota*, County of *Burleigh*. } ss. In *District* Court, *Sixth* Judicial District.

John Doe, plaintiff, against *Richard Roe*, defendant. } Judgment on Confession.

Whereas the defendant herein, *Richard Roe*, has, by his written statement of confession, duly verified by his own signature and oath, confessed that he is justly indebted to the said plaintiff in the sum of *two hundred and fifty* dollars, and whereas the court, upon reading the said statement and confession, has ordered that judgment be entered by the clerk in accordance therewith, and said confession of judgment having been duly filed,

Now therefore, on motion of *Oliver Ellsworth*, attorney for said plaintiff, it is ordered and adjudged that the said plaintiff do have and recover of and from the said defendant, *Richard Roe*, the said sum of *two hundred and fifty* dollars, together with *forty-five* dollars for costs and disbursements, amounting in the whole to the sum of *two hundred and ninety-five* dollars.

Witness, Hon. *John Marshall*, judge of said court, and my hand and the seal of said court, this *tenth* day of *June*, A. D. 1897.

Calvin Clark, clerk.

Form No. 6070.[3]

John Doe, plaintiff, against *Richard Roe*, defendant. }

This day came as well the plaintiff by his attorney as the defendant in his own proper person, and the said defendant acknowledges the plaintiff's action for the debt and interest in the said writ mentioned and the costs. Therefore it is considered that the said plaintiff recover against the said defendant the sum of *five hundred* dollars, with interest thereon to be computed after the rate of *six* per centum per annum from the *ninth* day of *February*, 1897, until paid, and his costs by him about his suit in this behalf expended and the said defendant in mercy, etc. †

1. **Disbursements** should be included in the judgment. The words enclosed by [ ] are not found in the reported case, but are added to complete the form.

2. *North Dakota.* — Rev. Codes (1895), § 6132.

South Dakota. — Dak. Comp. Laws (1887), § 5537 *et seq.*; see also list of statutes cited *supra*, note 2, p. 48.

3. *In Virginia and West Virginia*, in the clerk's office, judgment upon confession may be entered. Va. Code (1887), § 3283; W. Va. Code (1887), p. 787, § 43. These judgments may be modeled after the forms of the common-law judgments by cognovit, given in Form No. 6071 and the notes thereto. See also Robinson's F. (Va.), pp. 7, 97–100; Sands' F. (Va.), pp. 291–295, 499, 500.

(2) By Cognovit at Common Law.[1]

Form No. 6071.[2]

In the *Queen's Bench* (or *Common Pleas* or *Exchequer of Pleas*).
On the ——— day of ———, A. D. ——— (*date of the declaration.*)
——— to wit. *John Doe*, by *Oliver Ellsworth*, his attorney, (*etc.; proceed to the end of the declaration, and then, on a new line, thus:*)
And on the ——— day of ———, A. D. ——— (*day of signing judgment*) the defendant in his proper person says, that he cannot deny

In Covenant, the judgment may be as follows: (*Title of cause as in Form No. 6070.*) "This day came as well the plaintiff by his attorney as the defendant in his own proper person, and they do agree that the plaintiff hath sustained damages by occasion of the defendant's breach of his covenant in the said writ mentioned to *five hundred* dollars, with interest on the said damages to be computed at the rate of *six* per centum per annum from the *ninth* day of *February*, 1897, until paid, besides his costs; therefore" (*concluding as in Form No. 6070*).

If defendant arrested was surrendered by bail, after the † add these words: "Whereupon *Samuel Short*, the bail of the said defendant, surrendered him to the custody of the sheriff of *Albemarle* county, now here present; therefore, the said *Samuel Short*, from his undertaking as bail as aforesaid, is discharged, and on the prayer of the plaintiff the said defendant is committed to the custody of the sheriff of this county, to remain therein until he shall have satisfied this judgment or shall otherwise be discharged by due course of law."

If defendant arrested is not prayed into custody, the judgment may be as follows: (*Title of cause as in Form No. 6070.*) "The defendant, being arrested and in the custody of the sheriff of *Albemarle* county upon a writ of capias ad respondendum issued herein, acknowledges (*continuing as in Form No. 6070 to* †). And the defendant is not prayed into custody, and with the consent of the plaintiff is discharged therefrom."

On scire facias, the judgment may be as follows: (*Title of cause as in Form No. 6070.*) "This day came the parties by their attorneys, and by their mutual consent it is considered by the court that the plaintiff may have execution for *five hundred* dollars, the damages and costs in the writ aforesaid specified, and also that the plaintiff recover against the defendant his costs by him expended in suing out and prosecuting this writ."

1. **A cognovit is an unsealed confession** of judgment given to plaintiff after suit is brought. And. L. Dict., *citing* 3 Bl. Com. 397.

2. **Judgment by cognovit,** as set out in the text in Form No. 6071, is in Chit. F. (1847), p. 310, and may readily be adapted to use in such jurisdictions as follow the common-law practice.

In assumpsit, after issue, with a relicta verificatione, the judgment by cognovit as set out in Chit. F. (1847), p. 311, is as follows: (*Proceed to the end of the issue in the usual manner, and then thus:*) "At which day come here, as well the plaintiff by his attorney aforesaid as the defendant in his own proper person, and hereupon the defendant, relinquishing his said plea by him above pleaded, saith that he cannot deny the action of the plaintiff, nor but that the defendant did promise" (*concluding as in Form No. 6071*).

In debt on bond, the judgment by cognovit as set out in Chit. F. (1847), p. 311, is as follows: (*Proceed as in Form No. 6071 to *; then add:*) "nor but the said writing obligatory is the deed of the defendant, nor but that he owes to the plaintiff the said sum of *£1,000* above demanded, in the manner and form as the plaintiff hath above alleged. Therefore it is considered that the plaintiff do recover against the defendant his said debt, and also *£25* for his damages, which he hath sustained, as well on occasion of the detaining the said debt as for his costs and charges by him about his suit in this behalf expended, by the court here adjudged to the plaintiff, and with his assent: and the defendant in mercy, etc." (*concluding as in Form No. 6071*).

In Debt, as to part with remittitur as to residue, the judgment by cognovit as set out in Chit. F. (1847), p. 311, is as follows: (*Proceed as in Form No. 6071 to *; then add:*) "nor but that he the defendant does owe to the plaintiff the sum of *£500*, parcel of the said sum above

the action of the plaintiff, nor but that he the defendant did promise in manner and form as the plaintiff hath above alleged;* nor but that the plaintiff hath sustained damage, on occasion of the not performing of the said promises in the said declaration mentioned, to £1,000, as by the said declaration is above alleged: And hereupon the plaintiff prays judgment, and his damages so acknowledged, together with his costs and charges by him about his suit in this behalf expended, to be adjudged by him, etc.: Therefore it is considered that the plaintiff do recover against the defendant his damages aforesaid to £1,000 in form aforesaid acknowledged, and also £25 for his said costs and charges by the court here adjudged to the plaintiff, and with his assent; which said damages, costs and charges, in the whole, amount to £1,025; and the said defendant in mercy, etc.

(*In the margin of the roll, opposite the words* "Therefore it is considered," *write* "Judgment signed the ——— day of ———, 18—;" *also in the margin opposite the words* "mercy, etc.," *at the end, write* "Mercy.")

b. Before Justice of the Peace.

Form No. 6072.[1]

Territory of Arizona, *County* of *Gila*. } Before *Abraham Kent*, a Justice of the Peace within and for the said county, the *twentieth* day of *December*, 1897.

John Doe, plaintiff, against *Richard Roe*, defendant. }

This day came the above named plaintiff, by his attorney *Jeremiah Mason*, and also comes the above named defendant *Richard Roe*, in his own proper person, and acknowledges the plaintiff's cause of action, and that he is justly indebted to the said plaintiff in the

demanded: And upon this the plaintiff freely here in court remits to the defendant the sum of £500, residue of the said sum above demanded, and all damages by him sustained on occasion of the detention of the said sum of £500, residue, etc., and prays judgment for the said debt of £500, parcel, etc., so acknowledged as aforesaid, together with his costs and charges by him about his suit in this behalf expended, to be adjudged to him, etc. Therefore it is considered that the plaintiff do recover against the defendant the debt of £500, parcel, etc., in form aforesaid acknowledged, and also £25 for his damages, which he hath sustained as well on occasion of the detaining the said debt of £500 so acknowledged as aforesaid as for his said costs and charges by the court here adjudged to the plaintiff, and with his assent; and the said defendant in mercy, etc. And let the defendant be acquitted of the sum of £500, residue, etc., and the damages aforesaid in form aforesaid remitted, etc." (*concluding as in Form No. 6071*).

In debt, after issue, with a relicta verificatione, the judgment by cognovit given in Chit. F. (1847), p. 312, is as follows: (*Proceed to the end of issue in the usual manner, and then add:*) "At which day come here as well the plaintiff by his attorney aforesaid as the defendant in his own proper person; and hereupon the defendant, relinquishing his said plea by him above pleaded, says that he cannot deny the action of the plaintiff, nor but" (*concluding as in judgment by cognovit in debt on bond as set out supra this note*).

1. *Arizona.* — Rev. Stat. (1887), § 1444. This form will also be found sufficient under Tex. Rev. Stat. (1895), art. 1648. See also list of statutes cited *supra*, note 2, p. 48, for similar provisions in *California*, *Idaho*, *Montana*, *Nevada*, *Washington*, and other states.

sum of *forty-eight* dollars. It is therefore considered that the said plaintiff have and recover from the said defendant the said sum of *forty-eight* dollars as aforesaid confessed, with interest at the rate of *seven* per cent. per annum and for his costs by him about his suit in this behalf expended, and that he have execution therefor.[1]

Abraham Kent, Justice of the Peace.

Form No. 6073.[2]

(Sand. & H. Dig. Ark. (1894), p. 1651.)

[In Justice's Court, *Garland* County, *Arkansas*, before *Abraham Kent*, Justice of the Peace.

John Doe against *Richard Roe.* } Judgment by Confession.][3]

On this *third* day of *May*, 1894, comes the said *John Doe* as well as the said *Richard Roe*, and the said *John Doe* files before me a note against the said *Richard Roe* as follows: (*Here set out copy of note*), and the said *Roe* files in writing his confession of judgment wherein he says that he is indebted to the said *Doe* in the sum of *fifty* dollars debt and *nine* dollars and *fifty* cents interest due upon said note, and consents that judgment be rendered against him for that sum; all of which being assented to by the said *Doe*, it is therefore considered and adjudged that the said *Doe* have and recover of the said *Roe* the sum of *fifty-nine* dollars and *fifty* cents for his debt and interest and all his costs in and about this suit expended.

[*Abraham Kent*, Justice of the Peace.][3]

1. Where the party appears in person or by agent or attorney before a justice of the peace without issuance or service of process and confesses judgment, the plaintiff, his agent or attorney shall make and file an affidavit in writing signed by him to the justness of his claim. Ariz. Rev. Stat. (1887), § 1444; Tex. Rev. Stat. (1895), art. 1648. And where such judgment is confessed by agent or attorney the warrant of attorney shall be filed with the justice and noted in the judgment. Ariz. Rev. Stat. (1887), § 803; Tex. Rev. Stat. (1895), art. 1649. See also list of statutes cited *supra*, note 2, p. 48.

2. *Arkansas.* — Sand. & H. Dig. Ark. (1894), § 4379. See also list of statutes cited *supra*, note 2, p. 48.

Sufficiency of Judgment. — Where a party appears and files a written confession of judgment, such a description of the cause of action in the confession as will identify it is sufficient. The party is not required to state the technical character of the instrument upon which the confession is made. The amount, date and time of payment being given with sufficient certainty to identify a writing obligatory, it will not invalidate the judgment if in the confession it be called a "note." *Ex p.* Hays, 6 Ark. 419. The judgment in this case was as follows:

"*Louisa Hogins, administratrix of A. D. Hogins, deceased*, vs. *A. J. Hays.* } Debt.

On this day appeared *Louisa Hogins*, administratrix of *A. D. Hogins*, deceased, and filed a writing obligatory, dated the *twenty-fifth* day of *December*, 1842, and due *one* day after date, payable to *A. D. Hogins* for *eighty-six* dollars, and also appeared *A. J. Hays*, the defendant, and filed here in court his confession of judgment in writing, which is allowed by the court, and it is considered by the court that said plaintiff have and recover of the defendant the sum of *eighty-six* dollars debt and *five* dollars and *sixteen* cents damages with all costs, etc., this *eleventh* April, 1845. *John James*, J. P."

3. The words enclosed by [ ] will not be found in the form given in the statute, but have been added to render the form complete.

Form No. 6074.[1]

John Doe against *Richard Roe.* } Before *Abraham Kent*, Justice of the Peace.

New Haven County, ss. *December tenth*, 1897.

On this day personally appeared before me, *Abraham Kent*, justice of the peace within and for the county of *New Haven*, *Richard Roe*, and acknowledged that he is indebted to *John Doe* in the sum of *fifty* dollars on a certain promissory note (*or other cause of indebtedness*), as follows: (*Here set out the note or cause of indebtedness*), and confesses judgment in favor of the said *John Doe* against himself for the aforesaid sum of *fifty* dollars and *seventy-five* cents costs. Therefore, it is considered and adjudged that the said *John Doe* have and recover against the said *Richard Roe* his damages and costs aforesaid acknowledged and confessed, and that the said plaintiff have execution therefor.

Abraham Kent, Justice of the Peace.

Form No. 6075.[2]

(Fla. Rev. Stat. (1892), § 548.)

(*Annexed to or indorsed upon the confession of judgment is entered the following judgment:*)[3] Judgment is hereby rendered against *Richard Roe*, defendant, in favor of *John Doe*, plaintiff, for the sum of *fifty* dollars, and *fifty* cents damages, and *three* dollars and *fifty* cents costs, this *ninth* day of *February*, 1898.

Abraham Kent, Justice of the Peace.

Form No. 6076.[4]

State of *Illinois*, *Will* County. } ss. Before *Abraham Kent*, Justice of the Peace.

Jonn Doe against *Richard Roe.* } Upon Claim for *Twenty-five* Dollars due on *an Account.*

Whereas, the said *John Doe*, plaintiff above named, this *ninth* day of *February*, 1898, personally came before me, and the said *Richard*

1. *Connecticut.* — Gen. Stat. (1888), § 663. See list of statutes cited *supra*, note 2, p. 48.

2. *Florida.* — Rev. Stat. (1892), § 1609, subs. 6. See also list of statutes cited *supra*, note 2, p. 48.

3. For form of confession of judgment before a justice of the peace in *Florida* see *supra*, Form No. 6038.

4. *Illinois.* — Starr & C. Anno. Stat. (1896). p. 3083, par. 66. See also list of statutes cited *supra*, note 2, p. 48.

No technical formality is required, under the *Illinois* statute, in the practice in the justices' courts, and when a party there formally consents that judgment shall be given against him for a designated amount, and the judgment is thereupon so given, it is a judgment confessed. Such expressions as "I confess judgment for $*100*," or "I agree that judgment shall be given against me for $*100*," are sufficient. Boettcher *v.* Bock, 74 Ill. 334.

Where the docket shows that defendant agreed that plaintiff should have judgment for a given sum and that the plaintiff accepted the judgment tendered, this will be sufficient. Boettcher *v.* Bock, 74 Ill. 332.

It is sufficient to show that the court had jurisdiction of the parties and of all the subject matter, and that the matter was adjudicated, the amount

Roe waived the issuance and service of process; and the said *John Doe* and the said *Richard Roe* have entered their appearance in this cause, and the said *Richard Roe* has acknowledged that he is indebted to and owes the said *John Doe* the sum of *twenty-five* dollars, said money being due upon a certain *account* for goods, wares and merchandise to him the said *Richard Roe* sold, furnished and delivered, during the year 1897, as per statement and account hereunto annexed, and whereas, the said *John Doe* and *Richard Roe* have this day requested that judgment be rendered against the said *Richard Roe* for the amount of said *account*; it is therefore considered and adjudged that the said *John Doe*, plaintiff above named, do have and recover of the said *Richard Roe*, defendant above named, the sum of *twenty-five* dollars, and the sum of *five* dollars costs, taxed in this proceeding,[1] amounting in all to the sum of *thirty* dollars.

Witness my hand this *ninth* day of *February*, 1898.

Abraham Kent, Justice of the Peace.

Form No. 6077.[2]

John Doe
against
Richard Roe.

Judgment confessed this *ninth* day of *February*, 1898, by *Richard Roe*, the above named defendant, in favor of *John Doe*, the above named plaintiff, for the sum of *fifty* dollars, with interest upon such sum from the date of this judgment until time of payment of the same.

Abraham Kent, Justice of the Peace
in and for *Allegany* County, *Maryland.*

Form No. 6078.[3]

Cheshire, ss.

On this *first* day of *September*, A. D. 1897, the above named *John Doe* and *Richard Roe* voluntarily appeared before me, a justice of the peace within and for the said county, and subscribed the above agreement. It is therefore considered that the said *Richard Roe* have execution against the said *John Doe* for the sum of *fifty* dollars as confessed above (or *that execution be stayed until the first day of January, 1898.*)

Abraham Kent, Justice of the Peace.

found was confessed to be owing to the plaintiff, a recovery and the award of execution. Bartlett *v.* Powell, 90 Ill. 331.

Consent to Entry of Judgment. — A judgment entered upon the admission by the defendant of an amount due is not a judgment by confession. A confession of judgment is more than an acknowledgment that a certain amount is justly due; it is a consent to the entry of judgment. Dearborn Laundry Co. *v.* Chicago, etc., R. Co., 55 Ill. App. 441; Goddard *v.* Fisher, 23 Ill. App. 365; Campbell *v.* Randolph, 13 Ill. 313. So that where a party stated "that he could not deny the plaintiff's demand," such admission conferred no authority to enter a judgment by confession. Elliott *v.* Daiber, 42 Ill. 467, 468.

1. **Costs.** — Neither the items of costs nor the amount thereof need be stated in the judgment. Simms *v.* Klein, 1 Ill. 371.

2. *Maryland.*—Pub. Gen. Laws (1888), art. 52, § 33.

3. *New Hampshire.* — Every justice to whom a confession of debt is made

Form No. 6079.[1]

John Doe, plaintiff, against *Richard Roe*, defendant. } Before *Abraham Kent*, Esq., one of the Justices of the Peace of the Town of *Huntington*, County of *Suffolk*, *New York*.

Whereas, the defendant above named, *Richard Roe* [*and the plaintiff above named, John Doe*], has (or *have*) personally appeared before me, and the said *Richard Roe* having filed his confession of judgment herein wherein he consents that judgment be entered in this cause in favor of the plaintiff, *John Doe*, for the sum of *seventy-five* dollars upon a promissory note, as is evidenced by his said statement and confession in writing heretofore with me filed in this cause [accompanied by the affidavits both of the said *John Doe* and the said *Richard Roe*, as by section 3011 of the Code of Civil Procedure required];[2] it is now therefore considered and adjudged that the said *John Doe* do have and recover of and from the said *Richard Roe* the sum of *seventy-five* dollars, the sum confessed, and the sum of *fifteen* dollars costs, in this behalf incurred (*here specifying, by way of items, the costs*),[3] amounting in all to the sum of *ninety* dollars. Judgment entered this *ninth* day of *February*, 1898.

Abraham Kent, Justice of the Peace.

Form No. 6080.[4]

State of *Vermont*, *Washington* County. } ss.

Be it remembered that at *Montpelier*, on this *first* day of *July*, A. D. 1897, *Richard Roe*, of *Montpelier* aforesaid, personally appeared before me, *Abraham Kent*, justice of the peace within and for the said county of *Washington*, and acknowledged himself indebted to *John Doe*, of *Montpelier* aforesaid, without (or *with*) antecedent process, on a note in the sum of *ten* dollars, bearing date the *first* day of *September*, A. D. 1896, executed and delivered by the said *Richard Roe* to the said *John Doe*, and payable to the said *Doe* or order on demand, with interest, in the sum of *ten* dollars and *fifty* cents; and whereupon it is adjudged by the said justice that said *John Doe* recover of the said *Richard Roe* the sum of *ten* dollars and *fifty* cents and *twenty-five* cents more for taking the record of such confession, whereof the said *John Doe* may have execution.

Abraham Kent, Justice of the Peace.

shall keep a true and full record thereof, signed and certified by himself. N. H. Pub. Stat. (1891), c. 247, § 17.

1. *New York.* — Code Civ. Proc. (1897), § 3010 *et seq.* See also list of statutes cited *supra*, note 2, p. 48, for similar provisions in *California*, *Idaho*, *Minnesota*, *Missouri*, *Montana*, *Nevada*, and other states.

2. **Judgment for sum over fifty dollars** should refer to the affidavit by statutes required to accompany the statement and confession. N. Y. Code Civ. Proc., § 3011.

3. **The items of cost** should be specified in the judgment. N. Y. Code Civ. Proc., § 3078.

4. *Vermont.* — Stat. (1894), § 1048, provides that no judgment shall be rendered upon confession except upon specification in writing filed with the justice setting forth the claim on which judgment is rendered.

2. Upon Confession of Attorney.[1]

Form No. 6081.[2]

Territory of *Arizona*, County of *Gila*. } In the *District* Court.

John Doe, plaintiff, against *Richard Roe*, defendant. }

This day came the plaintiff, by his attorney, and filed his complaint herein, and the said defendant, by *Daniel Webster*, his attorney duly constituted by warrant of attorney, comes and in open court confesses that he is indebted to the said plaintiff for the sum of *twelve hundred and fifty* dollars, as claimed by the plaintiff in his complaint. It is therefore considered by the court that the said plaintiff recover from the said defendant the said sum of *twelve hundred and fifty* dollars as aforesaid confessed and that he have execution therefor.

Form No. 6082.[3]

State of *Michigan*, *Circuit* Court for the County of *Montcalm*. } ss.

John Doe against *Richard Roe*. }

On reading and filing the promissory note, warrant of attorney, and declaration in this cause, together with the answer of the said defend-

1. **Sufficiency of Judgment.**—*Name of attorney* appearing to confess the judgment need not be shown in the record of the judgment. Russell *v.* Lillja, 90 Ill. 330.

Warrant of attorney to confess judgment must be shown to be in existence in the entry of judgment by cognovit. Matzenbaugh *v.* Doyle, 56 Ill. App. 343. But the warrant need not be set out at length in the transcript. Applegate *v.* Mason, 13 Ind. 79. It is sufficient that the judgment recite the power of attorney without reciting that it was proven. Caruthers *v.* Caruthers, 2 Lea (Tenn.) 270.

After obligee's death, judgment upon warrant of attorney should be entered in the name of the executors. Guyer *v.* Guyer, 6 Houst. (Del.) 430.

Attorneys' fees may be included in the judgment when authorized by the warrant of attorney. Sweeney *v.* Stroud, 55 N. J. L. 97; Campbell *v.* Goddard, 123 Ill. 220; Seligman *v.* Franco-American Trading Co., 17 Civ. Proc. Rep. (N. Y. Supreme Ct.) 342; Moore's Appeal, 110 Pa. St. 433.

For an amount greater than that authorized by the warrant is irregular but not necessarily void. See Adam *v.* Arnold, 86 Ill. 185; Davenport *v.* Wright, 51 Pa. St. 292; Caldwell *v.* Fifield, 24 N. J. L. 150.

Where bond has been given, the form of judgment on a warrant of attorney at common law may be found in Chit. F. (1847), p. 316.

Where bond has not been given, the form of judgment on a warrant of attorney at common law is set out in Chit. F. (1847), p. 317.

Form of rule upon warrant of attorney to confess judgment at common law is given in Chit. F. (1847), p. 316.

Form of affidavit to enter up judgment after a year upon a warrant of attorney at common law is given in Chit. F. (1847), p. 315.

2. *Arizona.* — Rev. Stat. (1887), § 802 *et seq.* See list of statutes cited *supra*, note 2, p. 48, for similar provisions in other states.

3. *Michigan.* — How. Anno. Stat. (1882), § 7662.

See list of statutes cited *supra*, note 2, p. 48, for similar provisions in other states.

Judgment on confession, or cognovit in assumpsit, without warrant of attorney

ant, confessing the action of the said plaintiff, to the sum of *eight hundred* dollars damages; Therefore, it is considered that the said plaintiff do recover against the said defendant his damages so confessed as aforesaid, together with his costs and charges by him about his suit in his behalf expended to be taxed, and that the said plaintiff have execution thereof.

Carroll Johnson, Circuit Judge.

Form No. 6083.[1]

In the *Circuit* Court, *Colfax* County, in the State of *Nebraska*:

John Doe, plaintiff,
vs.
Richard Roe, defendant. } Judgment.

Now, on this *tenth* day of *December*, 1897, comes the plaintiff by his attorney; also comes *Daniel Webster*, one of the attorneys of this court, on behalf of the defendant, and by virtue of warrant of attorney for that purpose duly executed by the said defendant in this action filed, and now produced to the court, and waives the issuing and service of process, and, with the consent of the plaintiff, confesses that the said defendant is justly indebted to the said plaintiff in the sum of *two hundred and fifty* dollars, with interest thereon at the rate of *seven* per cent. per annum from the *first* day of *June*, 1896, as claimed in the petition. It is therefore considered and adjudged by the court that the plaintiff recover of and from the defendant the said sum of *two hundred and fifty* dollars, with interest thereon at the rate of *seven* per cent. per annum from the *first* day of *June*, 1896, together with his costs herein expended, taxed at *forty-eight* dollars and *thirty-five* cents.

John Marshall, Judge.

in *Michigan*, may be as follows: (*Title of court and cause as in Form No. 6082.*) "The defendant in this cause having appeared therein, by *Jeremiah Mason*, his attorney, and confessed the action of the said plaintiff, and his damages by him sustained on account of the non-performance of the several promises and undertakings in said plaintiff's declaration mentioned, to the sum of *eight hundred* dollars; hereupon said plaintiff prays judgment and his damages so acknowledged, together with his costs and charges by him about his suit in this behalf expended; Therefore; it is considered and adjudged that the said plaintiff do recover against said defendant his damages aforesaid, as aforesaid acknowledged and confessed, together with his costs and charges aforesaid to be taxed, and that said plaintiff have execution thereof.

Carroll Johnson, Circuit Judge."

1. *Nebraska.* — Comp. Stat. (1897), §§ 6012–6015.

See list of statutes cited *supra*, note 2, p. 48, for similar provisions in other states.

Precedent — *Ohio.* — In Callen *v.* Ellison, 13 Ohio St. 449, the judgment, omitting formal parts, was as follows: "And now of this day, that is to say, at the *June* Term, in the year of our Lord one thousand eight hundred and *twenty-seven*, comes the plaintiff by his attorney aforesaid, and the plaintiff, by his attorney, having proceeded and filed here in court his declaration against the said defendants, the defendants, by *George Collins*, Esq., their attorney, come into court, and, by virtue of his power of attorney, filed in this court, confessed judgment for the defendants for the sum of *one thousand three hundred and ninety-three* dollars, and *seventy* cents in damages; and therefore it is considered by the court that the plaintiff recover against the defendant his damages aforesaid by them confessed, and his costs by him about his suit in this behalf expended, except the docket fee."

Form No. 6084.[1]

(N. J. Gen. Stat. (1896), p. 173, § 5.)

Essex County *Circuit* Court, of the term of *December*, in the year of our Lord one thousand eight hundred and *ninety-seven.*

John Doe against *Richard Roe.* } In Debt on Bond and Warrant of Attorney.

The defendant's appearance to this action is entered and judgment confessed to the plaintiff for the sum mentioned in the above obligation by virtue of the warrant of attorney thereunto annexed and pursuant to the directions of an act entitled "An act directing the mode of entering judgments on bond with warrant of attorney to confess judgment," whereby it is considered that the said *John Doe*, the above named plaintiff, do recover against the said *Richard Roe*, the above named defendant, the sum of *one thousand* dollars debt and *four* dollars costs of suit. Judgment signed and ordered entered this *tenth* day of *December* in the year of our Lord one thousand eight hundred and *ninety-seven.*

John Marshall, Circuit Judge.[2]

Form No. 6085.[3]

John Doe, plaintiff, against *Richard Roe*, defendant. }

1. *New Jersey.* — Gen. Stat. (1896), p. 172, § 1 *et seq.*

Another form of entry of judgment in *New Jersey* may be as follows:

"Be it remembered that on this *ninth* day of *February*, 18*98*, before me, the subscriber, a *supreme* court commissioner, personally appeared *Jeremiah Mason*, attorney for *Richard Roe*, the defendant in the above entitled cause, and produced an original warrant of attorney, executed by the said defendant, and the copy whereof is hereto annexed, and by virtue of said warrant of attorney appeared to this action, received the foregoing declaration, confessed the said action and a judgment thereon in favor of *John Doe*, the plaintiff, against *Richard Roe*, the defendant, for the sum of *five hundred* dollars damages and costs of suit to be taxed; whereupon leave is given to enter up proceedings of said warrant of attorney and final judgment against the said *Richard Roe* in favor of the said plaintiff, *John Doe*, for the sum of *five hundred* dollars damages and costs of suit to be taxed.

Judgment signed and ordered to be entered this *ninth* day of *February*, 18*98*.

I do hereby certify that at the time of signing the foregoing judgment the affidavit of *John Doe*, the said plaintiff in the foregoing action, taken as required by the statute and hereto annexed, was produced to me on the *ninth* day of *February*, 18*98*.

John Marshall,
Supreme Court Commissioner."

Against two persons on the confession of one is improper. Westfall *v.* Donoven, 2 N. J. L. 64; Little *v.* Moore, 4 N. J. L. 82; Mills *v.* Sleght, 5 N. J. L. 653; Wiggins *v.* Klienhans, 9 N. J. L. 249; Ballinger *v.* Sherron, 14 N. J. L. 144. But such judgment is good against the one who confesses it. Wood *v.* Ogden, 16 N. J. L. 453.

Against one after his decease is improper. Stull *v.* Abbott, 15 N. J. L. 339; Milnor *v.* Milnor, 9 N. J. L. 93; Wood *v.* Hopkins, 3 N. J. L. 263.

2. **May be signed and ordered** by supreme court commissioner. N. J. Gen. Stat. (1896), p. 173, § 6.

3. *Virginia and West Virginia.* — See *supra*, note 3, p. 95.

In detinue, judgment may be as follows: (*Commencing as in Form No. 6085, and continuing down to* *) "saith that he cannot gainsay the plaintiff's action. Therefore it is considered by the court that the plaintiff recover against the

This day came the parties by their attorneys,[1] and thereupon the said defendant, relinquishing his former plea,* acknowledgeth the plaintiff's action against him, and further acknowledgeth that the plaintiff hath sustained, by occasion of the nonperformance of the assumptions made by him, damages to the amount of *five hundred* dollars; and he, the said defendant, agrees that judgment be entered for the plaintiff for the damages so acknowledged, with interest thereon from the *ninth* day of *February*, 1897, till paid, and the costs. Thereupon, with the assent of the plaintiff, it is considered by the court that the plaintiff recover against the defendant *five hundred* dollars, the damages aforesaid, so as aforesaid acknowledged, with interest thereon, to be computed after the rate of *six* per centum per annum, from the *ninth* day of *February*, 1897, till paid, and his costs by him about his suit in this behalf expended. And the said defendant in mercy, etc.

Form No. 6086.[2]

In the *Circuit* Court for *Vernon* County.

John Doe, plaintiff, against *Richard Roe*, defendant. } Judgment on Warrant of Attorney, without action.

Be it remembered that on the *ninth* day of *February*, 1898, came the plaintiff in the above entitled cause by *Oliver Ellsworth*, his attorney, and filed his complaint against the defendant in the above entitled cause, and together with said complaint said plaintiff also filed an affidavit, a promissory note, a warrant of attorney, and an

defendant the *five* cows named in the declaration mentioned, if they may be had, or the price of them, if they may not be had, which is agreed by the parties to be *five hundred* dollars, together with *one* dollar damages by them agreed for detaining the said cows, and his costs" (*concluding as in Form No. 6085*).

In trespass, assault and battery, the judgment may be as follows: (*Commencing as in Form No. 6085, and continuing to* *) "saith that he cannot gainsay the plaintiff's action, nor but that he is guilty in manner and form as the plaintiff against him hath complained; and the parties agree that the plaintiff hath sustained damages by that occasion to *five hundred* dollars, besides his costs. Therefore it is considered by the court" (*concluding as in Form No. 6085*).

Judgment against several defendants, where the action is confessed by one, is given in Robinson's F., p. 100, as follows, omitting formal parts:

"This day came, *etc.*, and the defendant, *Richard Roe*, relinquishing his former plea, acknowledges the plaintiff's action, and the cause remains without judgment upon that confession until a final judgment can be given as to all the defendants."

1. **By attorney in fact,** may be as follows: (*Title of cause as in Form No. 6085*). "This day as well the plaintiff by his attorney as the defendant by *Samuel Short*, his attorney in fact aforesaid, acting under a power of attorney under the hand and seal of said defendant, acknowledges" (*continuing as in Form No. 6085*).

Or as is given in Robinson's F., p. 101: "This day came the plaintiff by his attorney and produced the power of attorney for confessing judgment in this action under the hand and seal of the defendant, attested by *Samuel Short*, and approved the day of the execution thereof. Whereupon *Jeremiah Mason* appeared for the defendant by virtue of said power, and the defendant by his said attorney acknowledges the plaintiff's action for, etc. Therefore, etc."

2. *Wisconsin.*—Sanb. & B. Anno. Stat. (1889), § 2895 *et seq.* See also list of statutes cited *supra*, note 2, p. 48.

answer of the said defendant, which said complaint, affidavit, promissory note, warrant of attorney and answer are as follows, to wit:

(*Here set out copy of complaint.*)[1]
(*Here set out copy of affidavit.*)[2]
(*Here set out copy of promissory note.*)[3]
(*Here set out copy of warrant of attorney.*)[4]
(*Here set out copy of defendant's answer.*)[5]

State of *Wisconsin.*
In the *Circuit* Court for *Vernon* county.

John Doe, plaintiff,
against
Richard Roe, defendant. } Judgment.[6]

Having this day read the complaint of the plaintiff in the above entitled cause, and also his affidavit therewith filed, as well as the note sued upon herein, and the warrant of attorney signed by the defendant in the above entitled cause, authorizing the confession of judgment on the said note, and the answer of the said defendant, wherein he confesses said complaint and submits to a judgment against the said defendant in favor of the said plaintiff, all of which papers were produced, exhibited and filed herein. Now, therefore, on motion of *Oliver Ellsworth*, attorney for said plaintiff, it is hereby considered and adjudged that the said plaintiff, *John Doe*, have and recover of the said defendant, *Richard Roe*, the sum of *five hundred* dollars claimed in said complaint and confessed in said answer, together with *thirteen* dollars costs of this judgment, taxed as per stipulation in said answer, amounting in all to the sum of *five hundred and thirteen* dollars. Judgment ordered to be entered by the clerk on the *ninth* day of *February*, 1898.

Carroll Johnson, Circuit Judge.[7]

Calvin Clark, Clerk.

1. **For Form of complaint** upon a note, in *Wisconsin*, see the title BILLS AND NOTES, vol. 3, p. 283, Form No. 4122.

2. For form of this affidavit see *supra*, note 1, p. 85.

3. **The promissory note**, or other instrument in writing, may embrace also the warrant or authority for the confession of judgment. Sloane *v.* Anderson, 57 Wis. 123.

4. **For form of warrant of attorney** see *infra*, note 3, p. 109.

5. **For form of defendant's answer** see *supra*, Form No. 6057.

6. **Precedent.**— In Remington *v.* Cummings, 5 Wis. 138, the judgment, omitting formal parts, was as follows: "And now at this day come the parties by their attorneys into the clerk's office, and the defendants, by warrant of attorney duly executed and now here produced, waive the issuing of process and service thereof, and by the plea of confession by *J. P. Atwood*, their attorney, confess and acknowledge the plaintiff's right of action, and that they have sustained damages to the sum of *four hundred and twelve* dollars and *eighty-nine* cents. Whereupon, it is considered and adjudged by the court that the said plaintiffs do have and recover of and from the said defendants the sum of *four hundred and twelve* dollars and *eighty-nine* cents, their damages so as aforesaid confessed, together with their proper costs and charges therein expended and taxed at the sum of *twelve* dollars and *thirteen* cents, and that they may have execution therefor."

7. **Must be signed by a judge**, or court commissioner if entered in vacation. So held where a judgment was entered upon a sworn statement or confession by defendant indorsed upon the complaint without service of process. Wadsworth v. Willard, 22 Wis. 238; Blaikie *v.* Griswold, 10 Wis. 293. See also Remington *v.* Cummings, 5 Wis. 138; Fairchild *v.* Dean, 15 Wis. 206.

V. WARRANT OF ATTORNEY.[1]

1. Distinct Instrument.[2]

Form No. 6087.

Know all men by these presents, that I, *Richard Roe*, have made, constituted and appointed, and by these presents do make, constitute and appoint *Jeremiah Mason* true and lawful attorney for me and in

1. **A warrant of attorney** is an instrument authorizing the person to whom it is given to appear in an action on behalf of the maker or to confess judgment against him. And. L. Dict., Rapalje & L. L. Dict.; 28 Am. & Eng. Encycl. of L. 685.

Must be filed and made part of the record. Durham *v.* Brown, 24 Ill. 93.

Arizona. — Rev. Stat. (1887), §§ 803, 1445.

Kansas. — 2 Gen. Stat. (1897), c. 95, § 404.

Michigan. — How. Anno. Stat. (1882), § 7662.

Minnesota. — Stat. (1894), § 6080.

Missouri. — Rev. Stat. (1889), § 2232.

Nebraska. — Comp. Stat. (1897), § 6015.

Ohio. — Bates' Anno. Stat. (1897), § 5324.

Oklahoma. — Stat. (1893), § 4298.

Texas. — Rev. Stat. (1895), art. 1649.

Wyoming. — Rev. Stat. (1887), § 2671.

See list of statutes cited *supra*, note 2, p. 48, for similar provision in other states.

Before action brought, powers of attorney made on confessing judgment are null and void in the following states:

Florida. — Rev. Stat. (1892), § 1178.

Kentucky. — Gen. Stat. (1888), § 416.

Mississippi. — Anno. Code (1892), § 747.

In *Virginia*, a power of attorney to confess judgment may be executed before the action is brought. Virginia Valley Ins. Co. *v.* Barley, 16 Gratt. (Va.) 363.

If any person be in custody in a civil action, at the suit of another, no warrant of attorney executed by the person in custody, to confess judgment in favor of the person at whose suit he is in custody, shall be of any force unless some attorney expressly named by the person in custody be present and sign the warrant of attorney as a witness.

Kansas. — 2 Gen. Stat. (1897), c. 95, § 405.

Nebraska. — Comp. Stat. (1897), § 6016. See also list of statutes cited *supra*, note 2, p. 48.

2. **A Distinct Instrument.** — Some statutes authorizing confession of judgment upon a plea signed by an attorney in vacation require the authority for confessing such judgment to be in some proper instrument distinct from that containing the iustrument or contract, etc., upon which judgment is confessed.

Minnesota. — Stat. (1894), § 6080. See also list of statutes cited *supra*, note 2, p. 48, for similar provisions in other states.

Form of warrant of attorney at common law to confess judgment is given in Chit. F. (1847), p. 313.

Form of defeasance on warrant of attorney at common law to confess judgment is given in Chit. F. (1847), p. 314.

Form of affidavit of execution of warrant of attorney as required by 3 Geo. IV, c. 39, § 1, is given in Chit. F. (1847), p. 315.

In Michigan, the statute requires the authority to confess to be in some instrument distinct from that containing the evidence of the debt. Such an instrument may be as follows:

"To *Jeremiah Mason*, Esq., attorney of the *Supreme* Court of the state of *Michigan*, or to any other attorney of the said court, or of any other court, there or elsewhere: Whereas, I, *Richard Roe*, of the city of *Detroit*, in the state of *Michigan*, made, executed and delivered, for value received, my certain promissory note, of even date herewith, for the sum of *five hundred* dollars, payable *one day* after date, to the order of *John Doe*, of the said city of *Detroit*, state aforesaid, which said note was made and delivered to secure the payment of the sum of *five hundred* dollars by me this day borrowed of the said *John Doe*, and by the said *John Doe* loaned to me; these are to desire or authorize you or any of you to appear for me, my heirs, executors or admin-

my name, place and stead, to appear before the *District* Court of *Colfax* county, in the state of *Nebraska*, and there to waive service and issuing of process, and to confess judgment in favor of *John Doe* against me in the sum of *five hundred* dollars, with interest thereon at the rate of *six* per cent. per annum from the *ninth* day of *February*, 1897. Said indebtedness being now due and payable, and incurred on account of (*Here set out facts showing how the indebtedness arose, as in form No. 6030*), hereby giving and granting unto him, said attorney, full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney shall lawfully do or cause to be done by virtue thereof.[1]

istrators, in the said court, or elsewhere, in an action of assumpsit, there or elsewhere brought, or to be brought against me, my heirs, executors or administrators, at the suit of the said *John Doe*, or his assigns, on the said promissory note, or at any term or time, past or present, or any subsequent term or terms, there or elsewhere to be held, and confess judgment, or judgments, thereon against me, my heirs, executors or administrators, for the said sum of *five hundred* dollars, the debt, besides costs of suit by non sum informatus nil licit, or otherwise, as to you shall seem meet; and for you or any of you so doing, this shall be your sufficient warrant. And I do hereby for myself, my heirs, executors and administrators, remise, release, and forever quitclaim unto the said *John Doe*, his certain attorney, heirs, executors, administrators and assigns, all and all manner of error and errors, misprisions, misentries, defects and imperfections in the entering of the said judgment, or judgments, or any processes or proceedings thereon or thereto, or in anywise attaching or concerning the same. In witness whereof," etc.

1. **Must be clear and explicit,** and must be strictly pursued. Frye *v.* Jones, 78 Ill. 627; Keith *v.* Kellogg, 97 Ill. 147; Spence *v.* Emerine, 46 Ohio St. 433; Cushman *v.* Welsh, 19 Ohio St. 536.

A warrant of attorney to confess judgment on a note does not authorize a confession before the maturity of the note. Spier *v.* Corll, 33 Ohio St. 236.

Not naming attorney but running "to any attorney" is not defective. Poppers *v.* Meager, 33 Ill. App. 19.

"Any attorney" as used in a warrant of attorney will not include a prothonotary or a clerk. Grover, etc., Sewing Mach. Co. *v.* Radcliffe, 66 Md. 511.

Authorizing Scott or any other attorney of court to confess judgment, etc., sufficiently authorized a confession by Attorneys Scott and Booth. Patton *v.* Stewart, 19 Ind. 233.

Power to confess judgment as "of any term" means power to confess at some term, and does not authorize a confession in vacation. Whitney *v.* Bohlen, 157 Ill. 572. But where a warrant of attorney authorizes a confession of judgment upon a note "at any time" it may be done at any time after the delivery of the note. Elkins *v.* Wolfe, 44 Ill. App. 376.

Blanks in warrants of attorney may be read as though the name of the party against whom judgment is confessed had been inserted. Packer *v.* Roberts, 140 Ill. 671.

A printed blank warrant in which the date was omitted, which authorized the confession of judgment on a note, describing it as bearing even date herewith, a note and warrant being upon the same piece of paper, was held to be sufficient. Richards *v.* Globe Bank, 12 Wis. 692.

A printed blank warrant in a lease was held not to be void for uncertainty because some of the blanks were not filled in, such omissions not rendering the instrument ambiguous. Links *v.* Mayer, 22 Ill. App. 489. But this would not be true where the omissions were such as to render the instrument uncertain and ambiguous. Chase *v.* Dana, 44 Ill. 262; Morris *v.* Bank of Commerce, 67 Tex. 602.

In witness whereof, I have hereunto set my hand and seal the *ninth* day of *February*, one thousand eight hundred and *ninety-seven*.

Richard Roe.[1]

Signed and delivered in the presence of
Banks Belk,
T. M. Hughes.

United States of America. }
State of *Nebraska*, } ss.
County of *Colfax*. }

Be it known, that on the *ninth* day of *February*, one thousand eight hundred and *ninety-seven*, before me, a notary public in and for said county and state, personally appeared *Richard Roe*, above named, who is to me known to be the person described in and who executed the above warrant of attorney, and acknowledged the same to be his voluntary act and deed.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal, the day and year last above written.

(SEAL) *Norton Porter*, Notary Public.[2]

Form No. 6088.[3]

To any one of the Attorneys of the *Supreme* Court *of Judicature* of the State of *New Jersey*, or any other Court of Record in said State:

These are to desire and authorize you to appear for me, *Richard*

1. **Need Not be Under Seal.** — Truett *v.* Wainwright, 9 Ill. 411; Kneedler's Appeal, 92 Pa. St. 428; Alexander *v.* Alexander, 85 Va. 353; Kinnersley *v.* Mussen, 5 Taunt. 264; Brutton *v.* Burton, 1 Chit. Rep. 707, 18 E. C. L. 209. Though formerly it was required to be under seal. 3 Black. Com. 397.

2. **Must be acknowledged**, as required of deeds, in some jurisdictions.

Missouri. — Rev. Stat. (1888), § 2232.

Oklahoma. — Stat. (1893), § 4294. See also list of statutes cited *supra*, note 2, p. 48, for similar provisions in other states.

Proof of execution of warrant of attorney should be made before the judgment is confessed, and when the judgment is confessed in vacation the evidence of that fact must appear in the record. Iglehart *v.* Chicago M. & F. Ins. Co., 35 Ill. 514; Gardner *v.* Bunn, 132 Ill. 409. But a recital in judgment of proof of execution of warrant is sufficient though no affidavit thereon appears in the record. Iglehart *v.* Church, 35 Ill. 255. The following affidavit may be used for this purpose: "State of *Illinois*, } ss. *Samuel Short* of *Cook* County. } *Chicago* in said county of *Cook*, being duly sworn, deposes and says that he is acquainted with the handwriting of said defendant *Richard Roe*, the maker of the annexed note and power of attorney, and deponent further says that the signature to the said note and power of attorney is the genuine signature of said *Richard Roe*.

Samuel Short.

Subscribed and sworn to before me this *first* day of *November*, A. D. 1897.

Calvin Clark, Clerk."

3. *New Jersey.* — Gen. Stat. (1896), p. 172, § 1 *et seq.*

Included in the body of any bond, bill, or other instrument, for the payment of money, shall be void and of none effect. N. J. Gen. Stat. (1895), p. 172, § 1.

A warrant by two persons authorizing judgment to be confessed "against us" does not authorize the entry of a judgment against one of them. Hunt *v.* Chamberlain, 8 N. J. L. 336. But in Croasdell *v.* Tallant, 83 Pa. St. 193, a warrant embraced in a promissory note, the note commencing thus, "or either of us promise to pay," the warrant running in these words, "and we empower any attorney to appear for us and confess judgment against us," etc., was held to authorize the entering of a judgment against the two survivors upon the death of one of the makers.

The bail piece, which may be annexed

Roe, in the said *Supreme* Court, or in any other court of record in the said state of *New Jersey*, or before any justice or judge of said courts, in term time or in vacation as of any term thereof, past, present or to come; and then and there to receive a declaration against me at the suit of *John Doe* of a plea of trespass on the case upon promises upon a promissory note given by me to the said *John Doe* bearing date the *ninth* day of *February*, one thousand eight hundred and *ninety-seven*, for the sum of *five hundred* dollars, payable on demand to *John Doe* or to his order, for value received, without defalcation or discount, and then and there to confess such action and a judgment thereon against me in favor of the said *John Doe* for the sum of *five hundred* dollars damages, besides costs, being the amount due on said promissory note, the said judgment to be thereupon forthwith entered up of record against me and execution issue thereon accordingly; and for so doing this shall be your sufficient warrant and authority. And I do hereby release and authorize you to release, any errors that may happen to be made in the confessing and entering up of such judgment, or in the form or actual issuing of any execution thereon against me.

Witness, my hand and seal this *ninth* day of *February*, in the year of our Lord one thousand eight hundred and *ninety-seven*.

Richard Roe. (SEAL)

Sealed and delivered in the presence of
Banks Belk,
T. M. Hughes.

to or indorsed upon the warrant of attorney, may be as follows:

"*Essex Circuit* Court.
Of the *February* Term, 1898.
Essex County, ss.

Richard Roe, having been served with process, is delivered to bail to *Samuel Short* and *Solomon Smith*, both of the city of *Newark*, in the county of *Essex*, state of *New Jersey*, at the suit of *John Doe* in a plea of trespass on the case upon promises. *Jeremiah Mason*,
Attorney for Defendant."

Wisconsin. — Sand. & B. Anno. Stat. Wis. (1889), § 2896, provides that in case the answer is signed by an attorney an instrument authorizing confession of judgment or entry shall be produced to the court or judge signing the judgment and shall be made a part of the judgment-roll. The following form of power of attorney is substantially the same as that used in Remington *v.* Cummings, 5 Wis. 139:

"Know all men by these presents: That whereas the subscriber is justly indebted to *John Doe* upon a certain promissory note bearing above date herewith payable *sixty* days after date to *John Doe* or order at the *Merchants National Bank of Milwaukee* for the sum of *three hundred and ninety-eight* dollars with interest at the rate of *six* per cent. per annum until paid. Now therefore, in consideration of the premises, we do hereby make, constitute and appoint *Daniel Webster*, or any attorney of any court of record, to be our true and lawful attorney irrevocable for us and in our name and stead to enter our appearance before any court of record in any term time or in vacation in any of the states or territories of the United States at any time after the said note becomes due, to waive the service of process and to confess judgment in favor of the said *John Doe* or his assigns on said note for the above sum for so much as shall appear to be due according to the tenor and effect of said note, and interest thereon at the rate of *six* per cent. per annum from the day of entry of the said judgment, together with costs, and also to file a cognovit for amount that may be so due and to release all errors that may intervene in entering up said judgment or in issuing execution thereon Hereby ratifying all which our said attorneys may do by virtue hereof. Witness my hand and seal at *Milwaukee* this *twenty-second* day of *December*, 1897. *Richard Roe.* (SEAL)"

2. Embraced in Another Instrument.[1]

Form No. 6089.

Know all men by these presents, that I, *Richard Roe*, of *Newcastle*, county and state of *Delaware*, am held and firmly bound unto *John Doe* of *Kent*, county and state of *Delaware*, in the sum

This section does not require an "instrument authorizing judgment to be confessed" to be distinct from the bond or note. Sloane *v.* Anderson, 57 Wis. 123.

1. Embraced in the body of a promissory note and forming a part thereof, in *Illinois* (Keith *v.* Kellogg, 97 Ill. 151), was the following warrant of attorney authorizing confession of judgment upon the note:

"And in case said sum, together with accrued interest thereon, shall not be paid when due, I authorize and empower any attorney at law in the state of *Illinois* to appear before any court of record in said state and confess judgment for the above mentioned sum and the accrued interest thereon, together with costs of suit and $459.00 for attorney's fees, said attorney's fees to be included in said judgment as a part of damages on said note, and to release all errors and waive all proceedings in the nature of a stay of execution, appeal or petition in error. In witness whereof I have hereunto subscribed my name and affixed my seal this *twenty-third* day of *January*, A. D. 1879.

H. M. Lyford. (SEAL)"

Embraced in a promissory note and forming a part thereof, in *Pennsylvania*, a warrant of attorney may be as follows:

"And I do hereby empower *Jeremiah Mason*, Esq., attorney of the Court *of Common Pleas* of Allegheny county, or any other attorney of said court, or any court of record in the state of *Pennsylvania*, to appear for me and, with or without declaration filed, to confess judgment against me upon this note for the sum therein mentioned, as of the last, next or any other subsequent term, with costs of suit, and release of all errors, with stay of execution for *three* months after the entry of said judgment."

In *Texas*, a note signed by several, concluding in the following words: "In case of the nonpayment of the above note at maturity, we hereby authorize any licensed attorney at law to appear for us in court, and to accept service, waive process and confess judgment in favor of the legal holder of said note against —— for the amount of said note and interest, with *ten* per cent. attorney's fees additional," was held not to authorize confession of judgment against all the makers or any particular one of them. Morris *v.* Bank of Commerce, 67 Tex. 602.

In *Virginia*, the following note and warrant of attorney may be used:

"*One* year after date, for value received, I promise to pay *John Doe* the just and full sum of *one thousand* dollars ($*1,000.00*), with legal interest thereon from *February 9th*, 1897. I hereby waive the benefit of my homestead exemption as to this debt. Given under my hand and seal, at *Charlottesville* this *ninth* day of *February*, 1897.

Richard Roe. (SEAL)

And I hereby authorize and appoint *Jeremiah Mason* my true and lawful attorney in fact for me and in my name to appear in the clerk's office of the *Circuit* Court of the *county* of *Albemarle*, in the state of *Virginia*, in an action of debt to be brought against me at the suit of the said *John Doe* on the above bond at any time after the maturity thereof, and confess judgment thereon against me for the sum of *one thousand* dollars, with interest thereon from the *ninth* day of *February*, 1897, till paid, and the costs of the suit. And I hereby release all manner of error in the entering of said judgment, or any process or proceedings thereon. Witness the following signature and seal, this *ninth* day of *February*, 1897.

Richard Roe. (SEAL)"

The word "holder" found in a promissory note containing a power of attorney to confess judgment without process in favor of the "holder" at any time is construed in Richards *v.* Barlow, 140 Mass. 218.

Attached to a sealed note, payable to the payee or bearer, a warrant of attorney authorizing "any attorney at law at any time after the above sum becomes due, with or without process, to appear for us in any court of record in the state of *Ohio* and confess judgment," etc., conferred no authority to confess

of *one thousand* dollars, lawful money of the United States of America, to be paid to the said *John Doe* or his certain attorney, executors, administrators or assigns, to which payment well and

judgment against the maker of the note in favor of the holder to whom the payee had transferred it. Spence *v.* Emerine, 46 Ohio St. 433.

Embraced in a lease and forming a part thereof, in *Pennsylvania*, a warrant of attorney may be as follows: "And further the said *Richard Roe* hereby empowers any attorney of any court of record in the said county of *Allegheny*, or elsewhere, to appear for him and confess judgment against him for such amount as may at any time be due and in arrears for rent, stipulated to be paid as aforesaid, together with costs."

A lease embracing a provision authorizing an attorney to appear for the lessee and confess judgment in ejectment has been held to be a sufficient warrant of attorney. Betz *v.* Valer, 39 Leg. Int. (Pa.) 190.

Embraced in a judgment bond with forfeiture clause, the warrant of attorney is often as follows:

"Know all men by these presents, that we, *Richard Roe* and *Samuel Short*, both of *Kent*, county and state of *Delaware*, are held and firmly bound unto *John Doe* of Kent, county and state of *Delaware*, in the sum of *two thousand* dollars, lawful money of the United States of America, to be paid to the said *John Doe* or his certain attorney, executors, administrators or assigns, to which payment well and truly to be made we jointly and severally bind ourselves, our heirs, executors and administrators, firmly by these presents. Sealed with our seals, and dated this *ninth* day of *February*, in the year of our Lord one thousand eight hundred and *ninety-seven*.

The condition of this obligation is such, that if the above bound *Richard Roe* and *Samuel Short*, their heirs, executors or administrators, or any of them, shall and do well and truly pay or cause to be paid unto the above named *John Doe*, his certain attorney, executors, administrators or assigns, the full sum of *one thousand* dollars, lawful money of the United States of America, with lawful interest for the same (*Here state times and manner of making payments*), on or before the *ninth* day of *February*, in the year of our Lord one thousand eight hundred and *ninety-eight*, without fraud or further delay, then this obligation to be void and of no effect, or else shall be and remain in full force and virtue.

Provided, however, and it is hereby expressly agreed, that if at any time default shall be made in the payment of said principal debt and interest as the same becomes due and payable, or any part thereof, for the space of *thirty* days after any payment thereof shall fall due, then and in such case the whole principal debt then unpaid shall, at the option of the said *John Doe*, his executors, administrators or assigns, become due and payable immediately, and payment of said principal then unpaid and all interest thereon may be enforced and recovered at once, anything herein contained to the contrary thereof notwithstanding.

And further, we do hereby jointly and severally authorize and empower any attorney or prothonotary of any court of record in the state of *Delaware*, or elsewhere, to appear for us and each or either of us, at the suit of the said *John Doe*, his executors, administrators or assigns, and thereupon to confess judgment for the above penalty to the said *John Doe*, his executors, administrators or assigns, as of the last, next or any other term or time after the date hereof.

And further, we do hereby jointly and severally release all and all manner of error or errors in any such judgment, and execution to be issued thereon.

Richard Roe. (SEAL)
Samuel Short. (SEAL)

Signed, sealed and delivered in the presence of *Banks Belk.*
T. M. Hughes."

Annexed to a bond may be a warrant of attorney authorizing an attorney to confess judgment upon the bond; and such warrant may be as follows:

"To any Attorney at Law of any Court of Record of the State of *New Jersey* or elsewhere:

These are to authorize you to appear for me in any of the said courts, in an action of debt brought or to be brought against me at the suit of *John Doe* named in the following bond, my executors, administrators or assigns, and thereupon confess judgment against me as of the last or any subsequent

truly to be made I bind myself, my heirs, executors and administrators, firmly by these presents.

Sealed with my seal, and dated this *ninth* day of *February*, in the year of our Lord one thousand eight hundred and *ninety-seven.*

The condition of this obligation is such, that if the above bound *Richard Roe*, his heirs, executors or administrators, or any of them, shall and do well and truly pay, or cause to be paid unto the above named *John Doe*, his certain attorney, executors, administrators or assigns, the full sum of *two hundred and fifty* dollars, lawful money of the United States of America, with lawful interest for the same, at the times and in the manner following, to wit: *one hundred* dollars on the *first* day of *July* in the year of our Lord one thousand eight hundred and *ninety-seven*; *one hundred* dollars on the *first* day of *December* in the year of our Lord one thousand eight hundred and *ninety-seven*; and the balance of said sum on or before the *ninth* day of *February* in the year of our Lord one thousand eight hundred and *ninety-eight*, without fraud or further delay, then this obligation to be void and of no effect, or else shall be and remain in full force and virtue.

And further, I do hereby authorize and empower any attorney or prothonotary of any court of record in the state of *Delaware*, or elsewhere, to appear for me at the suit of the said *John Doe*, his executors, administrators or assigns, and thereupon to confess judgment for the above penalty to the said *John Doe*, his executors, administrators or assigns, as of the last, next or any other term or time after the date hereof.

And further, I do hereby release all and all manner of error or errors in any such judgment, and execution to be issued thereon.

Richard Roe. (SEAL)

Signed, sealed and delivered in the presence of
Banks Belk,
T. M. Hughes.

term, for the sum mentioned in the said obligation, with costs of suit, agreeably to law, hereby releasing all errors, and this shall be your warrant.

In witness where of, I have hereunto set my hand and seal this *ninth* day of *February*, one thousand eight hundred and *ninety-seven.*

Richard Roe. (SEAL)

Signed, sealed and delivered in the presence of *Banks Belk.*
T. M. Hughes."

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I. WANT OF CONSIDERATION.[1]

1. How Pleaded — *General Allegation that Contract was Without Consideration.* — A general allegation that a note or contract "was without any consideration whatever" constitutes a good defense. Fisher *v.* Fisher, 113 Ind. 474; Beard *v.* Lofton, 102 Ind. 408; Moyer *v.* Brand, 102 Ind. 301; Moore *v.* Boyd, 95 Ind. 134; Bush *v.* Brown, 49 Ind. 573; Hunter *v.* McLaughlin, 43 Ind. 38; Billan *v.* Hercklebrath, 23 Ind. 71; Barner *v.* Morehead, 22 Ind. 354; Swope *v.* Fair, 18 Ind. 300; Webster *v.* Parker, 7 Ind. 185; Miller *v.* Brumbaugh, 7 Kan. 343; Foren *v.* Dealey, 4 Oregon 93. But a general averment of this character is controlled and completely nullified by a statement of facts and circumstances in the answer showing that it is untrue and that there was, in fact, a good and sufficient consideration. McCormick *v.* Barry, 01 Neb. 207; Foren *v.* Dealey, 4 Oregon 93. An answer "that defendant received no consideration for said note" is bad on demurrer. Bingham *v.* Kimball, 33 Ind. 184; Anderson *v.* Meeker, 31 Ind. 245. The answer should allege,

Form No. 6090.

(Precedent in Linn *v.* State Bank, 2 Ill. 87.)[1]

[In the *Jackson Circuit* Court.

——— Term, 1830.

William Linn
ats.
The President and Directors of the State Bank of Illinois. } Debt.][2]

And the said defendant comes and defends the wrong and injury, when, etc., and claims oyer of the said supposed writing obligatory in the said plaintiffs' declaration mentioned, and it is read to him in these words: (*Here was set out a copy of the sealed note.*) Which being read and heard, the said defendant says that the said plaintiffs ought not to have or maintain their said action against him, this defendant, because he says that the said writing obligatory was sealed and delivered by him to the said plaintiffs for the notes or bills issued and emitted by the said President and Directors of the said *State Bank of Illinois*, under and by virtue of an act of the General Assembly of the said State, entitled "An act establishing the State Bank of Illinois," passed in the year of our Lord 1821, which said act of the General Assembly is here inserted, and made a part of this plea. By which said act the said notes or bills of said bank are not redeemable or payable by said bank until after the expiration of ten years from and after the passage of the said act incorporating said bank, and from and after the time said notes or bills should be emitted and issued by said bank, which said notes or bills were issued or

not that no consideration was received by the party pleading, but that no consideration existed for the execution of the contract. 4 Encycl. of Pl. and Pr. 948.

Facts Showing Want of Consideration. — In some jurisdictions a plea of want of consideration must, besides showing the circumstances, distinctly allege that there was no other consideration than that mentioned. Boden *v.* Wright, 12 C. B. 445, 74 E. C. L. 444; Tittle *v.* Bonner, 53 Miss. 578. But in such a case, where the defendant pleads want of consideration without stating the facts upon which the defense is based, the answer is assailable, not by demurrer but by motion for more specific statement. Simpson Centenary College *v.* Bryan, 50 Iowa 293. And see Chamberlain *v.* Painesville, etc., R. Co., 15 Ohio St. 225, where it was held that an answer that a note is wholly without consideration is sufficient to let in evidence to impeach or sustain the consideration if the plaintiff joins issue without requiring a statement of the facts upon which the defense is based.

Sufficient Facts. — An answer, in an action on a nonnegotiable note by the assignee against the maker, which shows that the maker being security for the payee the latter deposited with him a chattel as a pledge for his indemnity, and thereupon a note was given merely as evidence of the deposit, is a good plea of want of consideration. Doan *v.* Moss, 20 Mo. 297.

1. The trial court sustained a demurrer to this plea, but upon error the supreme court reversed the judgment, holding that bills issued by the state bank were bills of credit issued by the state within the meaning of the constitution of the United States and were therefore void. Linn *v.* State Bank, 2 Ill. 87, *overruling* Snyder *v.* State Bank, 1 Ill. 161. See also Craig *v.* Missouri, 4 Pet. (U. S.) 410; Byrne *v.* Missouri, 8 Pet. (U. S.) 40; Briscoe *v.* Kentucky Com. Bank, 11 Pet. (U. S.) 257; Darrington *v.* Branch of Alabama State Bank, 13 How. (U. S.) 12.

2. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

emitted on the ——— day of *July*, 1821, and the emission and delivery thereof by the said plaintiffs to this defendant were the sole and only consideration for the said writing obligatory so executed as aforesaid, and for no other consideration whatever was the said writing obligatory so executed as aforesaid, for no other consideration whatever was the said writing obligatory executed, sealed and delivered by the defendant to the said plaintiffs; which said notes or bills so emitted, issued and delivered as aforesaid, by the said plaintiffs to this defendant, are bills of credit within the true intent and meaning of the Constitution of the United States; and so the defendant says, that the said writing obligatory in the plaintiffs' declaration mentioned, was sealed and delivered by this defendant to the said plaintiffs, without his having received of and from said plaintiffs any good or valuable consideration therefor, and this he is ready to verify, wherefore he prays judgment if the said plaintiffs ought to have or maintain their said action thereof against him, this defendant, etc.

S. Breese, for defendant.

Form No. 6091.

(Bullitt's Civ. Code Ky. (1895), p. 635, No. 96.)

Lee Circuit Court.

John Doe, plaintiff,
against
Richard Roe, defendant. } Answer of Defendant.

The defendant, *Richard Roe*, says that the writing (or *note* or *agreement*) in the petition mentioned, was executed without any consideration.

Jeremiah Mason, Attorney.

The defendant, *Richard Roe*, says that the statements (or *that he believes the statements*) of the foregoing answer are true.

Richard Roe.

Signed and sworn to by said *Richard Roe* this *first* day of *February*, 1898, before me, clerk of the *Lee Circuit* Court.

John Hancock, Clerk.

Form No. 6092.

State of *North Dakota*, } In the *District* Court,
County of *Burleigh*. } *Sixth* Judicial District.

John Doe, plaintiff,
against
Richard Roe, defendant. } Answer.

The defendant answering the plaintiff's complaint says:

I. That the note therein mentioned was given by the defendant solely for and on account of certain goods (*naming them*), sold and delivered to the defendant by the plaintiff, and without any other consideration therefor.*

II. That the plaintiff was not the owner of said goods so sold and delivered to the defendant, but the same were the property of one *Samuel Short*, who, in an action of replevin, on the *third* day of

January. 1898, recovered said property from the defendant, whereby the defendant has received no consideration for said note.

Joseph Story, Defendant's Attorney.

(*Verification.*)[1]

II. FAILURE OF CONSIDERATION.[2]

1. Partial Failure.[3]

a. In General.

Form No. 6093.

(Precedent in Purkett *v.* Gregory, 3 Ill. 44.)[4]

[(*Title of court and cause as in Form No. 6090.*)][5]

And the said defendants come and defend, etc., and say that as to

1. **Verification.** — For the form of verification in a particular jurisdiction see the title VERIFICATIONS.

2. **How Pleaded.** — In pleading a failure of consideration, the facts showing wherein the failure of consideration consists must be alleged. Sims *v.* Herzfeld, 93 Ala. 145; Carmelich *v.* Mims, 88 Ala. 335; Ahren *v.* Willis, 6 Fla. 359; Applegate *v.* Crawford, 2 Ind. 579; Mullikin *v.* Latchem, 7 Blackf. (Ind.) 136; Garrett *v.* Heaston, 5 Blackf. (Ind.) 349; Sheldon *v.* Lewis, 97 Ill. 640; Christopher *v.* Cheney, 64 Ill. 26; Parks *v.* Holmes, 22 Ill. 522; Vanlandingham *v.* Ryan, 17 Ill. 25; Evans *v.* Green County, 6 Ill. 654; Swain *v.* Cawood, 3 Ill. 505; Sims *v.* Klein, 1 Ill. 302; Bradshaw *v.* Newman, 1 Ill. 133; Poole *v.* Vanlandingham, 1 Ill. 47; Cornelius *v.* Vanorsdall, 1 Ill. 23; Billan *v.* Hercklebrath, 23 Ind. 71; Swope *v.* Fair, 18 Ind. 300; Staley *v.* Ivory, 65 Mo. 74; Clifton *v.* Brundage, 25 Tex. 331; Luckie *v.* McGlasson, 22 Tex. 282; 4 Encycl. of Pl. and Pr. 950.

As to when partial failure may be shown under a plea of total failure, see 4 Encycl. of Pl. and Pr. 951.

Where the consideration fails from a defect in goods sold, the nature of the defect should be stated as nearly as may be, and also the extent of the depreciation thereby caused. Castles *v.* Woodhouse, 1 Code Rep. (N. Y. Super. Ct.) 71; Deifendorff *v.* Gage, 7 Barb. (N. Y.) 18. And unless it be alleged that the property purchased is entirely worthless it should be alleged that the defendant returned or offered to return it. Hynson *v.* Dunn, 5 Ark. 395.

3. **For other pleas of partial failure** of consideration see as follows: Defective title to land purchased by executory contract and in defendant's possession. Bullitt's Civ. Code Ky. (1895), p. 636.

Fraud in the sale of land conveyed with warranty of title and in defendant's possession. Bullitt's Civ. Code Ky. (1895), p. 637.

Mistake as to quantity of land purchased. Bullitt's Civ. Code Ky. (1895), p. 637.

In Morgan *v.* Printup, 72 Ga. 67, the plea was held to show a partial failure of consideration. Omitting formal parts it was as follows:

"Defendant says the consideration for which the note for the *one* 6 H. P. Scofield engine was given has entirely failed, because he says plaintiffs warranted said engine to be full six-horse-power, and to be in good condition, in all which plaintiffs were mistaken, the engine not being full six-horsepower, nor was it in good condition, but was a source of annoyance and expense to the defendant almost from the time he first bought it until it finally broke down entirely and is now worthless. And of this he puts himself upon the country. And for further plea in this behalf, defendant says *actio non*, etc., because he says that the consideration of the gin note has failed, because he says that the gin was represented as a good gin, when, on the contrary, the ribs of said gin were made of inferior soft metal, and wore out the first season."

4. The circuit court sustained a demurrer to this plea, but the supreme court reversed the judgment and held that the plea was good as a plea of partial failure of consideration. Purkett *v.* Gregory, 3 Ill. 44.

5. The words to be supplied within [ ] will not be found in the reported case.

one hundred and sixty-three dollars, part of the debt in the petition mentioned, the plaintiff *actionem non*; because they say that on the *23d* day of *August*, 1836, the plaintiff sold to these defendants certain parcels of land situated in *Illinois*, being all the right and interest of said plaintiff in the *Illinois Land Association*, and also sold the defendants the dividends which the plaintiff was entitled to from the said association from the sale of choice lands in said association; and the plaintiff covenanted and agreed with defendants, to convey said lands to defendants, and to pay to the association presently, to wit, at the date aforesaid, the amount bid by said plaintiff for choice of lands in said association, and that said defendants should receive the dividend which said plaintiff was entitled to, arising out of the payment of choice money as aforesaid. In consideration of which sale and agreements on the part of the plaintiff, the defendants executed the note in the petition mentioned, and the defendants aver that the choice money to which the plaintiff was entitled from the association aforesaid, and which the said plaintiff covenanted that these defendants should receive, amounted to the sum of *one hundred and sixty-three* dollars. And they further aver that the said plaintiff hath not paid the amount bid by him for choice of lands in said association, in consequence of which failure of the plaintiff to pay said association the amount bid as aforesaid, the defendants have not received the dividend due said plaintiff, as said plaintiff covenanted that said defendants should receive. Wherefore the defendants say that the consideration for which said note in the petition mentioned was given, hath failed to the extent of *one hundred and sixty-three* dollars as aforesaid, all which they are ready to verify, etc. Wherefore [(*concluding as in Form No. 6090*).][1]

b. False Representations as to Value of Real Estate.

Form No. 6094.

(Precedent in Reamer *v.* Bell, 79 Pa. St. 293.)[2]

[In the Court *of Common Pleas*, No. *2*, of *Allegheny* County.

Thompson Bell
against
Josiah Reamer, Wesley Wilson and Samuel Short, copartners under the name of The Mahoning Iron Company.

October Term, 1875.
No. *118*.

Allegheny County, ss.

Josiah Reamer, one of the defendants in the above entitled cause,

1. The words to be supplied within [ ] will not be found in the reported case.

2. This affidavit was held sufficient to put the plaintiff on proof that he was a bona fide holder.

Precedent. — In Moeck *v.* Littell, 82 Pa. St. 354, it was held that the affidavit stated a good defense against the indorsee. Omitting the formal parts the affidavit was as follows:

"Affiant purchased from *John Rowley* the lease of tavern No. *31 Diamond Square, Pittsburgh*, and certain personal property therein contained, for the sum of $*1,700*; affiant paid the sum of $*500*

being duly sworn according to law, deposes and says][1] that as deponent is informed and verily believes, and expects to be able to prove on trial of this cause, the said plaintiff has no title to the note sued on. That said note was given (*inter alia*) in part payment of the purchase money of certain property, situated in *Mahoning* county, *Ohio*, sold to the deponent and others by *William Dilworth, Jr.* (payee of said note), and others, and said note was secured by a mortgage on said property. That suit for the foreclosure of said mortgage has lately been instituted in the Court *of Common Pleas* of *Mahoning* county, *Ohio*, wherein it appears, by the pleadings and by an affidavit filed on behalf of *William Dilworth, Jr.*, that said *William Dilworth, Jr.*, claims to be the owner of the note sued on in this case. And deponent says that said note was procured by false and fraudulent representations, in the first instance, in reference to the value of the property, in part payment of which said note was given; and that the defendants have a full, just and legal defense to the payment of said note and to the foreclosure of the mortgage aforesaid, in this, that the consideration therefor has failed; [and further affiant saith not.

Josiah Reamer.

Sworn to and subscribed before me this *first* day of *October*, 1875.
(SEAL) *Norton Porter*, Notary Public.][1]

in cash, and gave to said *Rowley* two notes, one of $500, payable in *three* months after date, on which suit has been brought and judgment entered, and the note in suit for $700, of which *Jacob Moeck, Jr.*, is the maker; that affiant procured the same to be indorsed by *Conrad Moeck* and *Jacob Moeck*, the present defendant, which making and indorsing was for the accommodation of this affiant, and at the same time for the purpose of securing the said *John Rowley* in his purchase money, and affiant says that the defendant, at the time of the indorsement of the said note, was not aware of the amount of the same, nor the real object for which it was given. Affiant further says that a large portion of the consideration of said notes and money was the value of certain personal property alleged to have been on the premises at the time the purchase was made, and which was alleged to have been in good condition by said *Rowley*; said *Rowley* further alleging that the tavern stand which was then established there, and which also constituted a part of the consideration of said notes and money, was a first-class stand, very valuable, and that it was to remain in the condition it was then, at the time of the purchase, about *January 4th*, 1875; whereas, in fact, the goods, property, etc., alleged to be on said premises at the time, were almost worthless, and the better portion of them were after the said purchase removed off the premises before its occupation by affiant, by either the said *Rowley* or some person acting in his behalf, as affiant expects to be able to prove; and whereas, also, the house was not a good or first-class stand, and almost entirely worthless. And the said *Rowley* having represented that it would remain in the condition it was then was also an inducement for affiant to purchase. Yet the same was in a very short time reduced to a condition entirely untenantable and had to be entirely abandoned, and the defendant avers that the consideration for the note in suit has not only entirely failed, but more than failed, but affiant further avers, expects to be able to prove and show on the trial of this case, that *James Littell*, the plaintiff above named, is not the owner and holder for value, and before the maturity of the note in suit, but the same was handed over to him by *John Rowley*, the payee, for the purpose of debarring the maker and indorser thereof from a defense to the same."

Compare the precedent in Hutchinson *v.* Boggs, 28 Pa. St. 295.

1. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

c. Want of Title to Part of Land Purchased by Executory Contract.

Form No. 6095.

(Bullitt's Civ. Code Ky. (1895), p. 636.)

(*Title of court and cause as in Form No. 6091.*)

The defendant says that, on the *first* day of *November*, 1897, in consideration of *five hundred* dollars which he then paid to the plaintiff, and of the note in the petition mentioned, the plaintiff signed and delivered to the defendant a covenant, of the date aforesaid, which is filed herewith, marked Exhibit *A*, and by which he covenanted to convey to the defendant a tract of land situate in *Lee* county, and bounded as follows: (*Here describe the land by abuttals or by metes and bounds*), and containing *two hundred and fifty* acres; and that, as the defendant has since discovered, the plaintiff had not then, and has not now, any title to *one hundred and fifty* acres of said land.[1]

Wherefore, the defendant asks for a credit of *four hundred and fifty* dollars on the note sued on, and for any other relief he may appear entitled to.

Jeremiah Mason, Attorney.

d. Failure to Procure Assignment of Lease of Property Sold to Defendant.

Form No. 6096.

(Precedent in Mann *v.* Smyser, 76 Ill. 367.)[2]

[(*Title of court and cause as in Form No. 6090.*)][3]

And for a further[4] plea in this behalf, defendant says *actio non*, because he says that the plaintiffs caused and procured the defendant to enter into the said agreement, and to promise as to the said first count of said declaration alleged, and the defendant was induced to enter into and make the said agreement and promises aforesaid through and by means of fraud, covin and misrepresentation of the plaintiffs and others in collusion with them, in this: that on the *29th* day of *July*, A. D. 1872, plaintiffs sold to defendant their warehouse, situated on the side of the *I. and St. L. R. R.* in the city of *Paris*,

1. **Rescinding Contract.** — If the defendant wishes to have the contract rescinded, he may state facts, if they exist, conducing to show that he would not have purchased the land if he had known that the plaintiff had no title to the one hundred and fifty acres, and then say: "and the defendant says that he is ready and willing to surrender to the plaintiff the aforesaid covenant, and the possession of said land, and to account for such rents and profits as he may be found chargeable with.

Wherefore, he makes this answer and counterclaim against the plaintiff, and asks that the note sued on may be canceled, and for a judgment against the plaintiff for *five hundred* dollars, paid to him as above stated, with interest thereon from the *first* day of *November*, 1897, and costs, and for a sale of that part of the said land to which plaintiff has title, to wit: (*Here describe the lands by abuttals or by metes and bounds*), for the satisfaction of said jndgment, and for any other relief the defendant may appear entitled to.

Jeremiah Mason, Attorney."

2. This was held by the supreme court to be a sufficient plea of partial failure of consideration.

3. The words and figures to be supplied within [ ] will not be found in the reported case.

4. The remaining pleas were not set out in the reported case.

Illinois, for the sum of $*1,500*, including one corn-sheller, etc.; that said defendant was induced to and did enter into said contract by representations of said plaintiffs that they could and would procure for him an assignment of the lease from said railroad company of the ground upon which said warehouse and appurtenances were situated, which said representations plaintiffs knew to be false and fraudulent at the time and place last aforesaid.

Defendant further avers, that plaintiffs made said representations to defendant as aforesaid, knowing them to be false, and that defendant, relying upon such representations, entered into said contract, and in payment thereof executed his notes, as follows: for the sum of $*500* each, payable in *four*, *eight* and *twelve* months, respectively, the last of which is the one declared on in said declaration, the other two having been fully paid and discharged by said defendant.

And the defendant says plaintiffs did not and could not, by the terms of their lease with said railroad company, procure an assignment of the grounds on which the said warehouse and appurtenances were situated, but that the said railroad company, after the said sale to defendant, before they would assign said lease of plaintiffs to defendant, took possession of a portion of the grounds upon which said warehouse and appurtenances were situated, and compelled the defendant to remove a portion of said warehouse, and deprived him of a portion of said ground to his great damage, to wit: the sum of $*500*, of all which the plaintiffs then and there had notice and this he is ready to verify, [(*concluding as in Form No. 6090*).][1]

2. Total Failure.

a. Defeasance.

Form No. 6097.

(Bullitt's Civ. Code Ky. (1895), p. 635.)

(*Title of court and cause as in Form No. 6091.*)

The defendant, *Richard Roe*, says that, by a written agreement executed simultaneously with the note sued on, and which is filed herewith, the plaintiff agreed that, unless he should deliver a certain jackass therein mentioned to the defendant within *ten* days thereafter, said note should be given up to the defendant; and that said jackass was not delivered to the defendant within said *ten* days, nor afterwards.

Jeremiah Mason, Attorney.

b. Fraud in Selling Horse of No Value.

Form No. 6098.

(Bullitt's Civ. Code Ky. (1895), p. 635.)[2]

(*Title of court and cause as in Form No. 6091.*)

The defendant, *Richard Roe*, says that the note sued on was given

1. The words and figures to be supplied within [ ] will not be found in the reported case.

2. See another plea of failure of consideration through fraud in selling personal property to the defendant, and an offer to return the property, in Bullitt's Civ. Code Ky. (1895), p. 636.

in consideration of a horse sold by the plaintiff to the defendant, and which the plaintiff falsely and fraudulently represented to the defendant as being sound, though, as the plaintiff knew, it was unsound and had a disease of which it died, and which made it of no value.

Jeremiah Mason, Attorney.

(*Verification as in Form No. 6091.*)

c. Breach of Warranty in Sale of Chattel.[1]

Form No. 6099.

(*Commencing as in Form No. 6092, and continuing down to* *.)

II. That, as the plaintiff then well knew, said goods were purchased by the defendant for (*naming the purpose for which they were bought*), and the plaintiff, as part of the contract of sale and consideration of said note, warranted and represented that said goods were fit and proper and suitable for such purpose.

III. That, as the plaintiff well knew, the defendant accepted and purchased said goods for (*naming the purpose for which they were bought*), trusting in the said representations and warranty of the plaintiff.

IV. That the said goods were not fit or proper for said purpose, for the reason that (*Here state wherein the goods were defective*), and have always been and are altogether useless to the defendant.

V. That as soon as the defendant learned the character of said goods he notified the plaintiff thereof and offered to return them, which he is still ready and willing to do.

Wherefore (*concluding as in Form No. 6092*).

d. Failure to Make Good Title to Real Estate.[2]

Form No. 6100.

(Precedent in Hulshizer *v.* Lamoreux, 58 Ill. 73.)[3]

1. Precedent. — In Beers *v.* Williams, 16 Ill. 69, the plea was held to be a good plea of failure of consideration. Omitting formal parts it was as follows:

"And the said defendant, by leave of the court, etc., comes and defends, etc., and to the first count of the said declaration says *actio non*, because they say, that the consideration for which the said note sued on was given was a boiler and fireplace manufactured by the said plaintiff, and the warranty that the said boiler and fireplace were reasonably fit and proper for the purpose they were intended, and for no other consideration. And the defendant avers that they were intended for driving the machinery of a grist and saw mill at *Virginia*, *Cass* county, *Illinois*, for which boiler and fireplace, and the warranty thereof, the defendant paid *three hundred* dollars cash, and executed the note sued on for the balance; and the said defendant avers that said boiler and fireplace were not reasonably fit and proper for the place they were intended as aforesaid, but, on the contrary, they were unfit and improper in this, that they were unsound and defective; in consequence of which unsoundness and defectiveness, upon full and proper trial thereof by said defendant, the said boiler and fireplace exploded, and they consequently failed to answer the purpose for which they were intended and warranted as aforesaid; wherefore, he says that the consideration of said note has wholly failed."

2. Precedents. — See also forms of affidavits of defense in Bronson *v.* Silverman, 77 Pa. St. 95; Garrett *v.* Crosson, 32 Pa. St. 374.

3. This plea was held to set up a good defense, since no right of action accrued on the note until the title to the land was conveyed.

[(*Title of court and cause as in Form No. 6090.*)][1]

And for a further[2] plea in this behalf to the said declaration, the defendant says *actio non*, because, he says, the only cause of action sued on in said declaration is said note described in the first count thereof, and the said declaration avers that the sole and only consideration for said note was the following described real estate, sold by *William Lamoreux*, deceased, in his lifetime, to said defendant, to wit: Lots Nos. 5 and 6, in block No. 6, in the town of *Mason City*, *Illinois*, which said sale of lots was evidenced by a certain bond executed by the said *William Lamoreux*, deceased, in his lifetime in substance, as follows: That is to say, *William Lamoreux* acknowledged himself to be held and firmly bound unto the said defendant in the penal sum of $*1,000*, to be paid unto the said defendant, his heirs, executors, administrators or assigns, to whom payment was well and truly to be made, he bound himself, heirs, executors and administrators, and every one of them, firmly by these presents, sealed with the seal of said *William Lamoreux*, deceased, and dated *November 28th*, 1867. The condition written under said bond was, after reciting that the said *William Lamoreux* had that day sold to said defendant the said lots above described, for the sum of $*1,200*, of which said sum $*300* was to be paid down at the ensealing and delivering of said bond, and the balance, $*900*, on the *1st* day of *June*, 1868, with *ten* per cent. interest from date; that upon payment of said sum being made at the time and in the manner aforesaid, the said *William Lamoreux*, for himself, his heirs, executors and assigns, covenanted and agreed to and with the said defendant, his heirs, executors, administrators and assigns, to execute a good and sufficient deed of conveyance in fee simple, free from all incumbrances, with full and proper covenants of warranty for the above described premises.

Now if the said *William Lamoreux* shall well and truly keep, observe and perform his said covenants and agreements herein contained, on his part, then the above obligation to be void, otherwise to remain in full force and virtue, which said bond was duly signed and sealed by the said *William Lamoreux*, and the said defendant avers that the said note set out in the first count is the only remaining note or amount yet unpaid on said note due or to become due, and the defendant avers that the said *William Lamoreux*, deceased, in his lifetime, nor his heirs, executors, administrators or assigns, since his decease, at any time before the commencement of this said suit, nor at any time since, executed or offered to execute or tender to the said defendant upon the payment of the balance due on said note, a good and sufficient deed of conveyance in fee simple, free from all incumbrances, with full and proper covenants of warranty for the above described town lots, all of which the said defendant is ready to verify, [(*concluding as in Form No. 6090*).][1]

1. The words and figures to be supplied within [ ] will not be found in the reported case.

2. A plea of the general issue is omitted from the reported case.

e. Nonperformance of Condition upon which Subscription for Stock was Made.

Form No. 6101.[1]

State of *Indiana*, } In the *Johnson Circuit* Court,
Johnson County. } *October* Term, 1897.

John Fletcher
against
David Taylor.

The above named defendant, in answer to the plaintiff's complaint herein, alleges, that on the *first* day of *July*, 1897, the *Evansville, Indianapolis and Cleveland Straight-Line Railroad Company* proposed to build a railroad from *Evansville* in this state, to *Indianapolis*, the capital thereof, and to run the line thereof on the east side of *White* river, in *Johnson* county, by doing which the said road would have run near the lands of defendant, and materially enhanced the value thereof; that in consideration of the premises, the defendant subscribed to the construction of said road the sum of *one hundred* dollars, to be paid when the work should be commenced on the end of the road south from *Indianapolis*; that on the *first* day of *September*, 1897, on the representation of said railroad company by its agents that the work had been commenced on said road on its northern end and immediately south of *Indianapolis*, the defendant executed the note sued on as and for his subscription aforesaid, and because of said representations; and the defendant avers the fact to be that said company never did commence any work upon the northern end of said road and immediately south of *Indianapolis*, or elsewhere, except on the southern and middle portions of the line. And so the defendant says, that the note was obtained from him by the fraud and false representations of the payee thereof, and is without consideration and void.

F. M. Finch, Attorney for Defendant.

(*Verification.*)[2]

III. Illegal Consideration.[3]

1. Note Given to Compound Offense.

Form No. 6102.

(Conn. Prac. Act, p. 211, No. 387.)

John Doe
vs.
Richard Roe.

Superior Court,
New Haven County,
January Term, 1880.

1. The above answer contains the statement of facts which was held to constitute a good defense in Taylor *v.* Fletcher, 15 Ind. 80.

2. **Verification.** — For the form of verification in a particular jurisdiction consult the title Verifications.

3. **How Pleaded.** — In pleading an illegal consideration, all the facts which constituted the consideration and which rendered it illegal must be pleaded. Fisher *v.* Fisher, 113 Ind. 474; 4 Encycl. of Pl. and Pr. 953; 1 Encycl. of Pl. and Pr. 144.

Answer.

1. On *May first*, 1879, at *Hartford*, one *James Roe*, the son of the defendant, had feloniously stolen and led away a horse, the property of the plaintiff.

2. The defendant, in order to compound and settle said felony, gave the note mentioned in the complaint, upon the agreement of the plaintiff to desist from giving any information of said felony.

Richard Roe,
By *Jeremiah Mason*, his Attorney.

Form No. 6103.

(Bullitt's Civ. Code Ky. (1895), p. 639.)

(*Title of court and cause as in Form No. 6091.*)

The defendant, *Richard Roe*, says that the consideration of the note sued on was (or *was to the extent of one hundred dollars*) the plaintiff's agreement to compound a felony alleged to have been committed by the defendant in the state of *Kentucky*.

Jeremiah Mason, Attorney.

(*Verification as in Form No. 6091.*)

Form No. 6104.

Supreme Court, *Suffolk* County.

John Doe, plaintiff,
against
Richard Roe, defendant. } Answer.

The above named defendant for answer to the plaintiff's complaint herein alleges:*

I. That on or about the *first* day of *August*, 1897, at the village of *Northport*, in said county of *Suffolk*, *Robert Roe*, a son of this defendant, feloniously took, stole and carried away from the store of said *John Doe*, in said village of *Northport*, two gold watches, of the value of *fifty* dollars each.[1]

II. That the said promissory note for *one hundred* dollars, upon which this action was brought, was made and delivered by this defendant to the said *John Doe* on the *fifth* day of *September*, 1897, in consideration that he, the said *John Doe*, would not institute any criminal prosecution against said *Robert Roe* for said offense, and would furnish no evidence tending to prove the same against him,[2]

1. In a plea that the consideration for a note was the compounding of an offense, it is not necessary to allege that an offense has been committed, if a prosecution has been commenced, but it is otherwise if no prosecution has been instituted. Cheltenham Fire-Brick Co. *v.* Cook, 44 Mo. 29; McCoy *v.* Green, 83 Mo. 631; Steuben Bank *v.* Mathewson, 5 Hill (N. Y.) 249; Portner *v.* Kirschner, 169 Pa. St. 472.

2. To avoid a contract on the ground that it was made to compound a felony it is necessary to show that there was some agreement or promise on the part of the obligee to forbear prosecution for the crime, or to suppress evidence that would tend to prove it. Barrett *v.* Weber, 125 N. Y. 18. But it is not necessary to allege in express terms that the maker of a note agreed to compound a crime. It is sufficient if such was the intention of the parties and the agreement was such as to carry out that intent. Conderman *v.* Trenchard, 58 Barb. (N. Y.) 165.

and for no other consideration whatever. That said note is therefore without consideration, and is illegal and void.

Benjamin F. Butler, Attorney for Defendant.

(*Verification.*)[1]

2. Note Given for Money Used or Lost in Gaming.[2]

Form No. 6105.

(Conn. Prac. Act, p. 211, No. 386.)

(*Title of court and cause as in Form No. 6102.*)

1. On *May 1st*, 1879, the defendant and the plaintiff played together at a game of chance, called *euchre*, for stakes, and, at said gaming, the plaintiff won $250 of the defendant.

2. The defendant gave the plaintiff the note mentioned in the complaint for said money so staked and lost.

Richard Roe,
By *Jeremiah Mason*, his Attorney.

1. For the form of verification in a particular jurisdiction consult the title VERIFICATIONS.

2. Money Used in Speculating in Futures. — In Benson *v.* Dublin Warehouse Co., 99 Ga. 304, it was held that a promissory note given for money advanced by the payee to the maker to be used "as margins in speculating in cotton futures," and which the lender had, in the maker's behalf, in fact "placed" for this purpose, is void, and that the court erred in striking out the defendant's plea setting up this defense. The plea in question, omitting the formal parts, was as follows:

"For further plea defendant says that the consideration of said notes was in whole or in part money advanced by said *Dublin Warehouse Company*, to be used as margins in speculating in cotton futures, or options and loans on same; that said company made such advances with full knowledge that the money was to be used by *Fortson & Co.*, as margins in speculating in cotton futures; and in fact said company placed the margins for *Fortson & Co.* Said transaction was a gaming contract, and the promise founded thereon is founded on an illegal consideration, and is not binding on defendant. For further plea defendant says, without admitting that any partnership existed between defendant and *Thomas E. Fortson* in the transactions out of which the debt sued on arose, if it should be held that they were partners, this defendant says that speculating in cotton futures was entirely outside the scope of the partnership business, and this was well known to plaintiff. The advances for speculative purposes were made to *Thomas E. Fortson*, and this defendant, when he signed the notes sued on, had no notice or knowledge of the fact that any portion of the debt for which said notes were given was for such advances. For further plea defendant says, all transactions between *Fortson & Co.* and plaintiff out of which the debt sued on arose were carried on by said company with *Thomas E. Fortson*, this defendant having no personal connection with or knowledge of them. All advances made by said company to *Thomas E. Fortson* in his dealings with it were charged on the books of said company to *Fortson & Co.*, and when defendant signed said notes he did so relying upon the correctness of said books and believing that they were proper charges against *Fortson & Co.* Since signing said notes he has ascertained, and now charges, that a considerable portion of said debt, to wit, *one thousand* dollars or other large sum, was for advances made *Thomas E. Fortson* individually as margins in buying and selling cotton futures, and defendant, when he signed the notes, was entirely mistaken as to the fact, and the mistake was brought about by plaintiff's conduct in improperly charging to *Fortson & Co.*, on its books, money advanced to *Thomas E. Fortson* individually.

And now comes *James A. Benson* and says that the notes sued on were given to close up an account claimed by

Form No. 6106.

(Bullitt's Civ. Code Ky. (1895), p. 639.)

(*Title of court and cause as in Form No. 6091.*)

The defendant, *Richard Roe*, says that the consideration of the note sued on was (or *was to the extent of one hundred dollars*) money lent by the plaintiff to the defendant for the purpose of gaming, and that said note was executed in the state of *Kentucky*.

Jeremiah Mason, Attorney.

(*Verification as in Form No. 6091.*)

Form No. 6107.[1]

State of *Minnesota*, } *District* Court,
County of *Ramsey*. } *Second* Judicial District.

John Doe, plaintiff,
against
Richard Roe, defendant. } Answer.

The above named defendant, for answer to the plaintiff's complaint herein, alleges:

I. That on the *first* day of *September*, 1897, in the city of *St. Paul*, in said county of *Ramsey*, the plaintiff and defendant gambled and played together with cards at a certain game known as *draw-poker*, for divers sums, on credit, and not for ready money, and that the plaintiff won from the defendant and defendant lost to plaintiff at said game the sum of *one hundred and twenty-five* dollars, no part of which was paid in money.

II. That the promissory note for the sum of *one hundred and twenty-five* dollars, upon which this action was brought, was on said day made and delivered by the defendant to said plaintiff in payment of said sum of *one hundred and twenty-five* dollars, so lost by gambling as aforesaid, and for no other consideration whatever.

plaintiff to be due it by *Fortson & Co.*, a firm of which it was claimed and alleged he was a partner. He says the account represented by these notes was the balance of account claimed by plaintiff against *Fortson & Co.*, a firm composed of *T. E. Fortson* and *J. A. Benson*, and was given to close up said account. He further says the said balance of account was the sole and only consideration of said notes. He further says, that under the allegations in his original plea and this amendment, the taking of these notes as above set forth was a fraud upon him. He further says that the whole of said notes was for money advanced to *Fortson & Co.*, for margins and losses put up in cotton speculations or futures, as set forth in the original plea. These speculations and dealings in futures being gambling operations when cotton was ostensibly bought where there was no expectation of delivery of property under the purchase, no skill or labor or expense entered into the consideration, but the same was a pure speculation upon chances, when it is a contract for a sale of goods to be delivered a future day, and where both parties are aware that the seller expected to purchase himself to fulfill his contract.

Defendant further says, that had he known at the time of indorsing said notes that the consideration, in whole or in part, was for gambling in future operations of cotton, as alleged, he would never have indorsed the same, and that he signed or indorsed the same believing it represented a legitimate debt due by *Fortson & Co.* to plaintiff."

For a plea in an action on an indorsed note under the statute 9 Ann. c. 14, against gaming, see 3 Went. Pl. 103.

1. *Minnesota*. — Stat. (1894), § 6594.
New York. — Birds. Rev. Stat. (1896), p. 270, § 4.

Wherefore the defendant demands judgment that said complaint be dismissed, that said promissory note be delivered up and canceled, and for his costs and disbursements herein, and for such other and further relief as to the court may seem just.

Gordon E. Cole,
Attorney for Defendant.

(*Verification.*)[1]

3. Note Given for Liquors Sold Without License.

Form No. 6108.

(Conn. Prac. Act, p. 211, No. 388.)

(*Title of court and cause as in Form No. 6102.*)

1. The only consideration for the note, mentioned in the complaint, was the illegal sale of intoxicating liquors, sold by the (payee) to said defendant in *New Haven*.

2. Said (seller), at the time of such sale, had no license for the sale thereof, as required by law.

Richard Roe,
By *Jeremiah Mason*, his Attorney.

4. Contract Against Public Policy.

Form No. 6109.

(Precedent in Board of Education *v.* Thompson, 33 Ohio St. 322.)[2]

[*The Board of Education of Hartford Township*, plaintiff, against *H. B. Thompson, A. O. Woodford and Asa Newman*, defendants. } Court of *Common Pleas*—*Trumbull* County. Answer.

The defendants above named, answering the plaintiff's petition herein, allege:][3]

1. That they are sureties merely of *Thompson*, for his accommodation, without their understanding what was the consideration, supposing it was for a lawful purpose; but they have since learned, and so aver the fact to be, that there was no legal or valid consideration therefor.

2. The said defendants say for a second defense that they signed said paper writing as sureties merely of said *Thompson*, and without any consideration, under the circumstances and suppositions hereinbefore stated, and not otherwise; and that they have now learned

1. For the form of verification in a particular jurisdiction consult the title VERIFICATIONS.

2. In this case it was held that the sureties were not estopped to set up the illegality of the transaction; and that although the plaintiffs might do any act in disaffirmance of such illegal contract and recover back the money illegally taken from the treasury, yet they could not, in the absence of statutory authority, adopt a contract made in violation of law.

3. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

and here aver the facts and circumstances of the making of said paper to have been as follows, and not otherwise: That on the *first Monday* of *April*, 1871, the said *Thompson* was duly elected treasurer of said township of *Hartford*, and was then duly qualified and entered upon the duties of his said office, and continued to be and was the treasurer of said township until the *first Monday* of *April*, 1872, when one *Elwin Bennett* was duly elected and qualified treasurer of said *Hartford* township, as his successor, and entered upon the duties of his office, and was and continued to be the treasurer of said *Hartford* township until the *first Monday* in *April*, 1873, and at the expiration of his said office the said *Thompson* had in his hands about *eight hundred* dollars of school funds for school purposes, which, according to the statutes in such case made and provided, it was the duty of said *Thompson* to have then, at the expiration of his term of service as such treasurer, to have delivered over to his successor in office, the said *Bennett*, as plaintiffs well knew, yet the plaintiffs, in contravention of the requirements and provisions of the statutes in such case made and provided, in utter disregard of their own duties, and thereby enticing and persuading and aiding and inducing the said *Thompson* to disregard his duty, and contemptuously disobey said statutes, made and induced him, the said *Thompson*, to withhold the delivery of said moneys, so then in his hands as treasurer, to his successor in office, by making and delivering to them, the plaintiffs, said writing set forth in said petition, all which was done by the plaintiffs as well as said *Thompson* in their own wrong, in contravention of the statutes, against public policy and good morals, and without any authority; whereupon these defendants submit that said writing is utterly void, and no just right of action hath accrued thereon and thereby to said plaintiffs.

[*Joseph Story*, Defendants' Attorney.][1]

IV. CONSIDERATION TAINTED WITH USURY.

Form No. 6110.

(*Commencing as in Form No. 6104, and continuing down to* *.)

I. That the promissory note mentioned in plaintiff's complaint was made and delivered to plaintiff upon the usurious agreement between defendant and plaintiff, that defendant should pay plaintiff, and that plaintiff should reserve and secure to himself for the loan of money, a greater sum than at the rate of *six* per cent. per annum,[2] to wit, at the rate of *twelve*[3] per cent. per annum.

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. The answer should state what the usurious agreement was, between whom made, and the amount of the usury; and a general allegation of usury is not sufficient. Griggs *v.* Howe, 31 Barb. (N. Y.) 100; Manning *v.* Tyler, 21 N. Y. 567. And where the answer sets up that the contract sued on is usurious according to the laws of a foreign state, the answer should first state what those laws were at the time of the transaction and then set out facts showing that the contract was void according to those laws. Mayer *v.* Louis, 12 Abb. Pr. N. S. (N. Y. Supreme Ct.) 5; Curtis *v.* Masten, 11 Paige (N. Y.) 15.

3. **Amount of Usury.** — A statement

II. That said sum was deducted and reserved from the amount of said note by plaintiff, and the balance only paid to this defendant; that is to say, that this defendant agreed to pay, and the plaintiff agreed to receive, *one hundred and twenty* dollars for said loan, the plaintiff reserving and securing to himself for the loan of money on said note, until the maturity thereof, *one hundred and twenty* dollars.

(*Signature and verification as in Form No. 6104.*)

that the amount of usury exacted was "about enough, as he said, to get him a barrel of flour, which amount defendant believes was about seven or eight dollars," was held sufficient. Dagal *v.* Simmons, 23 N. Y. 491.

CONSOLIDATION OF ACTIONS.[1]

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1. For statutes relating to the subject of consolidation of actions see as follows:

Alabama. — Code Civ. Proc. (1886), § 2742.

Arizona. — Rev. Stat. (1887), § 918.

Arkansas. — Sand. & H. Dig. (1894), §§ 5707, 5708.

California. — Code Civ. Proc. (1897), §§ 1048, 1195.

Colorado. — Mills' Anno. Stat. (1891), §§ 2888, 2890.

Florida. — Rev. Stat. (1892), § 1003.

Georgia. — 2 Code (1895), §§ 4846, 4943.

Idaho. — Rev. Stat. (1887), § 4926.

Illinois. — Starr & C. Anno. Stat. (1896), p. 2423, par. 53.

Indiana. — Burns' Anno. Stat. (1894), §§ 7251, 7260.

Iowa. — Anno. Code (1897), § 3644.

Kansas. — Gen. Stat. (1889), §§ 4228, 4229.

Louisiana. — Garland's Rev. Code (1894), §§ 442, 443.

Maryland. — Pub. Gen. Laws (1888), art. 50, §§ 7, 8.

Michigan. — How. Anno. Stat. (1882), §§ 7375, 7376.

Minnesota. — Stat. (1894), §§ 5271, 6238.

Missouri. — Rev. Stat. (1889), §§ 2189, 2190, 6221–6224.

Montana. — Code Civ. Proc. (1895), § 1894.

Nebraska. — Comp. Stat. (1897), §§ 5741, 5742.

Nevada. — Gen. Stat. (1885), § 3524.

New Jersey. — Gen. Stat. (1895), p. 2554, § 121; p. 2581, § 289.

New Mexico. — Laws (1897), p. 73, § 117.

New York. — Code Civ. Proc., §§ 817–819, 1989 (Birds. Rev. Stat. (1896), p. 19, §§ 34–36; p. 27, § 77).

North Dakota. — Rev. Codes (1895), § 5738.

Ohio. — Bates' Anno. Stat. (1897), § 5120.

Oklahoma. — Stat. (1893), §§ 4023, 4024.

Oregon. — Hill's Anno. Laws (1892), § 514.

Rhode Island. — Gen. Laws (1896), c. 233, § 21.

Utah. — Rev. Stat. (1898), § 3489.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 2792.

Wyoming. — Rev. Stat. (1887), § 2507.

I. By Plaintiff.

Form No. 6111.[1]

Supreme Court, *Suffolk* County.

John Doe, plaintiff,
against
Richard Roe, defendant.

Supreme Court, *Suffolk* County.

John Doe, plaintiff,
against
Samuel Short, defendant.

You will please take notice that the above entitled actions have been consolidated into one action by the plaintiff, and are hereafter for all purposes to be considered as one action.

May 10, 1897.

Jeremiah Mason, Attorney for the Plaintiff,
Northport, *N. Y.*

To *Joseph Story*, Esq.,
Defendant's Attorney.

II. By Motion and Order.

1. The Application.

a. Notice of Motion.[2]

Form No. 6112.[3]

Supreme Court, *Suffolk* County.

John Doe, plaintiff,
against
Richard Roe, defendant.

County Court, *Suffolk* County.

John Doe, plaintiff,
against
Richard Roe, defendant.

You will please take notice that upon the annexed affidavit and the pleadings in the above entitled actions the undersigned will move the court, at a *special* term thereof, to be held at the *county courthouse*, in the town of *Riverhead*,[4] on the *tenth* day of *May*, 1897, at *ten* o'clock in the *fore*noon of that day, or as soon thereafter as coun-

1. *New York.* — Code Civ. Proc., § 819 (Birds. Rev. Stat. (1896), p. 19, § 36).

2. For forms of notices of motion, generally, consult the title Motions.

3. *New York.* — Code Civ. Proc., § 817 (Birds. Rev. Stat. N. Y. (1896), p. 19, § 34).

4. **Where Made.** — Where the plaintiff at one time and against the same defendants brought a separate action in each of the counties of the state for one and the same libel, it was held that the motion to consolidate was properly made in the county in which all the parties resided. Percy *v.* Seward, 6 Abb. Pr. (N. Y. Supreme Ct.) 326.

sel can be heard, that these two actions be consolidated into one, [and that for that purpose the above entitled action in the *County* Court be removed into the *Supreme* Court and so there consolidated.][1]

May 1, 1897. *Joseph Story*, Attorney for Defendant,
Northport, *N. Y.*

To *Jeremiah Mason*, Esq.,
Attorney for Plaintiff.

b. Affidavit in Support of Motion.[2]

Form No. 6113.[3]

(*Title of the several causes as in Form No. 6112.*)

State of *New York*, } ss.
County of *Suffolk*. }

Richard Roe, being first duly sworn, says that he is the defendant in all the above entitled actions, which are pending in the courts above named, and in all of which the parties, plaintiffs and defendants, are the same; that each of said actions is brought upon a promissory note alleged to have been made by defendant;[4] that the defense in all these actions is the same, to wit, payment, as appears from copies of the answers hereto annexed, and that deponent is advised and believes that the questions which will arise and are to be tried are substantially the same in all of said actions (or *that defendant does not intend to interpose any defense to said actions*);[5] that the summons and complaint in said actions were served on this defendant respectively on the *fifteenth* and *seventeenth* days of *March*, 1897, and that the said causes are at issue by the service of his answer to the said complaint on the *first* day of *April*, 1897; that plaintiff has refused to consent to the consolidation of said actions, although requested by this deponent.

Richard Roe.

Subscribed and sworn to before me this *fifteenth* day of *April*, 1897.
Norton Porter, Notary Public *Suffolk* County.

1. **Removal of Cause.** — The removal of a cause pending in another court into the supreme court for the purpose of consolidation is authorized by N. Y. Code Civ. Proc., § 818 (Birds. Rev. Stat. N. Y. (1896), p. 19, § 35). Where both causes are pending in the same court, the words enclosed by [ ] should be omitted.

2. For forms of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

3. *New York.* — Code Civ. Proc., § 817 (Birds. Rev. Stat. (1896), p. 19, § 34).

4. It must appear that the causes of action are such as may be joined in the same declaration. Dunning *v.* Auburn Bank, 19 Wend. (N. Y.) 23.

5. It must be made to appear that the defense to all the notes or demands is the same, or that there is no defense. Gerding *v.* Anderson, 64 Ga. 304; Logan *v.* Mechanics' Bank, 13 Ga. 201; Worley *v.* Glentworth, 10 N. J. L. 241; Boyle *v.* Staten Island, etc., Land Co., 87 Hun (N. Y.), 233; Campbell Printing Press, etc., Co. *v.* Lyddy, 1 Civ. Proc. Rep. (N. Y. Marine Ct.) 364; Wilkinson *v.* Johnson, 4 Hill (N. Y.) 46; Dunning *v.* Auburn Bank, 19 Wend. (N. Y.) 23. And where there is a defense the nature thereof must be stated. Dunn *v.* Mason, 7 Hill (N. Y.) 154; Crane *v.* Koehler (N. Y. Com. Pl. 1858), *cited* in Percy *v.* Seward, 6 Abb. Pr. (N. Y. Supreme Ct.) 326.

c. Motion.[1]

Form No. 6114.[2]

State of *Ohio*, *Lucas* County, ss. } Court *of Common Pleas.*

John Doe, plaintiff, against *Richard Roe*, defendant. }

And now comes the above named defendant, by *Joseph Story*, his attorney, and moves the court here (or *and moves the Honorable John Marshall, one of the judges of said court*) to consolidate into one action the three several actions now pending in said court, in each of which said actions the above named *John Doe* is plaintiff and the above named *Richard Roe* is defendant, and which said actions could have been joined in one action.

Dated the *tenth* day of *May*, 1897.

Joseph Story, Defendant's Attorney.

2. The Order.[3]

a. Consolidating Actions.

(1) Generally.[4]

Form No. 6115.[5]

At a *Special* Term of the *Supreme* Court held in and for the County of *Suffolk*, at the *County Court-house* in *Riverhead*, in said County, on the *tenth* day of *May*, 1897.

Present: Hon. *Wilmot M. Smith*, Justice.

(*Title of the several causes as in Form No. 6112.*)

On reading and filing the defendant's affidavits in these actions (*enumerating all the motion papers*), and after hearing *Joseph Story*, Esq., for defendants, and *Jeremiah Mason*, Esq., for plaintiff,*

Ordered, that the † several causes above entitled be, and hereby are, consolidated into one action in this court, and that the several statements of the causes of action in the respective complaints stand as the complaint in said consolidated action (or *that the plaintiff have leave* or *be required to serve an amended complaint in the consolidated action within fifteen days from the service of this order*), and that the plaintiff pay the costs of the first action up to the date of this order, and *ten* dollars costs of this motion.[6]

Enter:

W. M. S., J. *S.* C.

1. For forms of motions, generally, consult the title Motions.

2. *Ohio.* — Bates' Anno. Stat. (1897), § 5120.

3. For forms of orders, generally, consult the title Orders.

4. **Precedents.** — See also orders in Dupignac *v.* Dupignac, 12 Civ. Proc. Rep. (N. Y. Supreme Ct.) 351; Den *v.* Kimble, 9 N. J. L. 338; Biron *v.* Edwards, 77 Wis. 479; The Rio Grande, 19 Wall. (U. S.) 179.

5. *New York.* — Code Civ. Proc., § 817 (Birds. Rev. Stat. (1896), p. 19, § 34).

6. **Costs.** — Where the court directs a consolidation of suits, it can only direct the costs of the rule to be paid by plaintiff and should leave the general costs to abide the result. Buie *v.* Kelly, 7 Jones L. (52 N. Car.) 266.

(2) And Removing Cause from Another Court.[1]

Form No. 6116.[2]

(*Commencing as in Form No. 6115, and continuing down to* †) above entitled action pending in the *County* Court be and hereby is removed to the *Supreme* Court, and that the several causes of action above entitled be and hereby are consolidated (*concluding as in Form No. 6115*).

(3) And Enjoining Further Proceedings at Law.

Form No. 6117.

(Precedent in Furman *v.* Greenville, etc., R. Co., 3 S. Car. 432.)

Isaac W. Hayne, Att'y Gen'l South Carolina,
vs.
The Greenville & Columbia Railroad Company.

Upon hearing the information filed by *Isaac W. Hayne, Attorney General*, on behalf of the State in the above case, on motion of said *Attorney General*, It is ordered, that *Thomas C. Perrin*, of *Abbeville* District, the Executor of *James M. Perrin*, *John B. Earle*, of *Greenville* District, and *George Sims*, of *Richland* District, parties who are represented as having commenced suit at law in the Court *of Common Pleas*, sitting for their districts respectively, against the *Greenville & Columbia Railroad Company*, be and they are hereby enjoined and restrained from the further prosecution of said suits at law, without leave had and obtained from this court; and writs of injunction are hereby ordered to issue from the Register of this court, against the said *Thomas C. Perrin, John B. Earle* and *George Sims*, requiring their observance of the above order.

It is further ordered, that all separate proceedings in the cases in equity of *Charles M. Furman*, Trustee, against the *Greenville and Columbia Railroad Company*, instituted in the District of *Richland*, and of *Benjamin F. Huger* and *John E. Phillips*, Trustee, against the *Greenville and Columbia Railroad Company*, instituted in the District of *Charleston*, be stayed; that the said cases from the date of this order be considered as consolidated with the above case, and that all future orders and proceedings in any of these cases be taken as in the case of *The Attorney General* against *The Greenville and Columbia Railroad Company, C. M. Furman, Trustee, et al.*, and that parties to to the two first named cases be notified of this order.

It is further ordered, that all persons whatever, having claims against the *Greenville and Columbia Railroad Company*, be and they are hereby stayed, restrained and enjoined from instituting and carrying on any suit or suits, or proceeding or proceedings, in any court in this State, against the *Greenville and Columbia Railroad Company*, except by proceedings in this case, or by leave of this court first obtained, and that this order be published by *James Tupper*, Esquire, one of

1. **Precedent.** — See Solomon *v.* Belden, 12 Abb. N. Cas. (N. Y. Supreme Ct.) 63.

2. *New York.* — Code Civ. Proc., § 818 (Birds. Rev. Stat. (1896), p. 19, § 35).

the Masters of this court, in at least one paper each in *Charleston*, *Columbia* and *Greenville*.

It is further ordered, that the above orders are without prejudice to the equities of the parties concerned, and that upon the coming in of the answers, and due notice given, application may be made to annul or modify the same.

April 1, 1868. *Henry D. Lesesne.*

b. Directing One Action to Abide the Event of Another.

Form No. 6118.[1]

(*Commencing as in Form No. 6115, and continuing down to* *.)

Ordered, that all the causes abide the event and final determination of one of them, which the plaintiff may select and notice for trial, and that proceedings in all the remaining actions be stayed until the trial of such selected action, and that whatever judgment may be finally rendered in the cause noticed for trial shall be entered in all the other causes,[2] unless the defendant consent that such remaining actions abide the event of the action tried, in case the defendant should appeal from any judgment recovered against him.

Enter. *W. M. S.*, J. *S.* C.

III. By Consent of Parties.

1. The Stipulation.[3]

Form No. 6119.

(Precedent in Pons *v.* Hart, 5 Fla. 458.)

William Proctor vs. *Isaiah D. Hart.* } Replevin for Slaves.

It is agreed between the counsel in this cause that the jury now impaneled in the case of *Isaiah D. Hart* vs. *John Pons*, be also sworn in this cause, and that the same be submitted to them, and that the court render such judgment in both causes as may seem right and proper from the finding of the jury.

Sanderson & Call,
For *Isaiah D. Hart.*
Philip Fraser,
For *Proctor & Pons.*

1. See, as authorizing this order under 2 N. Y. Rev. Stat. 480, § 38 (now Birds. Rev. Stat. N. Y. (1896), p. 19, § 34), Clark *v.* Metropolitan Bank, 5 Sandf. (N. Y.) 665.

2. **Liberty to Consolidate after Trial.** — If liberty to the defendant to move for a consolidation after trial is reserved, the following words should be here inserted: "with liberty to the defendant after such trial to move for a consolidation of the remaining suits, and with like liberty to the plaintiff to apply then for a consolidation."

3. **That One Cause Abide Event of Another.** — In Gillmore *v.* American Central Ins. Co., 65 Cal. 64, it was held that where two causes alike in every material respect, and having the same attorneys on both sides, are pending in the same court, a stipulation that one of them shall abide the determination of the other, and that final judgment may be entered in accordance with such

2. The Order.[1]

Form No. 6120.

(Precedent in Morgan County *v.* Thomas, 76 Ill. 136.)

[State of *Illinois*, County of *Morgan.* } ss. In the *Circuit* Court. To the *Special September* Term, 1873.

William Thomas et al. against *The County of Morgan et al.* } In Chancery.][2]

It is ordered, by consent, that the case of *William Thomas* against the *County of Morgan and others*, be tried with the case of the *County of Morgan* against *The Peoria, Pekin and Jacksonville Railroad Company and others*, as one suit.

2d. That the depositions taken in the case of the *County of Morgan* against the *Peoria, Pekin and Jacksonville Railroad Company*, may be read on the trial of said cases as so tried.

The foregoing stipulations shall in no respect diminish the rights of said *Thomas*, but he shall have and may exercise all the rights of which he would be possessed if his case were tried separately.

The foregoing stipulations shall extend to the cases of *M. H. L. Schooley* against *Morgan County and others*, and *B. S. West* against the same.

The foregoing stipulations shall in no respect diminish the rights of the *Peoria, Pekin and Jacksonville Railroad Company*, or the rights of *Isaac L. Morrison*, or the *County of Morgan*, but each and all of said parties shall have and may exercise all the rights of which he or they would be possessed if the cases were tried separately.

determination, does not lose its effect for the reason that a judgment rendered in the other case is reversed on the ground of error in overruling a demurrer to the complaint, the pleadings in that case being thereupon amended without making any substantial change in the issues and final judgment obtained on the merits. The stipulation in the case, omitting formal parts, was as follows:

"This cause being regularly called for trial, the parties appearing by their respective attorneys, and both parties consenting in open court that the issues in this cause are identical with those of the other action pending in this court, No. 4,799, entitled *Lucy Gilmore* v. *The Lycoming Fire Insurance Company of Muncy, Pa.*

It is stipulated and agreed that all proceedings herein shall be stayed until final judgment and decision in said action wherein the *Lycoming Fire Insurance Company of Muncy, Pa.*, is defendant, and in case of an appeal in said last named action, then said proceedings are stayed until the final determination of such appeal, and upon such final determination, judgment and decision in said action wherein said *The Lycoming*, etc., is defendant, either party, without notice, shall and may cause to be entered a judgment in this action corresponding to and like the said final judgment, and of the same date in said other action; and if such judgment shall be for the plaintiff, the amount for which the same shall be entered shall be *six hundred and fifty* dollars and costs; and if for the defendant, then for its costs allowed by law.

An order pursuant to this stipulation shall be entered in the minutes of this court, *12th May*, 1879."

Consolidation of Appeals. — For form of stipulation to consolidate appeals consult the title APPEALS, vol. 1, Form No. 1931.

1. For forms of orders, generally, consult the title ORDERS.

2. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

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By Jos. R. Long.

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CROSS-REFERENCES.

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For matters of Practice, see the title CONSPIRACY, 4 ENCYCLOPÆDIA OF PLEADING AND PRACTICE, p. 706.

For matters of Substantive Law, see the title CONSPIRACY, 6 AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW (2d ed.), p. 830.

I. CRIMINAL PROSECUTION FOR CONSPIRACY.[1]

1. For formal parts of an indictment, information or criminal complaint consult the titles INDICTMENTS; INFORMATIONS; CRIMINAL COMPLAINTS.

Conspirators, How Described. — An indictment charging the defendant with conspiring with divers others to the jury unknown, is good though the other conspirators were known to the jury and their names might have been set forth. People *v.* Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122.

Charge of Conspiracy. — Each count in an indictment for conspiracy must contain an express charge in itself of the conspiracy. Merely charging an overt act done in pursuance of a conspiracy set forth in a previous count, without any direct charge of a conspiracy, is not sufficient. State *v.* Norton, 23 N. J. L. 33. Thus where the fourth count in an indictment alleged the performance of an act in pursuance of "the said unlawful and corrupt conspiracy," but did not set forth what the said conspiracy was, the count was held bad. U. S. *v.* Reichert, 32 Fed. Rep. 142.

"Unlawfully." — The use of the word "unlawfully" is unnecessary, though usual. The term "conspiracy" of itself implies illegality. Scholtz's Case, 5 C. H. Rec. (N. Y.) 112.

"Did conspire, combine, confederate and agree together" is the most approved manner of charging the conspiracy, and while undoubtedly not absolutely essential this form should be observed unless the indictment be drawn under a statute using other language. 3 Russell on Crimes 159; 3 Chit. Cr. L. 143.

Object of Conspiracy. — To constitute a conspiracy the purpose to be effected by it must be unlawful, either in respect of its nature or in respect of the means to be employed for its accomplishment, and the intended act, where it has not a common-law name to import its nature, must, in order to show its illegality, be set forth in an indictment for conspiracy with as much certainty as would be necessary in an indictment for the perpetration of it, otherwise it would not be shown to be criminal, nor would the confederates be shown to be guilty. Hartmann *v.* Com., 5 Pa. St. 60; State *v.* Crowley, 41 Wis. 271.

It is never enough that the purpose or the means are so described that they may be unlawful. If that is left uncertain, the indictment is fatally defective. It must appear to the court that, if the facts alleged are proved as they are stated, without any additional fact or circumstance, there can be no doubt of the illegality of the conduct charged, nor of its criminality. State *v.* Parker, 43 N. H. 83. If the facts averred in an indictment for conspiracy do not amount to the crime, the indictment is not aided by matter preceding or following the direct averments, as that the defendants acted unlawfully, deceitfully, unjustly, to the great damage, etc. Com. *v.* Hunt, 4 Met. (Mass.) 111.

Alleging Means. — It is well settled that where the conspiracy is to do an act in itself unlawful it is not necessary to set forth the particular means by which the conspirators intended to effect the illegal object. It is sufficient to aver the act of conspiring and the illegal object of the conspiracy. But where the object of the conspiracy is lawful or indifferent, and the act of conspiring becomes indictable only because of the illegal means intended to be employed, the means must be fully alleged. 3 Russell on Crimes, 148, 149.

Iowa. — State *v.* Jones, 13 Iowa 269; State *v.* Potter, 28 Iowa 554; State *v.* Stevens, 30 Iowa 391; State *v.* Harris, 38 Iowa 242; State *v.* Savoye, 48 Iowa 562; State *v.* Grant, 86 Iowa 216.

Maine. — State *v.* Ripley, 31 Me. 386; State *v.* Roberts, 34 Me. 320; State *v.* Mayberry, 48 Me. 218.

Massachusetts. — Com. *v.* Hunt, 4 Met. (Mass.) 111; Com. *v.* Shedd, 7 Cush. (Mass.) 514.

Michigan. — People *v.* Richards, 1 Mich. 216; Alderman *v.* People, 4 Mich. 414; People *v.* Clark, 10 Mich. 310; People *v.* Arnold, 46 Mich. 268; People *v.* Petheram, 64 Mich. 252.

New Hampshire. — State *v.* Burnham, 15 N. H. 396; State *v.* Parker, 43 N. H. 83.

New York. — People *v.* Everest, 51 Hun (N. Y.) 19; Cromwell's Case, 3 C. H. Rec. (N. Y.) 35.

Vermont. — State *v.* Noyes, 25 Vt. 415; State *v.* Keach, 40 Vt. 113.

Wisconsin. — State *v.* Crowley, 41 Wis. 271.

United States. — Pettibone *v.* U. S., 148 U. S. 197.

England. — Reg. *v.* Seward, 3 N. & M. 557, 1 Ad. & El. 706, 28 E. C. L. 185; Rex *v.* Fowler, 1 East P. C. 461, note. See also Rex *v.* Tanner, 1 Esp. N. P. 306; Rex *v.* Edwards, 8 Mod. 320.

An elaborate review of the general doctrine as to alleging the means intended to be employed in effecting the object of a conspiracy is to be found in Com. *v.* Barger, 14 Phila. (Pa.) 368. In this case Hare, P. J., said: "The subject * * * may be considered under the following heads: 1st. Where the end which the alleged conspirators have in view is criminal and punishable as such at common law. 2d. Where it is innocent, and the offense consists in an agreement to accomplish it by unlawful means. 3d. Where, though not criminal at common law, it is made punishable by statute. 4th. Where the accused are charged with combining to effect an end, which, though unlawful, would not have been criminal had it been the act of one—as where it is agreed that A shall tell a falsehood with intent to cheat, and B corroborate it. 5th. Where combining to effect an unlawful purpose has been made punishable by statute, without regard to the means employed, if they are such as tend to the accomplishment of the end. All the authorities concur that where the offense charged is an agreement to commit a crime, it is not necessary to set forth the intended means, because these may be known only to the guilty parties, and may vary with time, or as opportunity offers. * * * It is not less clear under the authorities, and on principle, that an indictment for a conspiracy to effect a lawful object is demurrable unless it avers that the parties agreed to use some unlawful means, which must be described with certainty as being the gist of the offense. The question which arises under the third head is more complicated, but seemingly depends on whether the statute makes the act punishable at all events, or only when it is accomplished by certain means; for in the latter case what is really forbidden is the means, and these must be set forth in order to show that the defendants designed to violate the statute. The fourth head presents the following question: Is a joint scheme to defraud punishable at common law, irrespective of the means by which the parties intend to carry it into effect? * * * The better opinion would seem to be that such a conspiracy is criminal *per se*, and if so, nothing more is requisite than to allege and prove that it exists. * * * Where a statute declares that it shall be criminal to conspire for the attainment of a certain end, it will be enough to aver that the parties so combined, contrary to the statute, and the pleader need not set forth the means by which they proposed to make their intent effectual."

This opinion was referred to with approval in 2 Whart. Cr. L. (9th ed.) 190, note. The particular conspiracy before the court fell under the fifth class and the indictment was held sufficient without alleging the specific means (*overruling* Com. *v.* Bracken, 14 Phila. (Pa.) 342).

Allegation of Overt Acts. — Where the conspiracy is itself unlawful, it is not necessary to set forth in the indictment acts done by the conspirators in pursuance of the unlawful agreement; the gist of the offense is the conspiracy. 2 Whart. Cr. L., § 2335.

Michigan. — People *v.* Richards, 1 Mich. 216; Alderman *v.* People, 4 Mich. 414; People *v.* Saunders, 25 Mich. 119; People *v.* Arnold, 46 Mich. 268; People *v.* Dyer, 79 Mich. 480.

New York. — Lambert *v.* People, 9 Cow. (N. Y.) 578; People *v.* Chase, 16 Barb. (N. Y.) 495; People *v.* Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; *contra* now in *New York* by statute, except in certain cases.

Vermont. — State *v.* Noyes, 25 Vt. 415.

England. — Rex *v.* Eccles, 1 Leach, C. C. 274; Reg. *v.* Best, 1 Salk. 174; Rex *v.* Seward, 1 Ad. & El. 706, 28 E. C. L. 185, 3 N. & M. 557. Rex *v.* Kinnersley, 1 Stra. 193.

But in several states it is provided by statute that no agreement, except to commit a felony upon the person of another, or to commit arson or burglary, shall be deemed a conspiracy, unless some act besides such agreement be done to effect the object thereof, by one or more of the parties to such agreement.

California. — Pen. Code (1897), § 184.

Minnesota. — Stat. (1894), § 6425

Missouri. — Rev. Stat. (1889), § 3781.

Montana. — Pen. Code (1895), § 323.

New Jersey. — Gen. Stat. (1895), p. 1093; Wood *v.* State, 47 N. J. L. 180.

New York. — Pen. Code, § 171; People *v.* Chase, 16 Barb. (N. Y.) 495.

North Dakota. — Rev. Codes (1895), §§ 7040, 8194.

South Dakota. — Dak. Comp. Laws (1887), §§ 6427, 7383.

Tennessee. — Code (1896), § 6695.

Utah. — Rev. Stat. (1898), § 4158.

Wisconsin. — Anno. Stat. (1889), § 4568.

See also

1. Falsely to Charge One with Criminal Offense.

Arkansas. — Sand. & H. Dig. (1894), §§ 1505–1509.

Kansas. — Gen. Stat. (1889), § 5277.

The *New Jersey* statute, in requiring an overt act, does not exact a full execution of the conspiracy to render it indictable. State *v.* Hickling, 41 N. J. L. 208, 32 Am. Rep. 198; Madden *v.* State, 57 N. J. L. 324. Nor must it be understood that the acts set out constitute all the means used to accomplish the object of the conspiracy. Madden *v.* State, 57 N. J. L. 324; State *v.* Young, 37 N. J. L. 184.

An indictment charging a conspiracy to do an act in itself criminal, and also the commission of such act, is not bad for duplicity, where no conviction is sought on account of the overt acts. State *v.* Grant, 86 Iowa 216. See also State *v.* Kennedy, 63 Iowa 197.

If an indictment for conspiracy is insufficient, the defective allegations are not aided by averments of overt acts done in pursuance of the conspiracy. Reg. *v.* King, 7 Q. B. 782, 53 E. C. L. 782; U. S. *v.* Britton, 108 U. S. 199; U. S. *v.* Walsh, 5 Dill. (U. S.) 58; Com. *v.* Shedd, 7 Cush. (Mass.) 514; Com. *v.* Wallace, 16 Gray (Mass.) 221; People *v.* Arnold, 46 Mich. 268. But see Reg. *v.* Wright, 2 Cox C. C. 336.

An indictment failing to aver the venue of the overt acts done in pursuance of the conspiracy is bad. People *v.* Barrett, 1 Johns. (N. Y.) 66.

For other forms of indictments for conspiracy see as follows:

To steal title deeds. 4 Cox C. C. Appendix xviii.

To solicit tenants to break their contracts with their landlords, and to refuse to pay their rent. Reg. *v.* Parnell, 14 Cox C. C. 508.

Wrongfully to charge the inhabitants of a parish with the maintenance of a child. 1 Cox C. C. Appendix xi.

To extort a deed by arresting and imprisoning the prosecutor under color and pretense of legal process. State *v.* Shooter, 8 Rich. L. (S. Car.) 72.

By the employees of a dyer to use the vats and dyes of their employer for their own profit, in violation of their duty. Reg. *v.* Button, 3 Cox C. C. 229.

To convey, possess and settle public lands under a pretended title not derived from the state. Com. *v.* Franklin, 4 Dall. (Pa.) 255.

To sell lottery tickets. Com. *v.* Gillespie, 7 S. & R. (Pa.) 469; Com. *v.* Sylvester, 6 Pa. L. J. 283.

To enter upon lands and hold same. Wilson *v.* Com., 96 Pa. St. 56.

To prevent use of English language in a German church. Com. *v.* Eberle, 3 S. & R. (Pa.) 9.

To remove goods in contemplation of bankruptcy. Heymann *v.* Reg., 12 Cox C. C. 383.

To abduct a young girl of property and cause her to be married without the consent or knowledge of her parents in order to secure her estate. Wakefield's Case, 2 Lew. C. C. 1.

To marry a young man of fortune to a woman of inferior character and condition. Rex *v.* Thorp, 5 Mod. 218; Rex *v.* Serjeant, R. & M. 352, 21 E. C. L. 453.

1. For the formal parts of an indictment, information or criminal complaint in a particular jurisdiction consult the titles INDICTMENTS; INFORMATIONS; CRIMINAL COMPLAINTS.

Averment of Overt Acts. — In several states it is made a misdemeanor for two or more persons to conspire falsely and maliciously to indict another for any offense, or to procure another to be charged or arrested for any such offense, or falsely to move or maintain any suit; but no such agreement shall be deemed a conspiracy unless some act besides such agreement be done to effect the object thereof, by one or more of the parties thereto; and in the following states the indictment must aver some overt act done in pursuance of the conspiracy.

California. — Pen. Code (1897), §§ 182, 184.

Minnesota. — Stat. (1894), §§ 3780, 3781.

Montana. — Pen. Code (1895), §§ 320–325.

New Jersey. — Gen. Stat. (1895), p. 1093, § 236.

New York. — Pen. Code, § 171; Birds. Rev. Stat. (1896), p. 588, § 4.

North Dakota. — Rev. Codes (1895), §§ 7037, 7040, 8194.

South Dakota. — Dak. Comp. Laws (1887), §§ 6425, 6427, 7383.

Tennessee. — Code (1896), § 6695.

Utah. — Rev. Stat. (1898), § 4158.

In other states, however, an averment of overt acts is not necessary.

Colorado. — Mills' Anno. Stat. (1891), § 1294.

a. Of Adultery.

Form No. 6121.[1]

Commonwealth of *Massachusetts*, } ss.
County of *Suffolk*. }

At the *Superior* Court begun and holden at *Boston* within and for the county of *Suffolk*, on the *first Monday* of *January*, in the year of our Lord one thousand eight hundred and *ninety-eight*.*

The jurors for the *commonwealth* of *Massachusetts* upon their oath present:

That *Michael O'Brien*, *William Clark*, and *Jane Harper*, all of said *Boston*, on the *seventh* day of *January*, in the year of our Lord

Idaho. — Rev. Stat. (1887), § 6540.

Illinois. — Starr & C. Anno. Stat. (1896), c. 38, § 45.

Mississippi. — Anno. Code (1892), § 1006.

Nebraska.—Comp. Stat. (1897), § 6842.

New Mexico. — Comp. Laws, § 845.

Wyoming. — Rev. Stat. (1887), § 960.

And where the statute requires an overt act it does not exact a full execution of the conspiracy to render it indictable. Thus, where in an indictment for conspiracy to slander a person by accusing him of theft, the overt acts laid were in substance that the defendants "reported to and among his neighbors that the said *Dringer* was a thief; and had dishonestly obtained certain brass, copper, etc., from, etc.; that they made false affidavits that said *Dringer* was a dishonest man, and had obtained fraudulently from the *Erie company* a large amount of copper, brass, etc., and other things fraudulently and in such a manner as to make it stealing by said *Dringer* from said company," it was contended that the allegation was of nothing more than a conspiracy to defame a person by the propagation of slander, and that the wrong was a civil injury and not a criminal offense. The court held otherwise, and that it was only necessary to allege that some act was done to effect the object of the conspiracy. State *v.* Hickling, 41 N. J. L. 208, 32 Am. Rep. 198.

The gist of the offense is the conspiracy, and acts done in pursuance of it being only matter of aggravation, any informality or uncertainty in alleging such acts will not vitiate the indictment. Com. *v.* Knowlton, 2 Mass. 530; Rex *v.* Rispal, 3 Burr. 1320.

Innocence of Prosecutor. — If the conspiracy be laid falsely, it is not necessary to aver the innocence of the prosecutor. Reg. *v.* Best, 1 Salk. 174, Holt 151, 2 Ld. Raym. 1167, Reg. *v.* Hollingberry, 6 D. & R. 345, 16 E. C. L. 262; State *v.* Locklin, 81 Me. 251; Johnson *v.* State, 26 N. J. L. 313. And an indictment for a conspiracy to indict for a capital offense is good although the word falsely is not added to the first charge of the conspiracy, nor the particular crime there specified, and although it is not alleged that the person charged was acquitted. Rex *v.* Spragg, 2 Burr. 993.

For other forms of indictments for conspiracy falsely to charge one with a criminal offense see as follows.

Arson.— People *v.* Dyer, 79 Mich. 480.

Corruption of Public Officer. — Rex *v.* Fowke, 20 How. St. Tr. 1185; Rex *v.* Fowle, 20 How. St. Tr. 1077.

Forgery. — 4 Wentw. Pl. 86.

Keeping Bawdy-house. — 2 Cox C. C. Appendix xxv.

Keeping Gaming-house. — Reg. *v.* Hollingberry, 6 D. & R. 345, 16 E. C. L. 262.

Poisoning Horse. — 4 Wentw. Pl. 98.

Receiving Stolen Goods. — Davis' Prec. 100.

Sodomy. — Rex *v.* Kinnersley, 1 Stra. 193.

1. This form is substantially the second count of the indictment in Com. *v.* O'Brien, 12 Cush. (Mass.) 85, in which case the defendants having been convicted, moved in arrest of judgment for the reasons that the count was bad in that it set forth an executed conspiracy to commit a felony and the misdemeanor was merged in the felony, also because it was double, vague, uncertain and contradictory, and did not set forth the offense with sufficient certainty and precision; but the motion was overruled. See also as to merger Johnson *v.* State, 26 N. J. L. 313.

Sufficient Indictment. — Where an indictment charged that a man and a woman falsely and maliciously conspired "to charge and accuse" one F.

eighteen hundred and *ninety-seven*, at *Boston*, aforesaid, being evil-disposed persons, devising and intending unjustly, fraudulently and maliciously to deprive the said *Samuel Bigelow* of his good name and character, and to subject him, without any just cause, to the punishment prescribed by law for the crime of fornication and adultery, and to extort from him, the said *Bigelow*,[1] money; to wit, the sum of *one thousand* dollars, did falsely, unlawfully, wickedly and maliciously, combine, conspire, confederate, and agree together, to entrap, seduce, and insnare, and falsely to charge and accuse him, the said *Bigelow*, of the crime of adultery, and thereby, by the means aforesaid,[2] to extort from him, the said *Bigelow*, money, to wit, *one thousand* dollars, and in pursuance of said agreement, conspiracy, combination, and confederacy, she, the said *Jane Harper*, did invite, entice, allure, and attempt to seduce the said *Bigelow* to visit her at the house of said *O'Brien* and *Clark*, being a house in the rear of the house numbered *fifteen* in *Bedford* street in said *Boston*, on said *seventh* day of *January*, in the evening of that day, and in further pursuance of said unlawful and fraudulent conspiracy, combination, and confederacy, they, the said *Michael O'Brien* and *William Clark*, at *Boston* aforesaid, on the *fifteenth* day of *January*, in the year of our Lord eighteen hundred and *ninety-seven*, and on divers other days, did maliciously threaten to accuse him, the said *Bigelow*, of the crime of fornication and adultery with the said *Jane Harper*, he, the said *Bigelow*, then and there being a married man, and having a lawful wife alive, to wit, one *Mary Ann Bigelow*, with intent then and there unjustly, fraudulently, and unlawfully to obtain and extort from the said *Bigelow*, by the means aforesaid, and thereby, his money and property, to wit, the sum of *one thousand* dollars, for compounding and settling for the said pretended crime of adultery; and in further pursuance of said unlawful and fraudulent conspiracy, combination, and confederacy, they, the said *O'Brien* and *Clark*, on

that he had committed the crime of adultery with the woman "with intent thereby then and there unjustly and unlawfully to obtain and acquire to them" divers sums of money of the said F., "for compounding the said pretended adultery so falsely and maliciously charged on him as aforesaid," it was held that the indictment charged an offense with sufficient certainty. Com. *v.* Andrews, 132 Mass. 263.

Insufficient Indictment. — Where the proof was that the defendants conspired to charge Baer with having seduced and committed adultery with one Abbie Hadley, and the indictment charged that the defendants "did conspire, combine, confederate and agree together to charge and accuse one *Bernhard Baer* that he had then lately before made a felonious assault upon the said *Abbie Hadley*, with intent the said *Abbie Hadley*, at *Newmarket*, in the county of *Rockingham*, in the state aforesaid, feloniously to ravish and carnally know, by force and against her will, with intent unjustly to obtain and acquire to them, the said *Albert Hadley*, *Abbie Hadley* and *George T. Wentworth*, of and from him, the said *Bernhard Baer*, divers sums of money for compounding the said pretended felonious assault so falsely, wickedly and maliciously charged on him as aforesaid, to the great damage of him the said *Bernhard Baer*," the variance was held to be fatal to a conviction under the indictment. State *v.* Hadley, 54 N. H. 224.

1. A charge of a conspiracy to extort money without saying from whom is too general and cannot be sustained. Com. *v.* Andrews, 132 Mass. 263.

2. It is not necessary to set out the means in the charge of conspiracy. Com. *v.* O'Brien, 12 Cush. (Mass.) 84.

the day last aforesaid, at *Boston* aforesaid, did unjustly and maliciously threaten to injure the name and reputation of the said *Bigelow*, and to begin a prosecution against said *Bigelow* for the pretended crime of adultery and fornication with said *Jane Harper*, with intent by such unjust and malicious threats, to extort money from the said *Bigelow*, against the law, peace and dignity of this *commonwealth*.

Daniel Webster, District Attorney.

b. Of Attempt at Murder.

Form No. 6122.

(Precedent in State *v.* Locklin, 81 Me. 251.)[1]

[State of *Maine*.

Franklin, ss. At the *Supreme Judicial* Court begun and held at *Farmington* within and for said county of *Franklin*, on the *second Tuesday* of *November* in the year of our Lord eighteen hundred and *eighty-eight*.][2]

The jurors for the said state, upon their oath present,* that *Abner Searles* and *Elijah W. Locklin*, both of *Rangely* in said county of *Franklin*, at *Rangely* in said county of *Franklin*, on the *fourteenth* day of *August*, in the year of our Lord one thousand eight hundred and *eighty-seven*, did unlawfully conspire, confederate and agree together with intent falsely, fraudulently and maliciously to accuse one *J. Wesley Dunham*, that he, the said *J. Wesley Dunham*, then and there attempted to kill and murder the said *Elijah W. Locklin* by then and there attempting to administer a deadly poison to the said *Elijah W. Locklin*, with intent then and there falsely, fraudulently and maliciously to cause the said *J. Wesley Dunham* to be prosecuted for attempt to murder and kill, of which crime the said *J. Wesley Dunham* was then and there innocent,[3] against the peace of the state, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid upon their oath aforesaid do further present, that *Abner Searles* and *Elijah W. Locklin*, both of *Rangely*, in said county of *Franklin*, at said *Rangely*, on the *fourteenth* day of *August* in the year before written, did unlawfully and maliciously conspire, combine, confederate and agree together falsely to charge and accuse one *J. Wesley Dunham* that he the said *J. Wesley Dunham*, did maliciously and feloniously incite, move, procure, aid, counsel, hire and command the said *Abner Searles* to attempt to kill and murder the said *Elijah W. Locklin* by depositing in the food

1. This indictment is sufficient under Me. Rev. Stat. (1883), c. 126, § 17. See also similar statutes as follows:

Indiana. — Horner's Stat. (1896), § 2140.

Iowa. — Code (1897), § 5058.

2. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

3. It was held in this case not to be necessary to aver that the defendants knew or had reasonable cause for believing that the party conspired against was innocent.

of him, the said *Elijah W. Locklin*, for said *Locklin* to eat, a certain deadly poison, to wit: one ounce of paris green, with intent then and there falsely, fraudulently and maliciously to cause the said *J. Wesley Dunham* to be prosecuted for said crime, of which crime the said *J. Wesley Dunham* was then and there innocent, against the peace of the state, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid, upon their oath aforesaid, do further present, that *Abner Searles* and *Elijah W. Locklin*, both of *Rangely* in the county of *Franklin*, at *Rangely* in the county of *Franklin*, on the *fourteenth* day of *August*, in the year of our Lord one thousand eight hundred and *eighty-seven*, did unlawfully and maliciously conspire, combine, confederate, and agree together falsely to charge and accuse one *J. Wesley Dunham* with having feloniously and of his malice aforethought attempted to kill and murder the said *Elijah W. Locklin*, with intent then and there falsely, fraudulently and maliciously to cause the said *J. Wesley Dunham* to be prosecuted for the offense aforesaid of which crime the said *J. Wesley Dunham* was then and there innocent.

And the jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of the said unlawful and malicious combination and conspiracy, the said *Elijah W. Locklin* did afterwards, to wit, on the *twenty-second* day of *August*, in the year aforesaid, accuse the said *J. Wesley Dunham* of the crime aforesaid, by procuring and causing complaint to be made before a trial justice in and for said county, upon which complaint made then and there by said *Locklin*, warrant was issued and the said *J. Wesley Dunham* was arrested on said warrant, as then and there issued, and taken before said justice to answer to said complaint. And the jurors do further present, that at a hearing on said complaint issued and procured as aforesaid, held on the *twenty-third* day of said *August*, and in further pursuance of said unlawful and malicious combination and conspiracy, said *Abner Searles* and *Elijah W. Locklin* did state and testify under oath that said *Dunham* did commit the crime as aforesaid, against the peace of the state, and contrary to the form of the statute in such case made and provided.

[*Andrew Johnson*, Foreman.
F. E. Timberlake, County Attorney.][1]

c. Of Being the Father of a Bastard.[2]

Form No. 6123.

(Precedent in Johnson *v.* State, 26 N. J. L. 314.)[3]

Bergen Oyer and Terminer and General Jail Delivery,
December Term, A. D. 1854.

Bergen county, to wit: The grand inquest of the State of *New Jersey* in and for the body of the county of *Bergen*, upon their oaths

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. For an indictment for a similar conspiracy at common law see Reg. *v.* Best, 2 Ld. Raym. 1167, 1 Salk. 174.

3. The indictment contained two

present, that *Susan Ann Smith*, *Albert Smith*, *Maria Smith*, *Joel M. Johnson*, and *Richard Van Winkle*, late of the township of *Franklin*, in the said county of *Bergen*, wickedly devising and intending one *William W. Packer*, not only of his credit and good name unjustly to deprive, but also to obtain and acquire to themselves of and from the said *W. W. P.* divers sums of money, and large amounts of property and other valuable things, on the *fifth* day of *October*, in the year one thousand eight hundred and *fifty-four*, with force and arms, at the township aforesaid, and within the jurisdiction of this court, did amongst themselves unlawfully conspire, combine, confederate, and agree to extort, obtain and procure, of and from the said *W. W. P.* large sums of money, and a large amount of property, and security for a large sum of money, for their own use; and in order to extort, obtain, and procure the same, did corruptly and unlawfully conspire and agree together falsely to charge and cause to have falsely charged, the said *W. W. P.* before one of the justices of the peace of the said county, on and by the oath of the said *Susan Ann Smith*, with having got the said *S. A. S.*, she then being a single woman, with child of a bastard, and to procure the issuing of a warrant thereupon by such justice of the peace for the arrest of the said *W. W. P.*, and when the said *W. W. P.* should be so arrested and under duress of imprisonment, to extort, obtain and procure from the said *W. W. P.* said money, property, and security for money for their use, by offering to receive the same for the suppression and compromise of the said charge, and for the liberation of the said *W. W. P.* from arrest and imprisonment under such warrant. And the jurors aforesaid, upon their oath aforesaid say, that the said *S. A. S.*, *A. S.*, *J. M. J.*, *M. S.* and *R. V. W.*, the defendants, in furtherance of their conspiracy, afterwards, to wit, on the day and year aforesaid, at the township and in the county aforesaid, did, before one *James V. Jeralemon*, then being one of the justices of the peace in and for the said county, falsely charge, and cause and

counts, both of which were sustained. It was objected to the first count (given in the text) that it contained no charge of conspiracy, because the averments show a felony, *i. e.*, perjury and subornation of perjury, in which the offense of conspiracy is merged. The court held that there was no merger, the making the false accusation, etc., being the means of accomplishing the conspiracy and not the same act.

In the second count it was averred that the defendants, in order to extort from the prosecutor money and securities, did corruptly, unlawfully and fraudulently conspire and agree to charge, and cause to be charged, the said W. W. P., on the oath of S. A. S., with having begotten her with child of a bastard, which would, when born, be chargeable to the township, and to procure his arrest, and thereby to put him in constraint and fear of public infamy and disgrace, and of liability to secure and indemnify the township for the support of such bastard child, when born, and to extort and obtain money and securities for the payment of money of the said prosecutor, by offering to receive the same as the consideration and price of suppressing such charge, and liberating him from arrest and indemnifying him from the pretended liability, and further, that they did cause the prosecutor to be so charged and arrested, and that they obtained from him a bond and mortgage for the payment of one thousand dollars. It was contended that this count charged no crime, but merely an agreement to procure a settlement or compounding of a charge of bastardy, not alleging it to be false, but the court held that the count clearly showed a combination to make a false charge for corrupt and unlawful purposes, as fully as if it were averred that the defendants conspired to make a false charge.

procure the said *S. A. S.* upon and by her oath, falsely to charge, that the said *W. W. P.* was the father of the bastard of which she then alleged herself to be with child, and which she then alleged was to be born a bastard, and chargeable upon the township of *Franklin*, in the said county, and that upon the said charge the said defendants procured a warrant to be issued by the said *J. V. J.*, justice of the peace as aforesaid, by virtue of which said warrant the said defendants afterwards arrested, and caused and procured to be arrested, the body of the said *W. W. P.*, and him held in custody, and while so under arrest and in custody, then and there did unlawfully, wilfully and deceitfully endeavor to obtain, extort, and procure of and from the said *W. W. P.* a large sum of money, security for a large sum of money, and property and things of great value, as and for a consideration or recompense to them for compromising and suppressing said charge, giving up the further prosecution thereof, and releasing the said *W. W. P.*, and then and there the said defendants did, unlawfully, wilfully and fraudulently obtain, extort, and procure from the said *W. W. P.*, and cause him to make, execute and deliver a bond or obligation, under the hand and seal of the said *W. W. P.*, bearing date the *fifth* day of *October* in the year last aforesaid, to the said *A. S.*, in the penal sum of *two thousand* dollars, upon condition that the said *W. W. P.* should pay to the said *A. S.* on the *first* day of *May* next ensuing the date thereof, the sum of *one thousand* dollars; also a certain mortgage dated the day and year last aforesaid, executed and given by the said *W. W. P.* on lands of him, the said *W. W. P.*, situate in the township of *Franklin* aforesaid, to the said *A. S.*, to secure the payment of the said bond, which bond and mortgage were given as the consideration or price for suppressing and compromising said charge and releasing said *W. W. P.* from arrest; that the said bond and mortgage were taken and received by the said defendants from the said *W. W. P.* for their use, to the great perversion and obstruction of justice and the due administration of the laws, to the evil example of all others in like cases offending, contrary to the form of the statute in such case made and provided, and against the peace of this state, the government and dignity of the same.

d. Of Larceny.[1]

Form No. 6124.

(Precedent in Jones *v.* Com., 31 Gratt. (Va.) 837.)

[*City* of *Manchester*, to wit.
In the *Hustings* Court of the said *City*.]

The jurors of the *commonwealth* of *Virginia* in and for the body of the *city* of *Manchester*, and now attending the said court, upon their

1. In State *v.* Cawood, 2 Stew. (Ala.) 360, the indictment was sustained as being in conformity to the precedent in 3 Chit. Cr. L. 1175, which was held good in 3 Burr. 993. Omitting the formal parts, the indictment charged that Thomas Cawood, Franklin Brown and Taylor Brown "wickedly and maliciously devising and intending unjustly to vex, oppress *John Self*, and to deprive him of his good name, fame, credit and reputation, etc., on, etc., at, etc., wickedly and unlawfully among themselves, did combine, conspire, con-

oath present, that *Junius E. Jones* and *Royall Haxall*, late of said city, on the *eighteenth* day of *March* in the year one thousand eight hundred and *seventy-eight*, and in the said *city* of *Manchester* and within the jurisdiction of the *Hustings* Court of said city,][1] unlawfully devising and intending one *Sally Cousins* to charge and convict of the larceny of a certain lot of railroad iron, the property of *The Richmond and Danville Railroad Company*, and to subject (and did subject) the said *Sally Cousins* to a criminal prosecution (wherein the said *Sally Cousins* was duly acquitted), did unlawfully conspire, combine, confederate and agree among themselves, and that in pursuance of and according to the conspiracy, combination, confederacy and agreement aforesaid, so as aforesaid had, they, the said *Junius E. Jones* and *Royall Haxall*, did falsely accuse the said *Sally Cousins* of the larceny of certain railroad iron as aforesaid, and did undertake to make and fabricate certain signs and evidences by which to convict the said *Sally Cousins* of the larceny aforesaid, and did then and there introduce said false evidence before his honor, the mayor of the city of *Manchester*, upon the trial of *Sally Cousins* for the larceny as aforesaid, on a warrant sworn out by said *J. E. Jones* in furtherance and pursuance of the conspiracy, etc., aforesaid, against the peace and dignity of the *commonwealth* of *Virginia*.

2. To Cheat or Defraud.[2]

federate and agree, falsely and without any reasonable or probable cause whatsoever, to charge and accuse the said *John Self* with having stolen, taken and carried away, feloniously, a certain bank note, for the payment of *one* dollar, of the value of *one* dollar, on the *Augusta Insurance Company*"; and "that the said *Franklin Brown*, on, etc., at, etc., in pursuance of and according to said conspiracy, combination, confederacy and agreement, between them so had as aforesaid, did say to the said *John Self*, that he, the said *John Self*, was a man of credit, and that he, the said *John Self*, had better make it up than have his credit blasted. And that the said *Franklin Brown*, in [further] pursuance of said combination, conspiracy, [confederation and agreement so had as aforesaid,] did on, etc., at, etc., unlawfully and wickedly exact, take and receive of and from the said *John Self*, a sorrel mare, of the goods and chattels of the said *John Self*, of the value of *fifty* dollars, for and as a compensation for the pretended offense above mentioned; whereas, in truth and in fact, the said *John Self* never was guilty of any such offense, etc., to the great damage [of the said *John Self*] and against the peace and dignity [of the state of *Alabama*]."

See also Elkin *v.* People, 28 N. Y. 177; State *v.* Hickling, 41 N. J. L. 208, 32 Am. Rep. 198.

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. **For statutes** delaring it to be a misdemeanor for two or more persons to conspire to cheat or defraud any person of property by any means which are in themselves criminal, or by any means which, if executed, would amount to a cheat or to obtaining money or property by false pretenses, see as follows:

Arkansas. — Sand. & H. Dig. (1894), § 1507.

California. — Pen. Code (1897), § 182.

Florida. — Rev. Stat. (1892), § 2593.

Idaho. — Rev. Stat. (1887), § 6540.

Illinois. — Starr & C. Anno. Stat. (1896), c. 38, § 38.

Minnesota. — Stat. (1894), § 6423.

Mississippi. — Anno. Code (1892), § 1006.

Missouri. — Rev. Stat. (1889), § 3780.

Montana. — Pen. Code (1895), § 320.

New Jersey. — Gen. Stat. (1895), p. 1093, § 236.

New York. — Pen. Code, § 168 (Birds. Rev. Stat. (1896), p. 587, § 1).

North Dakota. — Rev. Codes (1895), § 7037.

Pennsylvania. — Bright. Pur. Dig. (1894), p. 442, § 212.

South Dakota. — Dak. Comp. Laws (1887), § 6425.

Tennessee. — Code (1896), § 6693.

Utah. — Rev. Stat. (1898), § 4156.

For the formal parts of the indictment, information or criminal complaint in a particular jurisdiction consult the titles INDICTMENTS; INFORMATIONS; CRIMINAL COMPLAINTS.

Allegation of Means. — It is well settled in *England* that a general charge of a conspiracy to cheat and defraud without setting out the contemplated means is sufficient. Rex *v.* Gill, 2 B. & Ald. 204; Reg. *v.* Kenrick, 5 Q. B. 49, 48 E. C. L. 48; Reg. *v.* Gompertz, 9 Q. B. 824, 58 E. C. L. 245, 2 Cox C. C. 145; Reg. *v.* Parker, 3 Q. B. 292, 43 E. C. L. 741, 2 G. & D. 709; Sydserff *v.* Reg., 11 Q. B. 245, 63 E. C. L. 245; Reg. *v.* King, 7 Q. B. 782, 53 E. C. L. 782; Latham *v.* Reg., 5 B. & S. 635, 117 E. C. L. 635, 9 Cox C. C. 516; Rex *v.* Eccles., 1 Leach C. C. 274.

Thus an indictment charging that the defendants "unlawfully, fraudulently and deceitfully did conspire, combine, confederate and agree together to cheat and defraud" the prosecutor "of his goods and chattels" is not too general, and is good. Sydserff *v.* Reg., 11 Q. B. 245, 63 E. C. L. 245. And an indictment charging that the defendants conspired by divers false pretenses and subtle means and devices "to obtain from *A.* divers large sums of money of the moneys of the said *A.*, and to cheat and defraud him thereof," without further stating the means of the alleged conspiracy, was held sufficient. Reg. *v.* Kenrick, 5 Q. B. 49, 48 E. C. L. 48.

For similar forms held sufficient see Rex v. Hamilton, 7 C. & P. 448, 32 E. C. L. 579; Reg. *v.* Bullock, Dears. C. C. 653; Reg. *v.* Hudson, 8 Cox C. C. 305, and the precedents in 4 Cox C. C. Appendix xviii; 6 Cox C. C. Appendix lxiii, lxv, clx.

The American decisions as to the sufficiency of the form established in Rex *v.* Gill, 2 B. & Ald. 204, have not been uniform. It is now settled in the majority of states, however, that, in the absence of statutes affecting the case, a general allegation of a conspiracy to cheat and defraud by means of false pretenses and indirect means is insufficient, and the indictment must set forth the particular means by which the object of the conspiracy was to be effected, since the words "to cheat and defraud" do not necessarily in themselves import an act criminal or unlawful. It is so held in the following states:

Iowa. — State *v.* Jones, 13 Iowa 273.

Kentucky. — Com. *v.* Ward, 92 Ky. 158.

Maine. — State *v.* Roberts, 34 Me. 320.

Massachusetts. — Com. *v.* Prius, 9 Gray (Mass.) 127; Com. *v.* Wallace, 16 Gray (Mass.) 221; Com. *v.* Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; Com. *v.* Shedd, 7 Cush. (Mass.) 515; Com. *v.* Meserve, 154 Mass. 64.

New Hampshire. — State *v.* Parker, 43 N. H. 83.

New Jersey. — State *v.* Norton, 23 N. J. L. 33.

New York. — People *v.* Eckford, 7 Cow. (N. Y.) 535; Lambert *v.* People, 9 Cow. (N. Y.) 578; March *v.* People, 7 Barb. (N. Y.) 391; People *v.* Brady, 56 N. Y. 182. *Compare* Scholtz's Case, 5 C. H. Rec. (N. Y.) 112.

Vermont. — State *v.* Keach, 40 Vt. 113.

But the contrary view has been held in the following states:

Illinois. — Thomas *v.* People, 113 Ill. 531, 5 Am. Crim. Rep. 127.

Maryland. — State *v.* Buchanan, 5 Har. & J. (Md.) 317.

Michigan. — People *v.* Butler, (Mich. 1897) 69 N. W. Rep. 734; People *v.* Arnold, 46 Mich. 268; People *v.* Winslow, 39 Mich. 505; People *v.* Clark, 10 Mich. 310; People *v.* Richards, 1 Mich. 216.

New Jersey. — State *v.* Young, 37 N. J. L. 184.

North Carolina. — State *v.* Brady, 107 N. Car. 822.

Wisconsin. — State *v.* Crowley, 41 Wis. 271.

It has been considered that the authority of Rex *v.* Gill, 2 B. & Ald. 204, has been shaken in *Pennsylvania*, notably by the case of Hartmann *v.* Com., 5 Pa. St. 60; but Mr. Wharton concludes that in view of the exceeding liberality of pleading which was recognized in Com. *v.* Eberle, 3 S. & R. (Pa.) 9; Com. *v.* McKisson, 8 S. & R. (Pa.) 420; Com. *v.* Gillespie, 7 S. & R. (Pa.) 469; Collins *v.* Com., 3 S. & R. (Pa.) 220; Clary *v.* Com., 4 Pa. St. 210; Mifflin *v.* Com., 5 W. & S. (Pa.) 461, the precedent given in Rex *v.* Gill must be treated as if of unimpaired validity in *Pennsylvania*. Whart. Cr. L., § 2304; Whart. Prec. (2d ed.) 440.

In Com. *v.* Bracken, 14 Phila. (Pa.) 342, Briggs, J., said:

"Rex *v.* Gill is now as certainly

settled as authority in this state as a legal form for an unexecuted conspiracy as it is in England. But it has never been the law of this state as applicable to an executed conspiracy, without the addition of the overt acts by means of which the confederacy was carried into effect. Even where that form is relied on in an unexecuted conspiracy, if it does not state the confederation in a manner sufficiently specific to enable the defendants to comprehend its scope they may, of right, demand a bill of particulars." See also Com. *v.* Goldsmith, 12 Phila. (Pa.) 632; Com. *v.* Wilson, 4 Crim. L. Mag. 249.

In order to give needed information to the court and to the accused, where there is merely a general charge of a conspiracy to obtain property by false pretenses, a specification of particulars will be ordered by the court on motion. Reg. *v.* Kenrick, 5 Q. B. 49, 48 E. C. L. 48; Rex *v.* Hamilton, 7 C. & P. 448, 32 E. C. L. 579; Reg. *v.* Brown, 8 Cox C. C. 69; Reg. *v.* Rycroft, 6 Cox C. C. 76; Com. *v.* Meserve, 154 Mass. 64; State *v.* Brady, 107 N. Car. 822.

Allegation of Overt Acts. — Under the statutes of several states, the indictment must charge the performance of some overt act toward effecting the object of the conspiracy. See list of statutes cited *supra*, this note. But in other cases it has been held not necessary, in an indictment for conspiracy to cheat or defraud, to allege overt acts done in pursuance of the conspiracy. See for example Com. *v.* Fuller, 132 Mass. 566; Com. *v.* Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; Com. *v.* Shedd, 7 Cush. (Mass.) 514; Com. *v.* Judd, 2 Mass. 329; Com. *v.* Ward, 2 Mass. 397; Collins *v.* Com., 3 S. & R. (Pa.) 220; Com. *v.* McKisson, 8 S. & R. (Pa.) 420, 11 Am. Dec. 630; Clary *v.* Com. 4 Pa. St. 210; Heine *v.* Com., 91 Pa. St. 145; Com. *v.* Hadley, 13 Pa. Co. Ct. Rep. 188; Com. *v.* Wilson, 4 Crim. L. Mag. 249.

In Com. *v.* Bracken, 14 Phila. (Pa.) 342, the *Pennsylvania* cases are reviewed and the doctrine of these cases stated to be, that where the indictment charges merely an unexecuted conspiracy, as in Rex *v.* Gill, 2 B. & Ald. 204, no overt act by which the conspiracy is to be executed by the confederates need be set out, and even if the overt act be laid, it may be treated as aggravation merely and surplusage. But where the indictment lays the conspiracy as having been executed the overt acts must be set forth so specifically as to enable an innocent defendant to comprehend exactly the nature of the offense the commonwealth calls him to answer, and which will protect him against a second prosecution for the same offense. And when the overt act is set out it must be averred to be within the object of the conspiracy as stated in the indictment. Thus, where a count in an indictment charged the defendants with a conspiracy to defraud such persons as might be desirous of purchasing a certain horse, by means of false pretenses as to the said horse, and charged that they, in pursuance of said conspiracy, did obtain money from a certain person, without alleging that he was such a person as might be desirous, etc., the count was held insufficient. Reg. *v.* Henry, 1 Cox C. C. 101.

Accomplishment of Purpose. — The offense charged consists in the conspiracy to defraud by false pretenses, and whether the object of the conspiracy was successfully accomplished or not is immaterial. But if the conspirators carry out or attempt to carry out the object of the conspiracy, that fact may be alleged in aggravation of the offense. State *v.* Mayberry, 48 Me. 218; Com. *v.* Tibbetts, 2 Mass. 536.

Person to be Defrauded. — In Reg. *v.* Peck, 9 Ad. & El. 686, 36 E. C. L. 240, it was held that it was no objection to the count in the indictment that it did not name the parties to be defrauded. See also Reg. *v.* Whitehouse, 6 Cox C. C. 38. But in Reg. *v.* King, 7 Q. B. 782, 53 E. C. L. 782, an indictment charging that defendants conspired to cheat and defraud "certain liege subjects of the Queen being tradesmen," etc., was held bad, for the words alleging conspiracy showed a design to injure, not tradesmen indefinitely, but individuals, and therefore either the persons should have been named or an excuse stated for not naming them. Similarly a charge of conspiracy to defraud "the creditors of W. E." was held too general. Rex *v.* Fowle, 4 C. & P. 592, 19 E. C. L. 540.

Description of Goods. — An indictment for a conspiracy "to defraud J. W. of divers goods, and in pursuance of that conspiracy defrauding him of divers goods, to wit, of the value of *one hundred* pounds," cannot be quashed for not specifying the particular goods of which the prosecutor had been de-

a. A Bank.

Form No. 6125.

(Precedent in State *v.* Buchanan, 5 Har. & J. (Md.) 318.)[1]

State of *Maryland*, City of *Baltimore*, to wit: } The jurors for the State of *Maryland* for the body of the *City* of *Baltimore*, on their oath present, that by an Act of Congress of the United States, passed

frauded. The gist of the offense is the conspiracy. Rex *v.* ———, 1 Chit. Rep. 698, 18 E. C. L. 205; Com. *v.* Goldsmith, 12 Phila. (Pa.) 632; Com. *v.* Wilson, 4 Cr. L. Mag. 249. But in Com. *v.* Galbraith, 6 Phila. (Pa.) 281 (decided in 1867), it was held that an allegation of a conspiracy to cheat the prosecutor out of "$17,000 in cash," without specifying the kind of dollars meant, was insufficient. And an indictment for conspiracy to cheat and defraud a party of the fruits and advantages of a verdict obtained is bad for generality. Reg. *v.* Richardson, 1 M. & Rob. 402.

And an indictment for a conspiracy to obtain goods by false pretenses is bad, unless it state to whom the goods belonged. Reg. *v.* Parker, 3 Q. B. 292, 43 E. C. L. 741, 2 G. & D. 709.

For other forms of indictments for conspiracies to cheat and defraud see as follows:

By maker of two promissory notes and two other persons fraudulently to obtain said notes from the holder. 1 Cox C. C. Appendix xiii.

To induce person of unsound mind to sign a paper authorizing defendant to take possession of his goods. 1 Cox C. C. Appendix xxvii.

By inducing person to advance money on forged securities. 2 Cox C. C. Appendix vi.

To obtain money by pretending to be desirous of employing clerks and demanding security for their good behavior from such persons as should offer themselves. 4 Cox C. C. Appendix xiii.

By falsely and fraudulently altering the terms of a lease. 4 Cox C. C. Appendix xviii.

To obtain goods by false pretenses without paying for same. 4 Cox C. C. Appendix xxxv.

To defraud railway company by traveling without a ticket. 4 Cox C. C. Appendix xxxviii.

To cheat tradesmen generally of their goods. 6 Cox C. C. lxiii.; Com. *v.* Boyer, (Pa. 1823) 2 Wheel. Cr. Cas. 140.

To obtain goods by false representations as to property and occupation. 6 Cox C. C. Appendix lxiv.; Com. *v.* Warren, 6 Mass. 74.

To defraud intending emigrants of their passage money by pretending to have an interest in certain ships. 6 Cox C. C. Appendix lxxxi.

To defraud and deprive one of her leasehold and of the rents and profits thereof. Reg. *v.* Whitehouse, 6 Cox C. C. 38.

To cheat a vendor by procuring an abatement of price by false representations. Reg. *v.* Carlisle, 6 Cox C. C. 366, 25 Eng. L. & Eq. 577.

To defraud railway company by reason of false entries of stock in registers of stockholders. 7 Cox C. C. Appendix li.

By false representations to induce the committee of the stock exchange to grant a settling day and quotation for a certain joint stock company, and for a conspiracy to obtain a quotation to induce persons, who should thereafter buy and sell the shares of the company, to believe that the company was duly formed and constituted and had complied with the rules of the stock exchange so as to entitle the company to have their shares quoted in the official list. Reg. *v.* Aspinall, 13 Cox C. C. 230, 563.

To defraud insurance company by causing it to be believed that one of the conspirators had been burned to death. Musgrave *v.* State, 133 Ind. 297.

By fraudulently selling property at a price greatly exceeding its value. State *v.* Parker, 43 N. H. 83.

By inducing one to buy a bad note. People *v.* Barrett, 1 Johns. (N. Y.) 66.

By inducing one to indorse a forged note. Respublica *v.* Ross, 2 Yeates (Pa.) 1.

To obtain conveyance of real estate. State *v.* Bradley, 48 Conn. 535.

1. It was contended in this case that as the improper use, or embezzlement of the funds of the bank, by either the

on the tenth day of April, in the year of our Lord one thousand eight hundred and sixteen, at the City of Washington, entitled, "An Act to incorporate the subscribers to the Bank of the United States," a bank was established and chartered as a corporation and body politic, by the name and style of "The President, Directors and Company, of the Bank of the United States," with authority, power and capacity, among other things, to have, purchase, receive, possess, enjoy and retain, to them and their successors, lands, rents, tenements, hereditaments, goods, chattels and effects, of whatsoever kind, nature and quality, to an amount not exceeding in the whole, fifty-five millions of dollars, to deal and trade in bills of exchange, gold and silver bullion, and to take at the rate of six per centum per annum for or upon its loans or discounts, and to issue bills or notes signed by the president, and countersigned by the principal cashier or treasurer thereof, promising the payment of money to any person or persons, his, her, or their order, or to bearer, and that under and by virtue of the power and authority given to the said directors by the said Act of Congress, an office of discount and deposit of the said corporation was, at the time hereinafter mentioned, regularly and duly established in pursuance of the power contained in the said Act, at the City of *Baltimore*, in the State of *Maryland* aforesaid, and that *George Williams*, late of the City of *Baltimore*, merchant, was at the time hereinafter mentioned, and before and afterwards, one of the directors of the said Bank of the United States at *Philadelphia*, to wit, at the City of *Baltimore* aforesaid, and that *James A. Buchanan*, late of the City of *Baltimore*, merchant, was at the time hereinafter mentioned, and before and since, president of the said office of discount and deposit of the said Bank of the United States in the City of *Baltimore*, and that *James W. M'Culloh*, late of the City of *Baltimore*, gentleman, was at the time hereinafter mentioned, and before and afterwards, cashier of the said office of discount and deposit of the said Bank of the United States in the City of *Baltimore*, to wit, at the City of *Baltimore* aforesaid. And that the said *George Williams*, so being one of the directors of the said Bank of the United States, and the said *James A. Buchanan*, so being president of the said office of discount and deposit of the said bank in the City of *Baltimore*, and the said *James W. M'Culloh*, so being cashier of the said office of discount and deposit of the said bank in the City of *Baltimore*, being evil disposed and dishonest persons, and wickedly devising, contriving, and intending, falsely, unlawfully, fraudulently, craftily and unjustly, and by indirect means, to cheat and impoverish the said president, directors, and company, of the Bank of the United States, and to defraud them of their moneys, funds, and promissory

president or cashier of the office, would in law be only a breach of trust, a combination to effect the same purpose cannot amount to an indictable offense. But it was held that it was not necessary that the act conspired to be done should, if effected by an individual, be such as would *per se* amount to an indictable offense.

Defrauding Shareholders of Bank. — For substance of an indictment for a conspiracy to defraud the shareholders of a bank by falsely representing the bank to be in a prosperous condition, so as to induce them to continue to hold shares therein and to purchase other shares, see Reg. *v.* Esdaile, 8 Cox C. C. 69; Reg. *v.* Brown, 7 Cox C. C. 442.

notes for the payment of money, commonly called bank notes, and of their honest and fair gains to be derived under and pursuant to the said Act of Congress from the use of their said moneys, funds, and promissory notes for the payment of money, commonly called bank notes, on the *eighth* day of *May*, in the year of our Lord one thousand eight hundred and *nineteen*, at the City of *Baltimore* aforesaid, with force and arms, etc., did wickedly, falsely, fraudulently and unlawfully conspire, combine, confederate and agree together, by wrongful and indirect means, to cheat, defraud and impoverish the said president, directors and company of the Bank of the United States, and by subtle, fraudulent, and indirect means, and divers artful, unlawful and dishonest devices and practices, to obtain and embezzle a large amount of money, and promissory notes for the payment of money, commonly called bank notes, to wit, of the amount and value of *fifteen hundred thousand* dollars, current money of the United States, the same being then and there the property, and part of the proper funds of the said president, directors and company, of the Bank of the United States, from and out of the said office of discount and deposit of the said bank in the City of *Baltimore*, without the knowledge, privity or consent of the said president, directors and company of the Bank of the United States, and also without the privity, consent or knowledge of the directors of the said office of discount and deposit of the said bank in the City of *Baltimore*, for the purpose of having and enjoying the use thereof for a long space of time, to wit, for the space of *two* months, without paying any interest, discount or equivalent for the use thereof, and without securing the repayment thereof to the said corporation. And the more effectually and securely to perpetrate and conceal the same, that the said *James W. M'Culloh* should, from time to time, falsely and fraudulently state, allege and represent to the said directors of the said office of discount and deposit in the City of *Baltimore*, that such moneys and promissory notes, so agreed to be obtained and embezzled as aforesaid, were loaned on good, sufficient and ample security, in capital stock of the said bank, pledged and deposited therefor; and also should from time to time make and fabricate false statements and vouchers respecting the same, and other property and funds of the said corporation, to be laid before and exhibited to the said bank in the City of *Baltimore*, and that the said *George Williams*, *James A. Buchanan*, and *James W. M'Culloh*, being such officers of the said corporation as aforesaid, did then and there, in pursuance of and according to the said unlawful, false, and wicked conspiracy and confederacy, combination and agreement aforesaid, by indirect, subtle, wrongful, fraudulent and unlawful means, and by divers artful and dishonest devices and practices, and without the knowledge, privity or consent of the said president, directors and company of the Bank of the United States, and without the privity, knowledge or consent of the directors of the said office of discount and deposit of the said bank in the City of *Baltimore*, obtain and embezzle a large amount of moneys, and of promissory notes for the payment of money, commonly called bank notes, the same being the property and part of the proper funds of the said corporation, from and out of their said office of discount and deposit

in the City of *Baltimore*, to wit, to the amount and value of *fifteen hundred thousand* dollars current money of the United States, for the purpose of having and enjoying the use thereof, and did have and enjoy the use thereof, for a long space of time, to wit, for the space of *two* months, without paying any interest, discount or equivalent therefor, and without securing the repayment of the said moneys, and the said promissory notes for the payment of money, commonly called bank notes; and did then and there falsely, craftily, deceitfully, fraudulently, wrongfully and unlawfully, keep and convert the same to their own use and benefit without the knowledge, privity or consent of the said corporation, and without the knowledge, privity or consent of the directors of the said office of discount and deposit in the City of *Baltimore*, and did then and there, the more effectually to perpetrate and conceal the said conspiracy, confederacy, fraud and embezzlement, cause and procure false and fraudulent representations, allegations, statements and vouchers, to be made and fabricated, and the same to be exhibited to and laid before the directors of the said office of discount and deposit in the City of *Baltimore*, by the said *James W. M'Culloh*, as cashier of the said office of discount and deposit, and respecting the said moneys, and the said promissory notes for the payment of money, so obtained and embezzled as aforesaid, in which said representations, allegations, statements and vouchers, it was then and there falsely and fraudulently represented, alleged and exhibited, that the said moneys, and promissory notes for the payment of money, were loaned on good, sufficient, and ample security in capital stock of the said bank, pledged and deposited therefor, when in truth and in fact no capital stock of the said bank, and no other security was pledged or deposited therefor, as the said *George Williams*, *James A. Buchanan*, and *James W. M'Culloh*, then and there well knew. And that the said false, wicked, unlawful, and fraudulent conspiracy, confederacy and agreement, above mentioned, and the said false, wicked, unlawful, and fraudulent acts, done in pursuance thereof above set forth, were then and there made, done and perpetrated, by the said *George Williams*, *James A. Buchanan*, and *James W. M'Culloh*, in abuse and violation of their duty, and the trust reposed in them, and the oaths taken and lawfully sworn by them respectively as such officers of the said corporation as aforesaid. And that the said *George Williams*, *James A. Buchanan*, and *James W. M'Culloh*, did then and there falsely, wickedly, fraudulently, wrongfully and unlawfully, impoverish, cheat and defraud, the said president, directors and company of the Bank of the United States, to the great damage of the said president, directors and company, to the evil example of all others in like manner offending, and against the peace, government and dignity of the State of *Maryland*, etc.

And the jurors aforesaid, on their oath aforesaid, do further present, that the said *George Williams*, so being one of the directors of said Bank of the United States at *Philadelphia*, to wit, at *Baltimore*, aforesaid, and the said *James A. Buchanan*, so being president of the said office of discount and deposit of the said bank in the City of *Baltimore*, and the said *James W. M'Culloh*, so being cashier of the said office of discount and deposit of the said bank in the City of *Balti-*

more, being evil disposed and dishonest persons, and wickedly devising and contriving and intending, falsely, unlawfully, fraudulently, craftily and unjustly, and by indirect means to cheat and impoverish the said president, directors and company of the Bank of the United States, and to defraud them of their moneys, funds and promissory notes for the payment of money, commonly called bank notes, and of their honest and fair gains to be derived under and pursuant to the said Act of Congress, from the use of their said moneys, funds and promissory notes for the payment of money, commonly called bank notes, afterwards, to wit, on the *eighth* day of *May*, in the year of our Lord one thousand eight hundred and *nineteen*, at the City of *Baltimore* aforesaid, with force and arms, etc., did wickedly, falsely, fraudulently and unlawfully conspire, combine, confederate, and agree together by wrongful and indirect means to cheat, defraud and impoverish the said president, directors and company of the Bank of the United States, and by subtle, fraudulent and indirect means, and divers artful, unlawful and dishonest devices and practices, to obtain and embezzle a large amount of money and promissory notes for the payment of money, commonly called bank notes, to wit, of the amount and value of *fifteen hundred thousand* dollars, current money of the United States, the same being then and there the property and part of the proper funds of the said president, directors and company of the Bank of the United States, of and out of the said office of discount and deposit of the said bank in the City of *Baltimore*, without the knowledge, privity or consent of the said president, directors and company of the Bank of the United States, and also without the privity, consent or knowledge of the directors of the said office of discount and deposit of said bank in the City of *Baltimore*, for the purpose of having and enjoying the use thereof for a long space of time, to wit, for the space of *two* months, without paying any interest, discount or equivalent for the use thereof, and without securing the repayment thereof to the said corporation; and that the said false, wicked, unlawful and fraudulent conspiracy, confederacy and agreement above mentioned, were then and there made, done and perpetrated by the said *George Williams*, *James A. Buchanan* and *James W. M'Culloh* in abuse and violation of their duty, and the trust reposed in them, and the oaths taken and lawfully sworn by them respectively as such officers of the said corporation as aforesaid, to the great damage of the said president, directors and company, to the evil example of all others in like manner offending, and against the peace, government and dignity of the State of *Maryland*, etc.

Luther Martin, Attorney-General of *Maryland*,
and District Attorney of *Baltimore City* Court.

Form No. 6126.

(Precedent in State *v.* Norton, 23 N. J. L. 34.)[1]

[*Morris Oyer and Terminer and General Jail Delivery.*
December Term, A. D. 1849.][2]

The grand jurors of the state of *New Jersey*, in and for the body

1. This form is the first count of the indictment, which was sustained.

2. The words and figures enclosed by [ ] will not be found in the reported

of the county of *Morris*, on their oaths[1] present, that *Lambert Norton*, *William Thompson*, *Jacob M. King*, *Joseph Cutler*, *Samuel S. Doty*, and *David Sanderson*, all late of the township of *Morris*, in the county of *Morris*, and state of *New Jersey*, on the *30th* day of *October*, in the year 1839, at [*Morris* aforesaid][2] and within the jurisdiction of this court, being persons of evil name and fame, and of dishonest conversation, and wickedly devising and intending, unjustly, unlawfully, and by indirect means, to cheat and defraud "the President, Directors, and Company of the State Bank at Morris," and other persons to the jurors aforesaid unknown, of their money, goods, chattels, promissory notes, and effects, on [the *30th* day of *October*, aforesaid,][2] at [*Morris* aforesaid,][2] within [the jurisdiction of this court,][2] with force and arms, etc., did fraudulently, maliciously, and unlawfully conspire, combine, unite, confederate, and agree, between and among themselves, by wrongful and indirect means, and divers acts, unlawful and dishonest devices and practices, to cheat and defraud the said "the President, Directors, and Company of the State Bank at Morris," and divers other persons to the jurors aforesaid unknown, of the money, goods, and chattels, promissory notes and effects, of and belonging to the said "the President, Directors, and Company of the State Bank at Morris," and divers other persons to the jurors aforesaid unknown; and that in pursuance of the said conspiracy, combination, and agreement, made between and among them as aforesaid, the said *Lambert Norton*, *William Thompson*, *Jacob M. King*, *Joseph Cutler*, *Samuel S. Doty*, and *David Sanderson*, afterwards, to wit, on [the *30th* day of *October*, in the year 1839,][2] at [*Morris* aforesaid][2] and within [the jurisdiction of this court,][2] fraudulently, maliciously, and unlawfully, and without the said bank receiving any consideration therefor, suffered, caused, and procured the name of *David Sanderson* to be stricken off and erased from a certain promissory note, made by one *Egbert A. Thompson* (by the name and description of *E. A. Thompson*) for the sum of *ten thousand and fifty-seven* dollars and *sixty-eight* cents, dated *Morristown*, *September 4*, 1849, and payable to the order of the said *Egbert A. Thompson*, at *six* months after the date thereof, at the State Bank at *Morris*, for value received, without defalcation or discount, and endorsed by said *Egbert A. Thompson* and the said *David Sanderson*, with the intent to release the said *David Sanderson* from his liability on said note, and for which said promissory note, so as aforesaid endorsed by the said *David Sanderson*, the money had been advanced and paid by the said bank; and which promissory note was then, to wit, on the day and year last aforesaid, the property, promissory note, and effects of the said "the President, Directors, and Company of the State Bank at Morris," and divers other persons to the jurors aforesaid unknown.

case, but have been added to render the form complete.

1. An objection that the indictment was presented on the "oaths" instead of the "oath" of the jurors was not sustained. The use of the plural, while unusual and untechnical, was not fatal, it appearing, moreover, from the caption that the jurors were duly sworn.

2. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

By means whereof the said *David Sanderson* was released[1] from his liability to the said "the President, Directors, and Company of the State Bank at Morris," and divers other persons to the jurors aforesaid unknown, as endorser on the said promissory note; and thereby, then and there, by the means last aforesaid, the said *Lambert Norton*, *William Thompson*, *Jacob M. King*, *Joseph Cutler*, *Samuel S. Doty*, and *David Sanderson*, did greatly impoverish and injure the said "the President, Directors, and Company of the State Bank at Morris," and divers other persons to the jurors aforesaid unknown, to the great damage of the said "the President, Directors, and Company of the State Bank at Morris," and divers other persons to the jurors aforesaid unknown, against the peace of this state, the government and dignity of the same.[2]

b. A County.[3]

Form No. 6127.

(Precedent in People *v.* Butler, (Mich. 1897) 69 N. W. Rep. 734.)[4]

[(*Commencing as in Form No. 6130, and continuing down to* *)][5] that *Daniel M. Butler* and *William H. Bird*, late of said city of *Detroit*, heretofore, to wit, on the *first* day of *May*, in A. D. 1895, at the said city of *Detroit*, in the county aforesaid, unlawfully, falsely, deceitfully, and fraudulently did combine, conspire, confederate and agree together, by divers false pretenses, subtle means and devices, to attain and acquire unto themselves, of and from the county of *Wayne*, a sum of money, to wit, the sum of *fifty* dollars, of the value

1. It was objected that the indictment disclosed such a state of facts as showed that Sanderson could not have been released, but the court without passing upon this point held that the completion of the crime did not depend upon the success of its object, but the offense was consummated by doing any overt act in pursuance of the conspiracy. To the same effect see Madden *v.* State, 57 N. J. L. 324.

2. Another count for conspiracy concluded "contrary to the force of the statute," etc., which it seems would have been the proper conclusion in the form above, there being a statute then in force applicable to the case.

3. **Conspiracy to Cheat a City.** — An indictment which sets out that certain persons, being members of, composing and acting as a municipal board, conspired to cheat the city of its moneys by corruptly purchasing supplies for the city at excessive prices and by paying salaries to persons who rendered no services, is good. After this general allegation of a corrupt intent it is not essential that the statement of the means by which the conspiracy was to be executed should also show it. Madden *v.* State, 57 N. J. L. 324.

An indictment for a conspiracy to cheat and defraud a city which alleges that the defendants conspired through a contract to cheat and defraud the city of its money by making certain false representations, which are set out, is fatally defective if it fails to state through or with whom the alleged fraud was to be committed, the city having no power to act except through its proper agency. Com. *v.* Ward, 92 Ky. 158.

For substance of indictments for conspiracies to defraud a city see State *v.* Young, 37 N. J. L. 184; People *v.* Olson, (Buffalo Super. Ct.) 15 N. Y. Supp. 778; Casper *v.* State, 47 Wis. 535.

4. It was claimed that this information should have been quashed, first, because it states no offense known to the law; second, because it contains no allegations of the means by which the defendants conspired to cheat and defraud. The court held that the claim could not be sustained.

5. The matter to be supplied within [] will not be found in the reported case.

of *fifty* dollars, of the money of it, the said county of *Wayne*, and to cheat and defraud it, the said county of *Wayne* thereof, to the great damage of it, the said county of *Wayne* [(*concluding as in Form No. 6130*).][1]

c. An Individual.

(1) Generally.

Form No. 6128.

(Precedent in Thomas *v.* People, 113 Ill. 532.)[2]

[State of *Illinois*, } ss. Of the *March* Term of the *Cook County Criminal* Court, in the year of our Lord 1884.][3]
Cook County. }

The grand jurors, chosen, selected and sworn in and for the county of *Cook* in the State of *Illinois*, in the name and by the authority of the People of the State of *Illinois*, upon their oaths present that *Edward F. Thomas* and *William G. Murphy*, late of the county of *Cook*, on the *first* day of *December*, in the year of our Lord one thousand eight hundred and *eighty-three*, in said county of *Cook*, in the State of *Illinois* aforesaid,* feloniously, fraudulently and deceitfully, did conspire and agree together, with the fraudulent and malicious intent, then and there, feloniously, wrongfully and wickedly, to obtain *one* horse of the value of $*75*, *one* wagon of the value of $*25*, *twenty-five* dozen canned goods of the value of $*50* (*and other goods described*), and divers and sundry groceries, dry goods, notions and fixtures contained in her grocery store situated on *Clark* street, in the city of *Chicago*, in said county and State (a more particular description of which said groceries, dry goods, notions and fixtures is to said grand jurors unknown), of the value of $*580*, the personal goods and property of one *Kate Carberry*, from the said *Kate Carberry*, by false pretenses, and to cheat and defraud her, the said *Kate Carberry*, of the same, contrary to the statute and against the peace and dignity of the same People of the State of *Illinois*.

[*Luther Laflin Mills*,
State's Attorney.][3]

Form No. 6129.

(Precedent in Com. *v.* Fuller, 132 Mass. 563.)[4]

[(*Commencing as in Form No. 6121, and continuing down to* *.)][1] * * * And the jurors for the *Commonwealth* of *Massachusetts*, on their aforesaid oath, do further present, that *Gardner F. Fuller*, otherwise

1. The matter to be supplied within [ ] will not be found in the reported case.

2. This form is the first count of the indictment and was held good. The second count charged the conspiracy and overt acts in pursuance thereof.

Precedents. — See also precedents of similar character in Evans *v.* People, 90 Ill. 384; Johnson *v.* People, 22 Ill. 314; State *v.* Grant, 86 Iowa 216; State *v.* Crowley, 41 Wis. 271.

3. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

4. This form is the second count of the indictment upon which the defend-

called *Gardner A. Fuller*, *E. Frank Mosher* and *Abiel W. K. Newton*, all of said *Boston*, wickedly devising and intending to cheat and defraud one *Daniel Goodnow*, on the *eighteenth* day of *July*, in the year aforesaid, at said *Boston*, did unlawfully conspire, confederate, combine and agree together, falsely, knowingly, designedly and fraudulently, to cheat and defraud the said *Goodnow* out of a large quantity of goods, wares and merchandise, and *one* vessel called the "*Barque Western Sea*," of the property of him, said *Goodnow*, that is to say: *Three hundred* bales of cotton, each of the value of *forty* dollars; *one hundred and twenty-two* bags of wool, each of the value of *eighty* dollars; *eight hundred and seventy-three* pounds of tea, each of the value of *fifty* cents; *eight hundred and fifty* gallons of punch, each of the value of *two* dollars; *fifty* kegs of pickles, each keg the value of *three* dollars; *one* machine, called a "picker," of the value of *fifty* dollars; *sixty* bottles, each of the value of *one* dollar; *twenty-three* cases of wine, each case of the value of *twenty* dollars; *one* vessel, called the "*Barque Western Sea*," of the value of *four thousand eight hundred* dollars; by means of false and fraudulent pretenses thereafter to be made to said *Goodnow* by him, said *Fuller*, that he, said *Fuller*, had lately theretofore received an order from the *Pepperell Manufacturing Company* in *Biddeford*, in the State of *Maine*, to buy for and on account of said company, for its use in its mills there in said *Biddeford*, the cotton hereinbefore described; that he, said *Fuller*, had lately theretofore received an order from said company, and said company had given him, said *Fuller*, the authority to buy for said company, and on its account, the wool hereinbefore described, and that said company was in the habit of using said wool in its mills in said *Biddeford*, and in the manufacture of cloth there in its said mills; that said company there in said *Biddeford*, had a shop and store in which it commonly sold groceries, teas and wines, and that said company had given him, said *Fuller*, an order and the authority to buy for it, and on its account, the tea, and wine, and bottles hereinbefore described, for sale by it, said company, then in its pretended shop in said *Biddeford*; that said company had given him, said *Fuller*, an order, and the authority to buy for it, and on its account, the machine and picker hereinbefore described, for use in its mills there in said *Biddeford*; that said company, because it was in difficulty about the rates of freight upon the railroads between said *Boston* and said *Biddeford*, and because it needed for use in its busi-

ants were tried, the jury finding a verdict of guilty against Fuller and Mosher and not guilty against Newton. Mosher alleged exceptions, which were overruled. The court, by Allen, J., said: "The second count of this indictment contains everything necessary in an indictment for conspiracy, according to the strictest rules. The intention to cheat and defraud Goodnow, the conspiracy to do so, the property out of which he was to be cheated, the false and fraudulent pretenses by means of which the fraud was to be accomplished, are all fully set forth, and the defendant is connected with them all. A conspiracy to cheat and defraud one out of his property by means of false and fraudulent pretenses is an indictable offense of itself. It is not necessary to set out any overt acts, or any actual injury to the person intended to be defrauded, or any denial in detail of the truth of the various false pretenses; the general statement that the pretenses were false and fraudulent is sufficient."

ness in said *Biddeford* a vessel, had authorized him, said *Fuller*, to buy for it, and on its account, a vessel in which to ship and carry all the goods and articles hereinbefore described, from said *Boston* to said *Biddeford*, and had given him, said *Fuller*, such authority to buy for its account the vessel there called the "*Barque Western Sea*"; that said *Abiel W. K. Newton*, whom he, said *Fuller*, should introduce and present to said *Goodnow*, and who said *Newton*, should in the presence of him, said *Goodnow* and said *Fuller*, examine said cotton, and said wool, and said wine, and said punch, and said tea, and said machine, was the agent of said *Pepperell Manufacturing Company*, and was the person, on its behalf, who had given him, said *Fuller*, all the aforesaid orders and authority, and was examining all said articles, wares, and merchandise for the purpose of confirming such authority and orders to him, said *Fuller*, so to be falsely pretended to said *Goodnow*; that said *E. Frank Mosher*, whom said *Fuller* should take to, and introduce and present to, said *Goodnow*, and who should say to said *Goodnow* that the statements of said *Fuller* to said *Goodnow* about him, said *Mosher*, were true, was the person who had just then been sent by said company, from said *Biddeford*, to take command of and charge of said vessel, and all the goods and articles aforesaid, for and on behalf of said company, and that said company had just then paid to said *Mosher* a month's salary for such service, in advance, and that he, said *Mosher*, had just come in to said *Boston* from said *Biddeford*; that said company desired him, said *Goodnow*, to make a delivery of all said goods, wares, and vessel, upon a credit of *ten* days, and to deliver the same to said *Mosher*, as and for a delivery to said company, by him, said *Goodnow*, upon such credit to it, said company; to the great damage of said *Goodnow*, and against the law, peace, and dignity of said *Commonwealth*.

[*G. Marston*, District Attorney.]

Form No. 6130.

(Precedent in People *v.* Clark, 10 Mich. 310.)[1]

State of *Michigan*, County of *Wayne*: *January* Term, A. D. 1862; *Recorder's* Court of the City of *Detroit*.

In the name of the people of the State of *Michigan*, I, *David E. Harbaugh*, prosecuting attorney in and for the said county of *Wayne*, who prosecute for and on behalf of the people of the said State, in said court, come now here and give the court to understand and be informed* that one *Charles Clark*, and a certain other person, to the prosecuting attorney, aforesaid, unknown, late of said city, on the *8th* day of *January*, in the year of our Lord one thousand eight hundred and *sixty-two*, at the said city of *Detroit*, unlawfully, falsely, deceitfully, and fraudulently, did combine, conspire, confederate, and agree together, by divers false pretenses, subtle means and devices, to obtain and acquire to themselves, of and from one *John M. Whelpley*, a sum of money, to wit, the sum of *ten* dollars, of the moneys of said *John M. Whelpley*, and to cheat and defraud him, the said *John M.*

1. This information was held sufficient. See also a form in People *v.* Winslow, 39 Mich. 505.

Whelpley, thereof: The said *Charles Clark* and the other person, unknown as aforesaid, in pursuance of, and according to said combination, conspiracy, confederation and agreement between them, as aforesaid had, did on the *8th* day of *January*, A. D. 1862, at the city of *Detroit* aforesaid, by said divers false pretenses, subtle means and devices, unlawfully, falsely, deceitfully and fraudulently, obtain and acquire to themselves, of and from the said *John M. Whelpley*, and of the moneys, goods and chattels of the said *John M. Whelpley*, *two* pieces of current gold coin of the United States of America, each piece of the value of *five* dollars, with intent to cheat and defraud the said *John M. Whelpley* thereof, to the great damage of the said *Whelpley*, and contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of *Michigan*.

David E. Harbaugh,
Prosecuting Attorney of *Wayne* County, *Michigan*.

Form No. 6131.

(Precedent in State *v.* Brady, 107 N. Car. 823.)[1]

[*North Carolina*, *Moore* County. } *Superior* Court, *August* Term, 1890.][2]

The jurors of the state upon their oath present that *N. P. Brady*, *M. D. Brady*, *R. D. Williams* and *J. W. H. Cockerman*, late of the county of *Moore*, on the *10th* day of *December*, 1887, at and in the county of *Moore*, with the intent to defraud, unlawfully, wickedly and deceitfully did conspire together to cheat and defraud *William K. Jackson* of his goods and chattels, lands and tenements, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state.

And the jurors aforesaid, upon their oath aforesaid, do further present that the said *N. P. Brady*, *M. D. Brady*, *R. D. Williams* and *J. W. H. Cockerman*, late of the county of *Moore*, at and in the said county, on the *10th* day of *December*, 1887, with intent to defraud, unlawfully, wickedly and deceitfully did conspire together to cheat and defraud *William K. Jackson* of his goods and chattels, lands and tenements, and that the said defendants, in pursuance of said conspiracy, did falsely and fraudulently pretend to said *W. K. Jackson* that two certain tracts of land in *Chatham* county, contained gold mines, well knowing that neither of the said tracts of land contained a gold mine; and that, in pursuance of said conspiracy, the said *M. D. Brady* did then and there in *Moore* county unlawfully, knowingly and designedly obtain from the said *W. K. Jackson* $800 in money and the said *Jackson's* note for $700, being then and there the property of the said *Jackson*, and the said *N. P. Brady* did then and

1. The defendants moved to quash this indictment as to each count on the ground that it charged no indictable offense, and that it did not allege the means by which the cheating and defrauding were to be effected, but the indictment was held sufficient in both respects.

2. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

there in said county of *Moore*, unlawfully, knowingly and designedly obtain from the said *W. K. Jackson* a certain tract of land on *Deep River* in *Moore* county, of the value of *$3,000*, being then and there the property of the said *Jackson*, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state.

[*J. C. Black*, Solicitor.][1]

(2) By Inducing Surrender of Bond on Pretended Conveyance.

Form No. 6132.[2]

State of *Maine*.

Cumberland, ss. At the *Supreme Judicial* Court begun and holden at *Portland* within and for the county of *Cumberland*, on the *last Tuesday* of *November*, in the year of our Lord one thousand eight hundred and *fifty-eight*.

The jurors for said state upon their oath present, that *William Mayberry* and *Stephen P. Mayberry*, both of *Cape Elizabeth*, in the county of *Cumberland*, laborers, on the *twenty-ninth* day of *June*, in the year of our Lord one thousand eight hundred and *fifty-eight*, unlawfully, fraudulently and maliciously, did conspire, combine, confederate and agree together, one *Henry Pennell* to cheat and defraud, by then and there inducing him, the said *Henry Pennell*, a certain bond, or writing obligatory, signed with the signature and name and sealed with the seal of him, the said *William Mayberry*, whereby he, the said *William Mayberry*, acknowledged himself to be indebted to the said *Pennell* in the sum of *eighteen hundred* dollars, and also *three* certain promissory notes, each and all signed with the signature and name of him, the said *William Mayberry*, the tenor of which said promissory notes is to the jurors unknown, which said bond or writing obligatory, and promissory notes, were then and there the property of him, the said *Henry Pennell*, and were then and there of great value, to wit, of the value of *one thousand* dollars, and were then and there, all and singular in full force, and not revoked, canceled nor paid, to surren-

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. This form, save for the omission of an allegation held immaterial by the court, is the second count in the indictment in State *v.* Mayberry, 48 Me. 218, which was held sufficient.

Insufficient Indictment. — An indictment charging that the defendants "being evil-disposed persons, and devising and intending one *Owen Lawrence* to injure and defraud, did unlawfully conspire, combine, confederate and agree together the said *Owen Lawrence* to injure, cheat and defraud of a certain horse, the property of the said *Owen Lawrence*, of great value, to wit, of the value of *one hundred* dollars, against the peace and dignity of the state aforesaid," was held not to charge a conspiracy punishable either at common law or under the statute of the state (Rev. Stat. (1883), c. 126, § 18), making it a criminal offense to conspire to "injure the person, character, business, or property of another; or to do any illegal act injurious to the public trade, health, morals, police or administration of public justice; or to commit a crime punishable by imprisonment in the state prison." In the indictment, if the means by which the intended purpose was to be accomplished be not set out, the purpose itself should appear to be illegal. State *v.* Hewett, 31 Me. 396. To the same effect see State *v.* Clary, 64 Me. 369.

der, cancel and discharge under and by means of the false and fraudulent pretense, that he, the said *William Mayberry*, was then and there seised and possessed of a certain parcel of land, with the buildings thereon, situated in *Gray*, in said county of *Cumberland*, and that he had good right then and there to sell and convey the said land and buildings to him, the said *Henry Pennell*, and that he, the said *William Mayberry*, would then and there, for the consideration of the surrender, cancellation and discharge of the bond or writing obligatory aforesaid, and of the *three* promissory notes aforesaid, so as aforesaid held against him by the said *Pennell*, sell and convey the land and buildings aforesaid in *Gray* aforesaid, to him the said *Henry Pennell*; when, in truth and in fact, he the said *William Mayberry*, was not then and there seised and possessed, as aforesaid, of such lands or tenements in said *Gray*, and they, the said *William* and *Stephen P. Mayberry*, then and there well knew that he, the said *William*, was not then and there seised and possessed of said lands or tenements in said *Gray*, and that he, the said *William*, then and there had not good right then and there to sell and convey to him, the said *Henry Pennell*, the said lands or tenements situated in *Gray* aforesaid. And then and there knowing, as aforesaid, the falsity and fraud of all and singular the aforesaid pretenses, they, the said *William Mayberry* and *Stephen P. Mayberry*, then and there, as aforesaid, unlawfully, fraudulently and maliciously, did conspire, combine, confederate and agree together, him, the said *Henry Pennell*, then and there, as aforesaid, by the false and fraudulent pretenses aforesaid, to defraud and cheat, against the peace of the state and contrary to the form of the statute in such case made and provided.

Andrew Johnson, Foreman.

James Smith, County Attorney.

(3) By Making One Drunk and Playing Falsely at Cards.[1]

Form No. 6133.

(Precedent in State *v.* Younger, 1 Dev. L. (12 N. Car.) 357.)[2]

[(*Caption as in Form No. 6131.*)][3]

The jurors for the state upon their oath present, that *William G. Younger* and *Richard I. Cook*, on [the *tenth* day of *October*, 1827,] at [*Rutherfordton* in said county] did combine, conspire, confederate and agree, to and with each other, to cheat and defraud one *Peter Dyer* out of his goods and chattels, and in pursuance of the aforesaid agreement, so as aforesaid between them had and made, the said *William G. Younger* and *Richard I. Cook* did, at [*Rutherfordton* aforesaid] cause

1. For an indictment for a conspiracy between several persons to play at a game so that one of them should seem by his playing to have much less skill than he really possessed so as to induce a looker on to play with him and thereby lose to him his money, see Reg. *v.* Bailey, 4 Cox C. C. 392.

2. Upon this indictment the defendant was convicted and moved in arrest of judgment upon the ground that the indictment did not state an indictable offense at common law. The motion was overruled, and upon appeal the judgment was affirmed.

3. The matter to be supplied within [ ] will not be found in the reported case.

and procure the said *Peter Dyer* to be intoxicated, and did then and there propose to him, the said *Peter Dyer* to play at a game of cards for money. By means whereof, the said *William G. Younger* and *Richard I. Cook*, by falsely, fraudulently and deceitfully playing at the game of cards, with him, the said *Peter Dyer*, for money, they, the said *William G. Younger* and *Richard I. Cook*, did then and there cheat and defraud him, the said *Peter Dyer*, out of the sum [of *twenty* dollars, lawful money of the United States.] And so the jurors aforesaid, upon their oath aforesaid, do say, that the aforesaid *William G. Younger* and *Richard I. Cook*, by means of the aforesaid combination, conspiracy, confederation and agreement, so as aforesaid, between them, in manner and form as aforesaid had and made, him, the said *Peter Dyer*, of the aforesaid sum [of *twenty* dollars] of the goods and chattels of him, the said *Peter Dyer*, then and there, in manner and form aforesaid, by falsely, corruptly and deceitfully playing and gambling at the game of cards aforesaid, falsely and deceitfully did cheat and defraud, to [the great damage of him the said *Peter Dyer*] and against the peace and dignity of the state.

[(*Signature as in Form No. 6131.*)][1]

d. The Public, by Uttering False Bank Notes.[2]

Form No. 6134.

(Precedent in Collins *v.* Com., 3. S. & R. (Pa.) 220.)[3]

[In the Court *of Quarter Sessions of the Peace* for the County of *Dauphin*, *February* Session, A. D. 1817.

County of *Dauphin*, ss. The grand inquest of the *commonwealth* of *Pennsylvania* inquiring for the body of the county of *Dauphin* upon their oaths and affirmations do present* that *Thomas Collins*, *John Doe* and *Samuel Short*, all late of said county, on the *first* day of *January* in the year of our Lord one thousand eight hundred and *seventeen*, at the county aforesaid and within the jurisdiction of the said court,][4] falsely, unlawfully and wickedly did conspire, combine, confederate and agree among themselves to deceive and defraud, and to cause to be deceived and defrauded, divers of the citizens of the *Commonwealth* of *Pennsylvania*, of great sums of money, by means of false pretenses and false, illegal, and unauthorized paper writings, in the form and similitude of bank notes, which said paper writings were of no value, and purported to have been promissory notes, bearing different dates, for the payment of divers sums on demand, by

1. The matter to be supplied within [ ] will not be found in the reported case.

2. **For other forms of indictments** for conspiracy to cheat and defraud the public see as follows:

By means of the circulation of a false prospectus to induce them to take shares in a worthless company. Reg. *v.* Gurney, 11 Cox C. C. 414.

By the manufacture of spurious indigo, with intent to sell the same as genuine indigo of the best quality, and so to cheat and defraud the purchasers. Com. *v.* Judd, 2 Mass. 329.

3. For similar forms of indictment see Williams *v.* Com., 34 Pa. St. 178; Clary *v.* Com., 4 Pa. St. 210; Com. *v.* Delany, 1 Grant's Cas. (Pa.) 224.

4. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

the *Ohio Exporting and Importing Company*, at their bank in *Cincinnati*, and to have been signed by *Z. Sharp* as president, and *J. Lance* as cashier, when, in verity and truth, no such banking company existed, and that according to, and in pursuance of the conspiracy, combination, confederacy, and agreement among themselves, had as aforesaid, the said *Thomas Collins*[1] afterwards did fraudulently, unlawfully, and deceitfully, offer, and pay, to one *Joseph Preston*, for the purpose of deceiving and defrauding him,[2] the said *Joseph*, for, and as a good, genuine, and lawful bank note, *one* of the aforesaid false, illegal, and unauthorized paper writings, in the form and similitude of a bank note, partly written and partly printed, purporting to be a promissory note for the payment of *ten* dollars, by the *Ohio Exporting and Importing Company*, to *N. White*, or bearer, on demand, at their bank in *Cincinnati*, bearing date the *fifteenth* day of *January*, in the year of our Lord one thousand eight hundred and *sixteen*, and to have been signed by *Z. Sharp*, as president, and *J. Lance*, as cashier, he, the said *Thomas Collins*, did, then and there, to wit, on [the *first* day of *January*, aforesaid, offer as aforesaid],[3] and well knowing that no such bank existed in *Cincinnati*, or elsewhere, as the *Ohio Exporting and Importing Company*, and, that the said note, purporting to be a bank note, issued by the said company, was of no value, [to the evil example of all others in like case offending and against the peace and dignity of the *commonwealth* of *Pennsylvania*.

Daniel Webster, District Attorney.][3]

e. The State.

Form No. 6135.[4]

Georgia, Richmond County.

The grand jurors selected, chosen and sworn for the county of *Richmond*, to wit: (*Here insert names of jurors*), in the name and

1. An overt act charged to be done by one conspirator in pursuance of the conspiracy is to be considered as the act of all. Collins *v.* Com., 3 S. & R. (Pa.) 220. But an averment of an overt act is not necessary. Clary *v.* Com., 4 Pa. St. 210.

2. It is not necessary to charge the actual defrauding of any person; passing, with intent to defraud, is sufficient. Collins *v.* Com., 3 S. & R. (Pa.) 220. And the indictment may charge a conspiracy to cheat or defraud the public generally, without naming any individual intended to be defrauded. Rex *v.* De Berenger, 3 M. & S. 67; Rex *v.* Gurney, 11 Cox C. C. 414; McKee *v.* State, 111 Ind. 378; Com. *v.* Judd, 2 Mass. 329; People *v.* Arnold, 46 Mich. 268; Malone's Case, 2 C. H. Rec. (N. Y.) 22; Clary *v.* Com., 4 Pa. St. 210; Collins *v.* Com., 3 S. & R. (Pa.) 220.

But the indictment must charge a conspiracy to cheat either an individual or class of individuals, or the public generally; a general allegation of an intent to cheat and defraud is bad for uncertainty and ambiguity, and an allegation of an overt act in pursuance of the conspiracy directed against a particular person will not aid the defective allegation of the conspiracy. People *v.* Arnold, 46 Mich. 268.

3. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

4. *Georgia.* — 3 Code (1895), § 287. See also §§ 288, 289.

Precedent. — In State *v.* Cardoza, 11 S. Car. 195, the indictment was in four counts. The first count charged that the defendants were officers of the state and then charged the conspiracy, setting forth the means in detail. The second and third counts were substan-

behalf of the citizens of *Georgia*, charge and accuse *John Doe*, *Samuel Short* and *William Rufus*, of the county and state aforesaid, with the offense of conspiracy, for that the said *John Doe*, *Samuel Short* and *William Rufus*, on the *first* day of *June*, in the year of our Lord one thousand eight hundred and *ninety-seven*, at the county aforesaid, did unlawfully and wickedly conspire and agree to defraud, cheat and illegally obtain from the state of *Georgia* a large sum of money, to wit, the sum of *five thousand* dollars of the property and moneys of the said state, contrary to the laws of said state, the good order, peace and dignity thereof.

Superior Court, A. D. 1897, *October* Term. — *Daniel Webster*, Solicitor General. *Richard Roe*, Prosecutor.

3. To Commit Certain Crimes.[1]

a. Abduction of Child.

Form No. 6136.[2]

North Carolina, *Wake* County. } *Superior* Court, *February* Term, 1897.

The jurors for the state upon their oaths present,* that on the *first* day of *January*, A. D. 1897, in the county of *Wake*, one *Jane White* then and there being the child of one *John White*, was residing with her said father, *John White*, and that then and there, while the said *Jane White* was so residing with her said father, *John Doe* and *Richard Roe*, both late of said county, wilfully, unlawfully and wickedly did conspire, combine, confederate and agree together to abduct the said *Jane White* from, and induce her the said *Jane White* to leave, her father aforesaid, the said *John White*, she the said *Jane*

tially the same as the first. These counts were objected to, but were sustained as sufficient. The fourth count was excepted to on the ground that the statement of the means to be employed was insufficient, but the exceptions were overruled. The court, upon a careful review of the authorities, distinguished clearly between conspiracies to defraud a private person and those formed for the purpose of defrauding the public. Conspiracies of the latter class are indictable in themselves, and hence no allegation of the means to be employed is necessary, the rule being otherwise in respect to conspiracies to defraud a private person. See also State *v.* Rickey, 9 N. J. L. 293.

The fourth count was as follows, to wit:

"And the jurors aforesaid, upon their oaths aforesaid, do further present: That *Richard H. Gleaves*, *Samuel J. Lee*, *Josephus Woodruff*, *A. O. Jones* and *Francis L. Cardoza*, late of the county and state aforesaid, on the *tenth* day of *January*, in the year of our Lord one thousand eight hundred and *seventy-four*, with force and arms, at *Columbia*, in the county and state aforesaid, unlawfully, falsely, fraudulently and corruptly did conspire, combine, confederate and agree together, by divers false pretenses and indirect means, to cheat and defraud the said state of *South Carolina* of a large sum of money, to wit, of the sum of *four thousand* dollars, to the great damage of the said state of *South Carolina*, to the evil example of all others in like case offending, and against the peace and dignity of the state."

1. For requisites of indictment generally see *supra*, note 1, p. 140.

2. *North Carolina.* — Code (1883), § 974. Under this statute it is not necessary to aver that the defendant was not a nearer relation to the child than the person from whose custody she was abducted. State *v.* George, 93 N. Car. 567.

White then and there being under the age of fourteen years, to wit, of the age of *ten* years, against the form of the statute in such case made and provided, and against the peace and dignity of the state.

Daniel Webster, Solicitor.

b. Abortion.

Form No. 6137.[1]

In the Court *of Quarter Sessions of the Peace* for the County of *Delaware*, *February* Session, A. D. 1897.

County of *Delaware*, ss.

The grand inquest of the *commonwealth* of *Pennsylvania*, inquiring for the body of the county of *Delaware*, upon their respective oaths and affirmations, do present that *John Doe*, *Samuel Short* and *Peter Sharp*, all late of said county, being persons of evil minds and dispositions, on the *first* day of *January*, in the year of our Lord one thousand eight hundred and *ninety-seven*, at the county of *Delaware* aforesaid, and within the jurisdiction of the said court, unlawfully and wickedly did conspire, combine, confederate and agree together, in and upon the body of one *Rachel Roe* an assault to make, with a wicked intent, to wit, to cause and procure the said *Rachel Roe* to miscarry and to bring forth a certain child with which she was then big and pregnant, dead, to the great damage of the said *Rachel Roe*, to the evil example of all others in the like case offending, and against the peace and dignity of the *commonwealth* of *Pennsylvania*.

And the jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that the said *John Doe*, *Samuel Short* and *Peter Sharp*, being such persons as aforesaid, on the day and year aforesaid, and within the jurisdiction of the said court, unlawfully and wickedly did conspire, combine, confederate and agree together, to cause and procure the said *Rachel Roe* to miscarry and to bring forth a certain child, with which she was then big and pregnant, dead, to the great damage of the said *Rachel Roe*. And the jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that the

1. This form, from Whart. Prec. (2d ed.), p. 470, is based on the counts in Com. *v.* Demain, 6 Pa. L. J. 29, Bright. (Pa.) 441, which were sustained on special demurrer by the supreme court of *Pennsylvania*.

Woman not Pregnant. — A woman who believes herself to be with child but not being with child conspires with other persons to administer drugs to herself or to use instruments on herself with intent to procure abortion is liable to be convicted of conspiracy to procure abortion. Reg. *v.* Whitchurch, 24 Q. B. D. 420, 8 Am. Cr. Rep. 1. The indictment in this case was as follows: "The jurors, etc., present that *Thomas William Whitchurch*, *John Howe*, and *Elizabeth Cross*, believing that the said *Elizabeth Cross* was then pregnant and that in due course of nature she would be delivered of a child begotten by the said *John Howe*, and wickedly intending and contriving to conceal such pregnancy and to prevent such her delivery in due course of nature, on *June 1*, 1889, did amongst themselves unlawfully, knowingly, and wickedly conspire, combine, confederate, and agree together feloniously and unlawfully to procure the miscarriage of the said *Elizabeth Cross* by unlawfully administering to and causing to be taken by her certain noxious things, and by unlawfully using certain instruments and other means, with intent to procure the miscarriage of the said *Elizabeth Cross*." The indictment also set out a

said defendants, in pursuance of and according to the said conspiracy, combination, confederacy and agreement between them, the said defendants as aforesaid, had, on the day and year aforesaid, in the county aforesaid, and within the jurisdiction of the said court, in and upon the body of the said *Rachel Roe*, then and there being pregnant and big with a certain other child, did make an assault, and her the said *Rachel Roe* then and there did bruise, wound and ill treat, so that her life was thereby greatly despaired of, and a certain instrument made of silver or other metal, in the shape and form of a hook, up and into the womb and body of the said *Rachel Roe* then and there wickedly, violently and inhumanly, did force and thrust, with a wicked intent to cause and procure the said *Rachel Roe*, as aforesaid, to miscarry and abort as aforesaid, and to kill and murder the said child, by reason whereof, and by means of which the said last-mentioned premises, the said child was killed, and its life destroyed and taken away in its mother's womb; and the said *Rachel Roe*, afterwards, to wit, on the *tenth* day of *January*, in the year aforesaid, miscarried and was aborted of the said child, being a *female* child, to the great injury of the said *Rachel Roe*, to the evil example of all others in the like case offending, and against the peace and dignity of the *commonwealth* of *Pennsylvania*.

Daniel Webster, District Attorney.

c. Assault and Battery.[1]

Form No. 6138.

(Precedent in Com. *v.* Putnam, 29 Pa. St. 296.)[2]

[In the Court *of Quarter Sessions of the Peace* for the County of *Erie*, *February* Sessions, A. D. 1857.

County of *Erie*, ss. The grand inquest of the *commonwealth* of *Pennsylvania* inquiring for the county of *Erie* upon their respective oaths and affirmations do present that *Francis Putnam* and *Samuel Short*, late of said county, on the *second* day of *January* in the year of our

number of acts done in pursuance of the conspiracy, which are not set forth in the case as reported.

1. **Precedents.** — See also forms in State *v.* Ripley, 31 Me. 386; State *v.* Pulle, 12 Minn. 164; Reg. *v.* Denew, 14 How. St. Tr. 895.

In State *v.* Ormiston, 66 Iowa 143, 5 Am. Cr. Rep. 113, an indictment drawn under Iowa Code (1897), § 5059, was held not bad for duplicity when the charging par was in the words following, to wit:

"*Calvin Ormiston*, *David Ormiston* and *Charles Bramer* did wickedly and maliciously conspire together with intent wrongfully to injure the person and character of one *Charles Blanchard*, and to assault the said *Charles Blanchard* with the felonious intent to inflict upon him a great bodily injury, in violation of law; and in pursuance of said conspiring together said defendants did, in the night-time, feloniously decoy said *Charles Blanchard* away from his home and family, and into the public highway, and did then and there feloniously assault, ill treat, and tar and feather the said *Charles Blanchard*."

2. On trial the jury found the defendants "guilty in manner and form as they stand indicted," but the court, on motion of defendant's counsel, arrested the judgment on the ground that a conspiracy to commit an assault and battery is not an indictable offense. This judgment, however, was reversed by the supreme court and the record remitted for further proceedings according to law.

Lord one thousand eight hundred and *fifty-seven*,][1] with force and arms, at the county of *Erie* aforesaid, unlawfully and wickedly did conspire, combine, and confederate, and agree together, and with divers other evil disposed persons whose names are unknown to the jurors aforesaid, unlawfully to attempt and endeavor to commit an assault upon *Andrew L. Haskell*, then and there being in the county of *Erie* aforesaid, and him, the said *Andrew L. Haskell*, to beat, bruise, wound, and maltreat, and other wrongs to him, the said *Andrew L. Haskell*, in his person to do and inflict, against the peace and dignity of the *commonwealth of Pennsylvania*.

[*C. W. Kelso*, District Attorney.][1]

d. Breaking Jail.

(1) To Escape.

Form No. 6139.[2]

(*Commencing as in Form No. 6122, and continuing down to* *) that *William Murray*, *David Terry*, and *Charles Burlingham*, all of *Bangor* in the county of *Penobscot*, on the *first* day of *April*, 1897, were persons lawfully confined in the county jail in *Bangor*, in the county aforesaid, then and there lawfully detained in the custody of the keeper of said prison, by divers legal processes then in force against them, and that they, the said *William Murray*, *David Terry*, and *Charles Burlingham*, unlawfully contriving and intending to break down, demolish, prostrate and destroy part of the wall belonging to and inclosing the said prison, and thereby unlawfully to effect the escape of themselves, the said *William Murray*, *David Terry*, and *Charles Burlingham*, and divers other prisoners then lawfully confined in said prison and in the custody of the keeper thereof from and out of the same, on the *first* day of *April* aforesaid, at *Bangor* in the county aforesaid, did unlawfully conspire, combine, confederate and agree among themselves, and meet together for the purposes aforesaid, and being so assembled and met together, did then and there, in pursuance of the conspiracy, combination, confederacy and agreement aforesaid, so as aforesaid had among themselves, unlawfully and wickedly began to break down, demolish, prostrate and destroy part of the said wall with intent thereby unlawfully to effect the escape of themselves so there confined in the said prison and in the custody of the keeper thereof, against the peace (*concluding as in Form No. 6122*).

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. This form is based on the indictment in State *v.* Murray, 15 Me. 100, in which case the defendants, having been found guilty, filed exceptions. It was objected that the indictment was bad in that it charged two crimes, conspiracy and prison breach, but the court held that the principal charge was the conspiracy, and that the breaking of the floors, etc., were alleged as evidence of the consummation of the project, and that the conspiracy to commit a misdemeanor was not merged in the commission of it, and the exceptions were overruled.

See also forms in Davis' Prec. 106, 107; 3 Chit. Cr. L. 1150, 1151.

(2) To Injure or Kill Prisoner.

Form No. 6140.[1]

(*Commencing as in Form No. 6136, and continuing down to* *) that heretofore and at the time of committing the offense hereinafter mentioned one *John White* was a prisoner lawfully confined in the county jail of the county of *Wake*, situated at *Raleigh* in the county aforesaid, and lawfully detained by the keeper of the said jail under a charge of *rape*, and that *John Doe*, *Richard Roe*, and *Samuel Short*, all of the county of *Wake* aforesaid, and divers other persons to the jurors aforesaid unknown, on the *first* day of *January*, A. D. 1897, at the county aforesaid, unlawfully and wickedly, did conspire, combine, confederate and agree together to break and enter the said jail and place of confinement for the purpose of killing[2] the said *John White*, he, the said *John White*, so being a prisoner and confined in said jail as aforesaid, against (*concluding as in Form No. 6136*).

e. Burglary.

Form No. 6141.

(Precedent in Scudder *v.* State, 62 Ind. 14.)[3]

[In the *Jefferson Circuit* Court of *Indiana* of the *November* Term, A. D. 1877.

1. *North Carolina.* — Laws (1893), c. 461, § 1.

2. Or otherwise injuring the prisoner. N. Car. Laws (1893), c. 461, § 1.

3. This form is sufficient under Horner's Stat. Ind. (1896), § 2139.

Precedent. — In Brown *v.* State, 2 Tex. App. 115, it was held that in an indictment for conspiracy the same degree of particularity is not required in charging an unexecuted conspiracy as in charging an executed one. The charging part of the indictment, which was held to be sufficient (see Tex. Pen. Code (1895), § 953 *et seq.*), was in the words and figures following, to wit:

"On the *19th* day of *June*, A. D. one thousand eight hundred and *seventy-six*, the said *Peter Brown*, *Sam Mason*, *Henry Helm*, and *Bob White*, being persons of evil minds and dispositions, wickedly devising, and intending fraudulently, burglariously, and by force to break and enter, in the night-time, the store-house of *E. H. Newlon* and *J. K. Williams*, composing the commercial firm of *E. H. Newlon & Co.*, situated in said *Harrison* county, with the intent to fraudulently take, steal, and carry away from, and out of, the possession of the said *E. H. Newlon* and *J. K. Williams*, and without their consent, and with the intent to deprive the said *E. H. Newlon* and *J. K. Williams* of the value of the same, and to appropriate the same to the use of them, the said *Peter Brown*, *Sam Mason*, *Henry Helm*, and *Bob White*, certain goods and groceries, of the value of *one hundred* dollars, the property of the said *E. H. Newlon* and *J. K. Williams*, they, the said *Peter Brown*, *Sam Mason*, *Henry Helm*, and *Bob White*, did, on the day and date aforesaid, in the county aforesaid, fraudulently, maliciously, and unlawfully conspire, combine, confederate, and positively agree together, between and amongst themselves, by force and in the night-time, to burglariously enter the said store-house of the said *E. H. Newlon* and *J. K. Williams*, then and there situate as aforesaid, with the intent as aforesaid to fraudulently take, steal, and carry away the goods and groceries as aforesaid, of the value of *one hundred* dollars, the property of the said *E. H. Newlon* and *J. K. Williams*, without their consent and with the intent to deprive the said *E. H. Newlon* and *J. K. Williams* of the value of the same, and to appropriate said goods and groceries to the use of them, the said *Peter Brown*, *Sam Mason*, *Henry Helm*, and *Bob White*."

State of Indiana
against
Edward D. Scudder, George Scott and Jacob Batchell.][1]

The grand jurors for the county of *Jefferson* upon their oath present, that *Edward D. Scudder*, *George Scott* and *Jacob Batchell*, on the *25th* day of *December*, A. D. 1877, at said county of *Jefferson*, did unlawfully and feloniously unite, combine, conspire and agree together and among themselves, and each of them with the others, for the purpose of feloniously and burglariously breaking and entering, in the nighttime, into the storehouse of one *Frederick W. Hoblizel* then and there situate, with the intent the moneys, goods and chattels of[2] the said *Frederick W. Hoblizel* then and there being, to [feloniously][3] steal, take and carry away, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of *Indiana*.

[*J. F. Bellamy*, Prosecuting Attorney.][1]

f. Destroying Property.

(1) Dwelling-house.

Form No. 6142.[4]

State of *Vermont*,
Rutland County, ss.

Be it remembered that at a term of the *County* Court begun and held at *Rutland* within and for the county of *Rutland* aforesaid, on the *tenth* day of *May*, A. D. 1897, the grand jurors within and for said county of *Rutland* upon their oath present, that *John Doe*, *Samuel Short* and *William Rufus*, all late of *Rutland*, in the said county of *Rutland*, on the *first* day of *April*, A. D. 1897, at the county aforesaid, did unlawfully and wickedly conspire together for the purpose and with the intent violently and forcibly to burn and destroy the dwelling-house of one *John White*, situate at *Rutland* in the said county, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state.

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. **Kind and Value of Goods.** — An indictment for a conspiracy to commit burglary, with the intent to steal, take and carry away the personal property of a person named, is not defective for failing to state the kind or value of the goods intended to be stolen. Reinhold *v.* State, 130 Ind. 467.

3. The indictment in this case was held insufficient because it alleged an intent to "steal, take," etc., instead of "to *feloniously* steal, take," etc., in accordance with the statutory definition of a larceny. It was so held also in Smith *v.* State, 93 Ind. 67.

4. *Vermont.* — Stat. (1894), § 5052. This statute makes it a criminal offense to conspire to kill, maim or wound any person, or to rob any person, corporation or community, or to burn, blow up or otherwise destroy any bank building, store, factory, dwelling or other building, or depository of property, or a railroad car or engine, or any vessel, steamboat or other water craft, finished or unfinished, for use in navigable waters.

See a similar statute in *Connecticut* relating solely to public property. Conn. Gen. Stat. (1888), §§ 1421, 1422.

(2) Railroad Tracks.

Form No. 6143.[1]

(*Commencing as in Form No. 6128, and continuing down to* *) feloniously did conspire and combine to take up, injure and destroy a certain railroad track belonging to the *Illinois Central Railroad Company*, there situate, which said track was then and there necessary to the free use of said railroad, contrary to (*concluding as in Form No. 6128*).

g. Murder.[2]

Form No. 6144.

(Ala. Crim. Code (1886), § 4899, No. 29.)[3]

The State of *Alabama*, } *Circuit* court, *March* term, 1897.
Monroe county. }

The grand jury of said county charge that, before the finding of this indictment, *John Doe* and *Samuel Short* conspired together to unlawfully, and with malice aforethought, kill *Richard Roe*, against the peace and dignity of the State of *Alabama*.

Daniel Webster, Solicitor of the *third* circuit.

Form No. 6145.[4]

Pulaski Circuit Court.

The State of Arkansas }
against }
John Doe and Richard Roe. }

The grand jury of *Pulaski* county, in the name and by the authority of the state of *Arkansas*, accuse *John Doe* and *Richard Roe* of the crime of conspiracy, committed as follows, viz: The said *John Doe* and *Richard Roe*, on the *first* day of *June*, A. D. 1897, in the county aforesaid, did then and there unlawfully agree and conspire together to unlawfully and with malice aforethought kill and murder one *John White*, then and there being in the peace of the state, and in pursuance of the said agreement and conspiracy, and as an advance thereto,[5] they, the said *John Doe* and *Richard Roe*, did then and there lie in wait for the said *John White*, with intent to kill and murder him, the said *John White*, as aforesaid, which said murder they, the said *John Doe* and *Richard Roe*, did not then and there commit,[6] against the peace and dignity of the state of *Arkansas*.

Daniel Webster, Prosecuting Attorney.

1. *Illinois*. — Starr & C. Anno. Stat. (1896), c. 38, § 187.

2. For other forms of indictment for conspiracy to commit murder see Rex *v.* Glennan, 26 How. St. Tr. 438; Rex *v.* Dunn, 26 How. St. Tr. 839; State *v.* Tom, 2 Dev. L. (13 N. Car.) 569.

For conspiracy to murder unborn infant. Reg. *v.* Banks, 12 Cox C. C. 393.

3. *Alabama*. — Crim. Code (1886), §§ 4007, 4008.

4. *Arkansas*. — Sand. & H. Dig. (1894), § 1506.

5. Under the statute, the conspirators must make some advance toward committing the felony.

6. Under the *Arkansas* statute (Sand. & H. Dig. (1894), § 1506), a conspiracy to commit a felony is not indictable after the felony has been committed. It is therefore necessary to allege in the indictment that the felony which the de-

h. Procuring Defilement of Young Female.

Form No. 6146.

(Precedent in Reg. *v.* Mears, 4 Cox C. C. 425, 1 Eng. L. & Eq. 581.)[1]

Borough, town and County of the town of *Southampton*, to wit.

The jurors for our lady the Queen, upon their oath and affirmation, present, that *Mary Ann Mears*, late of the parish of *St. Mary*, in the town and county of the town aforesaid, single woman, being a person of wicked and depraved mind and disposition, and contriving and craftily and deceitfully intending to debauch and corrupt the morals of one *Johanna Carroll*, as hereinafter mentioned, and to seduce her into an infamous and wicked course of life, heretofore, and after the passing of a certain act of Parliament for the better preventing the heinous offense of procuring the defiling of women, to wit, on the *14th* day of *November*, in the year of our Lord 1850, with force and arms, at the parish aforesaid, in the town and county aforesaid, did knowingly, deceitfully, and unlawfully attempt and endeavor, as much as in her lay, to procure the said *Johanna Carroll* then and there being a child under the age of twenty-one years, to wit, of the age of *fifteen* years, an orphan, and a servant out of place, to have illicit carnal connection with a man, to wit, a certain man whose name is to the jurors aforesaid unknown, by then and there knowingly and unlawfully, falsely and fraudulently pretending and representing to the said *Johanna Carroll* that she, the said *Mary Ann Mears*, was the friend of the said *Johanna Carroll*, and knew her father and mother, and that if she, the said *Johanna Carroll*, would go home with her, the said *Mary Ann Mears*, she the said *Mary Ann Mears* would keep her until

fendants are charged with conspiring to commit was not committed. Elsey *v.* State, 47 Ark. 572.

1. It was held in this case that the prisoners were rightly convicted of a conspiracy under Stat. 12 & 13 Vict., c. 76, and that they might have been indicted for the offense at common law.

Precedents. — For indictments for similar conspiracies see 5 Cox C. C. Appendix viii; Rex *v.* Grey, 9 How. St. Tr. 127; and 6 Cox C. C. Appendix lxxix, where the indictment is as follows:

"*Staffordshire*, to wit. The jurors for our Lady the Queen, upon their oath present that *John Doe* and *Richard Roe*, on the *first* day of *June*, in the year of our Lord 1853, did between themselves conspire, combine, confederate and agree together wickedly, knowingly and designedly, to procure, by false pretenses, false representations and other fraudulent means, one *Jane Grey*, then being a girl under the age of twenty-one years, to wit, of the age of *fifteen* years, to have illicit carnal connection with a man, to wit, with a certain man whose name is to the jurors aforesaid unknown."

This form, while charging an offense at common law, was drawn under the provisions of the Criminal Law Amendment act (14 & 15 Vict., c. 100). It is unnecessary to state any venue in the body of the indictment, the venue in the margin being sufficient. Nor is it necessary to allege that the offense was committed "with force and arms" or "against the peace." To adapt the form to American practice, the venue and usual conclusion should be added.

Joinder of Counts. — A count for a conspiracy to induce a female to have illicit criminal intercourse may be joined with counts charging the abduction of the said female for the purpose of prostitution and detaining her against her will in a house of prostitution, although the former offense is a misdemeanor and the others a felony. Herman *v.* People, 131 Ill. 564.

she, the said *Johanna Carroll*, could get a place, and that she, the said *Mary Ann Mears*, would herself try all she could to get her a place; and by then and there, under such false and fraudulent pretenses and representations, taking her, the said *Johanna Carroll*, to the home of the said *Mary Ann Mears*, and keeping her there for a long space of time, and soliciting her and trying to induce her then and there to have illicit carnal connection with the said man; whereas, in truth and in fact, the said *Mary Ann Mears* was not the friend of the said *Johanna Carroll*, and the said *Mary Ann Mears* did not intend to take, and did not take, the said *Johanna Carroll* home with her to keep her, the said *Johanna Carroll*, till she, the said *Johanna Carroll*, could get a place, or till she, the said *Mary Ann Mears*, could obtain a place for her, but craftily and subtly, with the wicked design and purpose, by the said false and fraudulent pretenses, representations, and means aforesaid, to procure the said *Johanna Carroll* to have connection with a man as aforesaid, contrary to the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. And the jurors aforesaid, upon their oath and affirmation aforesaid, do further present that *Amelia Chalk*, late of the parish aforesaid, in the town and county aforesaid, laborer, at the time of the committing of the said misdemeanor by the said *Mary Ann Mears* as aforesaid, to wit, on the day and year aforesaid, at the parish aforesaid, in the town and county aforesaid, the said *Mary Ann Mears* to do and commit the said misdemeanor wickedly, knowingly, and unlawfully did aid, abet, and assist, contrary to the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. And the jurors aforesaid, upon their oaths and affirmation aforesaid, do further present, that the said *Mary Ann Mears* and the said *Amelia Chalk*, afterwards, to wit, on the said *14th* day of *November*, in the year aforesaid, with force and arms, at the parish aforesaid, in the town and county aforesaid, knowingly, wickedly, and unlawfully, did, by false pretenses, false representations, and other fraudulent means, attempt to procure the said *Johanna Carroll*, then and there being a child under the age of twenty-one years, to wit, of the age of *fifteen* years, to have illicit carnal connection with a man, to wit, a certain man whose name is to the jurors aforesaid unknown, contrary to the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. And the jurors aforesaid, upon their oath and affirmation aforesaid, do further present, that the said *Mary Ann Mears* and the said *Amelia Chalk* afterwards, to wit, on the day and year aforesaid, with force and arms, at the parish aforesaid, in the town and county aforesaid, did, between themselves, conspire, combine, confederate, and agree together, wickedly, knowingly and designedly, to procure by false pretenses, false representations, and other fraudulent means, the said *Johanna Carroll*, then being a poor child under the age of twenty-one years, to wit, of the age of *fifteen* years, to have illicit carnal connection with a man, to wit, a certain man whose name is to the jurors aforesaid unknown, contrary to the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

i. Procuring Elopement of a Minor Daughter.

Form No. 6147.[1]

(*Commencing as in Form No. 6134, and continuing down to* *) that at the time of the commission of the several grievances hereinafter mentioned and for a long time before, at said county, one *Jane M. Nevin*, a daughter of *David Nevin* and *Maria*, his wife, of said county, was a minor under the age of twenty-one years, and was dwelling and residing in the family of her said father, and under his paternal care, guardianship, protection, instruction, control, authority, and employment. And the said jurors on their said oaths and affirmations, do further present, that *Joseph Mifflin*, late of the said county, yeoman, *Robert C. Hays*, late of said county, physician, and *David H. Culbertson*, late of said county, yeoman, being persons of evil minds and dispositions, together with divers other evil-disposed persons to the jurors aforesaid unknown, on the *eighth* day of *June*, in the year of our Lord one thousand eight hundred and *forty-three*, at the county aforesaid, with force and arms, etc., unlawfully, wickedly, falsely, maliciously, and injuriously did conspire, combine, confederate, and agree together to cause, effect, produce, and procure the elopement and escape of the said *Jane M. Nevin* from the house, family, guardianship, protection, control, care, authority, and employment of her said father, the said *David Nevin*, without the consent of her said father, and against his will; and in pursuance and furtherance, and according to the said conspiracy, combination, confederacy, and agreement between them, the said *Joseph Mifflin*, *Robert C. Hays* and *David H. Culbertson*, as aforesaid had, did, on the night between the *tenth* and *eleventh* days of *June*, in the year aforesaid, at said county, entice, persuade, cause, procure and assist the said *Jane M. Nevin* to elope, escape, and depart from her said father's, the said *David Nevin's*, house, family, care, guardianship, protection, authority, control, and employment, secretly, covertly, and without his leave, consent, or approbation, and against his will, the said *Jane M. Nevin* then and there still being a minor under the age of twenty-one years; to the great damage of the said *David Nevin*, and of his said minor daughter, to the evil example of all others in the like case offending, and against the peace and dignity of the *commonwealth* of *Pennsylvania*.

And the jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that the said *Joseph Mifflin*, *Robert C. Hays* and *David H. Culbertson*, together with divers persons to the jurors aforesaid unknown, being persons of evil minds and dispositions, afterwards, to wit, on the day and year aforesaid, at the county aforesaid, with force and arms, etc., unlawfully, wickedly, deceitfully, maliciously, and injuriously did conspire, combine, confederate and agree together to cause, induce, persuade and procure the said *Jane M. Nevin*, the said *Jane M. Nevin* then and there being a minor under the age of twenty-one years, and dwelling and residing in the house and family of her

1. This form, given in Whart. Prec. (2d ed.), p. 489, is the indictment which was sustained on error by the supreme court of *Pennsylvania* in the case of Mifflin *v.* Com., 5 W. & S. (Pa.) 461. For a similar indictment see Respublica *v.* Hevice, 2 Yeates (Pa.) 114

father, *David Nevin*, and under his paternal care, guardianship, protection, control and authority, to escape, elope and depart from her said father's house, family, care, guardianship, protection, and control, without her said father's consent, and against his will, with the view, purpose and intent that she, the said *Jane M. Nevin*, might be joined in marriage with one *Charles M. Reynolds*, without the consent and approbation and against the wish and will of the said *David Nevin*, and in violation of his lawful and parental rights and authority. And the jurors aforesaid, on their oaths and affirmations aforesaid, do further present, that the said *Joseph Mifflin*, *Robert C. Hays* and *David H. Culbertson*, with the said other persons unknown, in pursuance and furtherance of and according to the said conspiracy, combination, confederacy and agreement between them, the said *Joseph Mifflin*, *Robert C. Hays* and *David H. Culbertson*, as aforesaid had, did, on the night between the *tenth* and *eleventh* days of *June*, in the year aforesaid, about the hour of *one* o'clock, at *Shippensbury*, in said county, and within the jurisdiction of this court, wickedly, falsely, maliciously, unlawfully and injuriously entice, persuade, cause, procure, aid, and assist the said *Jane M. Nevin* to elope, escape and depart from her said father's house, family, care, guardianship, protection, control and authority, in the company and along with the said *Charles M. Reynolds*, and secretly and without the knowledge, approbation, and consent, and against the will of the said *David Nevin*, with the view, purpose and intent that she, the said *Jane M. Nevin*, should be joined in marriage with the said *Charles M. Reynolds*, without the consent and against the will of her said father; and with the same intent and purpose, and in furtherance of and according to the said conspiracy, combination, confederacy and agreement, the said *Joseph Mifflin*, *Robert C. Hays* and *David H. Culbertson* and other persons unknown, then and there did aid, assist, abet and co-operate with the said *Jane M. Nevin* and *Charles M. Reynolds*, secretly and covertly to carry away and remove a large quantity of clothing, goods and chattels of the said *David Nevin*, and to place the said *Jane M. Nevin* and the said goods, chattels and clothing within and upon a certain railroad car then and there passing, so that the said *Jane M. Nevin* might be swiftly and secretly conveyed and carried away and transported beyond the pursuit and protection of her said father, with the intent, view and purpose aforesaid; to the great damage of the said *David Nevin*, to the evil (*concluding as in Form No. 6134*).

j. Procuring Marriage Falsely to Appear of Record.

Form No. 6148.

(Precedent in Com. *v.* Waterman, 122 Mass. 44.)[1]

[*Commonwealth* of *Massachusetts*, } ss. At the *Superior* Court begun
County of *Suffolk*. } and holden at *Boston*, within and for the county of *Suffolk*, on the *second Monday* of *September*, in the year of our Lord one thousand eight hundred and *seventy-six*.][2]

1. This indictment was held to sufficiently charge an indictable offense.
2. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

The jurors for the *commonwealth* of *Massachusetts*, on their oath present, that *Edgar R. Butterworth*, *Maud M. Waterman*, *Lizzie Douglass*, *Henry M. Ingraham* and *Moses S. Marshall*, all of said *Boston*, on the *sixteenth* day of *March*, in the year one thousand eight hundred and *seventy-five*, at *Boston*, aforesaid, with wicked intent to cause it falsely to appear of record that one *Roderick D. Richardson* was lawfully married to said *Maud*, and with intent to injure said *Richardson* thereby, and to prevent said *Richardson* (he, said *Richardson*, then and ever since being an unmarried man) from contracting any marriage, except with said *Maud*, and with intent to cheat and defraud, unlawfully and wickedly did combine, conspire, confederate and agree together that said *Marshall* should then and there apply in person to *Nicholas A. Apollonio*, the registrar of births, deaths and marriages, duly appointed and qualified, in said city of *Boston*, to record all facts concerning marriages, and should falsely represent to said registrar that he, said *Marshall*, was said *Roderick D. Richardson* (said *Richardson* then being a citizen of said *Boston*, other than said *Marshall*), and should, in the office of said registrar in said *Boston*, give notice, and state that said *Richardson* and said *Maud* were both then residents of said *Boston*, and that said *Richardson* and *Maud* then intended shortly to be joined in marriage at said *Boston*, and should request and obtain from said registrar the certificate of said notice in such case required by law to be given by said registrar; that thereafter at said *Boston*, said *Butterworth* (he, said *Butterworth*, being then and there a justice of the peace for said county of *Suffolk*, duly commissioned and qualified) should falsely, and before, and without any marriage between said *Maud* and said *Richardson*, with a certain certificate and writing under the hand of and signed by him, the said *Butterworth*, as such justice, purporting to be a copy of a truthful and genuine record of a marriage, therein falsely alleged to have been solemnized by said *Butterworth*, as such justice at said *Boston*, between said *Richardson* and said *Maud*, pursuant to said notice, and said certificate to be obtained from said registrar in manner and form as aforesaid; and that said *Douglass* and *Ingraham* should thereupon falsely and publicly pretend to have been present at such marriage as witnesses thereto; and that said *Maud* should thereupon, without the knowledge of said *Richardson*, cause to be delivered such copy of record of marriage (signed by said *Butterworth* as aforesaid) to said registrar, at his said office, for record, as and for a true and genuine copy of a truthful and genuine record of marriage, and that thereafter said *Maud* should publicly assume to be the wife of said *Richardson*, and that the said *Butterworth*, *Douglass*, *Ingraham* and *Marshall* should declare such assumption to be just and true within their own knowledge; and the jurors aforesaid, upon their oath aforesaid, do further present that then and there, in pursuance of said conspiracy and agreement, said *Marshall* did then and there apply to said registrar, and give said notice, and then and there pretend to be said *Richardson*, and did then and there receive such certificate of said notice from said registrar; and said *Butterworth* did thereafter, to wit, on said day, at said *Boston*, as such justice, write and sign such false copy of record as and for a true certificate and copy of a truthful record

of marriage, and said *Douglass* and *Ingraham* did then and there publicly declare themselves to have been witnesses of such marriage, and said *Maud* did thereafter cause said writing, signed by said *Butterworth*, to be duly entered and recorded in the office of said registrar, at said *Boston*; and said *Maud* did thereafter publicly say and aver falsely, that she, said *Maud*, was the lawful wife of said *Richardson*, and said *Butterworth*, *Douglass*, *Ingraham* and *Marshall* did declare the same to be true as of their own knowledge.

Whereas, in truth and in fact, said *Marshall* then and there was not said *Roderick D. Richardson*, but said *Richardson* was a man other than said *Marshall*; and said *Roderick* did not then and there, nor did he at any time, intend to be joined in marriage with said *Maud*; nor did said *Richardson* desire said notice to be given to said registrar by said *Marshall*, or by any other person, or by himself, said *Richardson*; nor did he, said *Richardson*, at any time before said notice was given as aforesaid, know that the same was to be given; and whereas, in truth and fact, said *Richardson* was never joined in marriage by said *Butterworth* to said *Maud*, nor was he, said *Richardson*, ever married to any person whomsoever, nor was there any truthful record of any marriage between said *Maud* and said *Richardson*, all of which said *Butterworth*, *Douglass*, *Waterman*, *Ingraham* and *Marshall* at the time they so combined, confederated and agreed together, and at the time they committed the acts hereinbefore set forth, then and there all well knew. And so the jurors aforesaid, upon their oaths aforesaid, do say that said *Butterworth*, *Marshall*, *Ingraham*, *Douglass* and *Waterman*, at said *Boston*, on said *sixteenth* of *March*, did unlawfully combine, conspire, confederate and agree together, by the means and in form aforesaid, to cause said *Richardson* falsely to appear of record to be married to said *Maud*, against the law, peace and dignity of said *commonwealth*.

[*W. C. Loring*, District Attorney.][1]

k. Robbery.

Form No. 6149.

(Precedent in Landringham *v.* State, 49 Ind. 187.)[2]

[In the *Marion Criminal Circuit* Court of *Indiana*, of the *June* Term, 1874.

State of Indiana
against
James Landringham.][1]

The grand jurors for the county of *Marion*, and State of *Indiana*, upon their oath present that *James Landringham* on the *12th* day of *November*, A. D. 1874, at and in the county of *Marion*, and State aforesaid, did unlawfully and feloniously unite, combine, and conspire with

1. The words and figures enclosed by [ ] are not in the reported case, but have been added to render the form complete.

2. This form is sufficient under Horner's Stat. Ind. (1896), § 2139.

Under the *Alabama* statutes, an indictment was held good which charged that the defendants "conspired together to unlawfully take *one thousand* dollars in money, the property of *Julius C. Hudspeth*, from his person, and against his will, by violence to his person, or by putting him in such fear as unwillingly to part with the same." Thompson *v.* State, 106 Ala. 67, 9 Am. Cr. Rep. 199.

Thomas King, for the purpose of making an assault upon one *Thomas J. Barlow*, and for the purpose and with the intent then and there of feloniously and forcibly taking from the person of the said *Barlow* [by violence, and putting in fear the said *Barlow*][1] *ten* United States treasury notes, of the denomination of *ten* dollars each and of the value of *ten* dollars each (*and other notes, describing them*), all of said notes being the personal goods of said *Barlow*, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of *Indiana*.

[*J. M. Cropsey*, Prosecuting Attorney.][2]

Form No. 6150.

(Precedent in People *v.* Richards, 67 Cal. 412, 6 Am. Cr. L. Rep. 42.)[3]

In the *Superior* Court [of the county of *Santa Clara*, State of *California*, *Monday*, the *seventh* day of *February*, 1*885*.

The People of the State of California against *John Richards*. } Information.][2]

John Richards is accused by the district attorney of the county of *Santa Clara*, State of *California*, by this information, of conspiracy, committed as follows:

The said *John Richards*, on or about the *9th* day of *September*, A. D. 1*884*, at the county and state aforesaid, did conspire with one *David Davis*, feloniously and by means of force and fear to take certain bank checks to and of the value of $*15,000* from the person and immediate presence of one *Henry Miller*, the owner thereof, against the will of the said *Henry Miller*;[4] and immediately theretofore, and for the purpose of said taking, to compel said *Henry Miller*, by means of force and fear, to draw, make, and sign said checks; and said defendant in pursuance of said conspiracy, and to effect the object thereof, did on or about the date last named, proceed from the town of *Hollister*, in the county of *San Benito*, State of *California*, to the city of *Gilroy*, in the county of *Santa Clara*, in said State, and did

1. The words enclosed by [ ] were not in the precedent, which on that account was held insufficient. In accordance with the terms of the statute defining robbery, the indictment should have used the words "by violence" or "putting in fear." And an indictment under the *Indiana* statute must describe the particular felony intended to be committed with the same substantial accuracy as would be necessary in an indictment for such felony. Landringham *v.* State, 49 Ind. 186; State *v.* McKinstry, 50 Ind. 465; Scudder *v.* State, 62 Ind. 13; Miller *v.* State, 79 Ind. 198; Smith *v.* State, 93 Ind. 67.

The proviso formerly contained in the act that it should not be necessary to charge the particular felony intended to be committed is unconstitutional and void. Landringham *v.* State, 49 Ind. 186; Scudder *v.* State, 62 Ind. 13; Miller *v.* State, 79 Ind. 198.

2. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

3. The superior court sustained a demurrer to this information on the ground that there must be two persons at least joined as defendants, but on appeal the supreme court after a full review of the authorities reversed the judgment and remanded the cause with direction to the court below to overrule the demurrer and require the defendant to plead to the indictment.

4. The language of the statute defining robbery is here used. See Cal. Pen. Code (1897), § 211.

arm and disguise himself, and on the *13th* of *September*, 18*84*, did set forth from said city of *Gilroy* along the road leading therefrom to the certain place in the county last aforesaid, known as *Pacheco Pass*, there to lie in wait for said *Henry Miller*, and consummate the purpose of the said conspiracy, contrary to the form, force, and effect of the statute in such cases made and provided, and against the peace and dignity of the people of the State of *California*.

[*J. H. Campbell*, District Attorney.][1]

I. Seduction by Sham Marriage.[2]

Form No. 6151.

(Precedent in State *v.* Savoye, 48 Iowa 562.)[3]

[*District* Court of the County of *Allamakee*.

The State of Iowa
against
Charles Savoye and Conrad Arnold.][1]

The jurors of the grand jury of the State of *Iowa* within and for said county of *Allamakee*, legally convoked, impaneled, tried, sworn and charged, in the name and by the authority of the State of *Iowa*, upon their oaths do aver, find and present that *Charles Savoye* and *Conrad Arnold*, at and within said county, on or about the *15th* day of *August*, 18*75*, with force and arms unlawfully, wickedly, deceitfully, maliciously and injuriously, did conspire, combine, confederate and agree together, to cause, induce, persuade and procure one *Mary Ellen Elizabeth Stielsmith*,[4] commonly known as *Elizabeth* or *Lizy Stielsmith*, she the said *Lizy Stielsmith* then and there being a minor under the age of twenty-one years, to wit, *nineteen* years old, to go with them, the said *Charles Savoye* and *Conrad Arnold*, with the view, purpose and intent, with the intention of bringing about a sham marriage or pretended marriage between her, the said *Lizy Stielsmith*, and him, the said *Charles Savoye*, and thus bring about the seduction of her, the said *Lizy Stielsmith*, in violation of law.[5]

[*J. F. McJunkin*,
County Attorney of *Allamakee* County.][1]

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. **Sufficient Indictments.** — An indictment is unobjectionable both in form and substance which alleges a conspiracy falsely and fraudulently to seduce from her virtue and carnally to know an unmarried female by procuring the consent of herself and parents to her marriage with one of the conspirators, and then, in furtherance of such conspiracy, producing a forged license, assuring them of its genuineness, falsely and fraudulently representing another of the conspirators to be authorized to celebrate the marriage, who actually performed the ceremony, in consequence of all of which the daughter and her parents were deceived, and she cohabited with her pretended husband. State *v.* Murphy, 6 Ala. 765.

3. This indictment was held to sufficiently charge a conspiracy to commit a crime.

4. **Previous Character of Woman.** — It was held in this case unnecessary to charge that the woman was unmarried and of a previously chaste character.

5. **Accomplishment of Purpose.** — This indictment contained another count,

m. Soliciting Bribes.[1]

Form No. 6152.

(Precedent in Com. *v.* Smith, 163 Mass. 413.)[2]

[(*Commencing as in Form No. 6121, and continuing down to* *)][3] * * *

And the jurors aforesaid, on their oath aforesaid, do further present that *Horace I. Pinkham*, *Charles H. Cox*, *Fred H. Cate*, *George O. Tilton*, *William W. Ham*, *Charles H. Croy*, and *Hadley H. Hoyt*, all of *Haverhill* in said county of *Essex*, at *Haverhill* in said county of *Essex*, on the *Tuesday* next after the *first Monday* of *December* in the year of our Lord one thousand eight hundred and *ninety-three*, to wit, on the *fifth* day of *December* in the year of our Lord one thousand eight hundred and *ninety-three*, said *fifth* day of *December* being the day of the annual municipal election of the city of *Haverhill*, a municipal corporation duly established by law and located within said county of *Essex*, were severally duly elected by the qualified voters of the city at large, voting in their respective wards, as aldermen of said city, to severally hold their said offices as aldermen for one year from the *first Monday* of *January next* following the said *fifth* day of *December* in the year of our Lord one thousand eight hundred and *ninety-three*, and until a majority of the new board should be elected and qualified in their places, said *first Monday* of *January* being the *first* day of *January* in the year of our Lord one thousand eight hundred and *ninety-four*, the said *Horace I. Pinkham* being then and there at said annual municipal election chosen from and by the qualified voters of the city at large, the said *Charles H. Cox* being then and there at said annual municipal election selected from the *first* ward of said city, the said *Fred H. Cate* being then and there at said annual municipal election selected from the *second* ward of said city, the said *George O. Tilton* being then and there at said annual municipal election selected from the *third* ward of said city, the said *William W. Ham* being then and there at said annual municipal election selected from the *fourth* ward of said city, the said *Charles H. Croy* being then and there at said annual municipal election selected from the *fifth* ward of said city, and the said *Hadley H. Hoyt* being then and there at said annual municipal election selected from the *sixth* ward of said city, and that the said *Horace I. Pinkham*, *Charles H. Cox*, *Fred H. Cate*, *George O. Tilton*, *William W. Ham*, *Charles H. Croy*, and *Hadley H. Hoyt* thereafter, to wit, on the said *first* day of *January* in the year last aforesaid, severally duly qualified as such aldermen, and then and there severally became and were municipal officers, to wit, aldermen of said city of *Haverhill*, and thenceforward severally continued to be municipal officers, to wit, aldermen of said city of *Haverhill*, until the day

alleging the accomplishment of the object of the conspiracy in pursuance thereof, but this count is omitted in the text, as the court held that it was immaterial on an indictment for conspiracy whether the object intended be accomplished or not.

1. Bribery. — For indictment for a conspiracy to commit bribery held sufficient see Shircliff *v.* State, 96 Ind. 369.

2. This is the second count of the indictment, on which the defendants were properly convicted.

3. The matter to be supplied within the [ ] and the first and third counts of the indictment are not set out in the reported case.

of the finding of this indictment; and that at the said annual municipal election of said city of *Haverhill*, holden on the said *fifth* day of *December* in the year of our Lord one thousand eight hundred and *ninety-three*, at said *Haverhill*, the legal voters of said city of *Haverhill* duly voted to authorize the granting of licenses for the sale of intoxicating liquors in said city of *Haverhill* for the year commencing on the *first* day of *May* in the year of our Lord one thousand eight hundred and *ninety-four*, by then and there at said annual municipal election duly and by lawful majority vote, voting "Yes" upon the question, "Shall licenses be granted for the sale of intoxicating liquors in this city?" the warrant for said annual municipal election duly containing an article providing for a vote upon said question, whereby the mayor and aldermen of said city of *Haverhill*, duly elected and qualified, and holding their offices for one year from the *first Monday* of *January* in the year of our Lord one thousand eight hundred and *ninety-four*, and until a majority of the new board should be elected and qualified in their places, might lawfully grant licenses of the first five classes for the sale of intoxicating liquors for the year commencing on the *first* day of *May* in the year of our Lord one thousand eight hundred and *ninety-four*.

And the jurors aforesaid, on their oath aforesaid, do further present that *Fred M. Smith*, of *Boston* in the county of *Suffolk* and said *Commonwealth*, *Charles A. Kimball*, *Fred H. Cate*, *George O. Tilton*, *William W. Ham*, and *Hadley H. Hoyt*, all of said *Haverhill*, in said county of *Essex*, did, at said *Haverhill*, on the *first* day of *February*, in the year of our Lord one thousand eight hundred and *ninety-four*, then and there well knowing the premises, unlawfully and maliciously conspire, combine, confederate, and agree together, and with divers other persons whose names to the jurors are unknown, to unlawfully counsel, solicit, incite, and procure divers persons who should thereafter duly make applications to said mayor and aldermen of said city of *Haverhill* for licenses of any of the first five classes to sell intoxicating liquors in said *Haverhill*, for the year commencing on the *first* day of *May* in the year of our Lord one thousand eight hundred and *ninety-four*, and whose names and a further description of whom are to the jurors unknown, unlawfully and corruptly severally to give gifts and gratuities, to wit, certain sums of money, the amount, value, and further descriptions of which said sums of money are to the jurors unknown, to the said *Fred H. Cate*, *George O. Tilton*, *William W. Ham*, and *Hadley H. Hoyt*, they then and there being aldermen of said city of *Haverhill* as aforesaid, the said applications for licenses to sell intoxicating liquors being then and there matters which might by law thereafter come and be brought before them, the said *Fred H. Cate*, *George O. Tilton*, *William W. Ham*, and *Hadley H. Hoyt*, in their official capacities of aldermen as aforesaid, with intent on the part of said divers persons who should make applications for licenses as aforesaid then and there, by the gifts and gratuities aforesaid, to influence the acts, votes, opinions, decisions and judgments of the said *Fred H. Cate*, *George O. Tilton*, *William W. Ham*, and *Hadley H. Hoyt*, in their official capacities of aldermen as aforesaid, upon the said applications for licenses to sell intoxicating liquors in said

Haverhill thereafter to be duly made as aforesaid, against the peace of said *Commonwealth* and contrary to the form of the statute in such case made and provided.

[*W. H. Moody*, District Attorney.]

4. To Hinder Trade or Commerce.[1]

a. By Formation of Trust.

Form No. 6153.

(Precedent in Hathaway *v.* State, (Tex. Crim. App. 1896) 36 S. W. Rep. 465.)[2]

[In the Name and by the Authority of the State of *Texas*.

The grand jurors for the county of *McLennan*, state aforesaid, duly organized as such at the ——— term, A. D. 1896, of the *District*

1. For statutes making it a misdemeanor to conspire to commit any act injurious to trade or commerce see as follows:

California. — Pen. Code (1887), § 182.
Florida. — Rev. Stat. (1892), § 2593.
Idaho. — Rev. Stat. (1887), § 6540.
Illinois. — Starr & C. Anno. Stat. (1896), c. 38, § 46.
Minnesota. — Stat. (1894), § 6423.
Mississippi. — Anno. Code (1892), § 1006.
Missouri. — Rev. Stat. (1889), § 3780.
Montana. — Pen. Code (1895), § 320.
New Jersey. — Gen. Stat. (1895), p. 1093, § 236.
New York. — Pen. Code, § 168 (Birds. Rev. Stat. (1896), p. 587, § 1).
North Dakota. — Rev. Codes (1895), § 7037.
South Dakota. — Dak. Comp. Laws (1887), § 6425.
Tennessee. — Code (1896), § 6693.
Utah. — Rev. Stat. (1898), § 4156,

For a statute prohibiting the association of persons to prevent any person from apprenticing himself to learn a trade, or for the purpose of inducing one so apprenticed to leave the employment of his employer, see 3 Ga. Code (1895), § 119.

For the formal parts of an indictment, information or criminal complaint in a particular jurisdiction consult the titles INDICTMENTS; INFORMATIONS; CRIMINAL COMPLAINTS.

For other forms of indictments see as follows:

Conspiracy by workmen against employers to compel reinstatement of discharged employee. Reg. *v.* Bunn, 12 Cox C. C. 316; Reg. *v.* Rowlands, 17 Q. B. 671, 79 E. C. L. 670.

Conspiracy by workmen to leave their employment in violation of contract. Reg. *v.* Bunn, 12 Cox C. C. 316.

By workmen to prevent their employers from retaining and employing apprentices. Rex *v.* Ferguson, 2 Stark. 489, 3 E. C. L. 500.

By workmen to raise their wages. People *v.* Fisher, 14 Wend. (N. Y.) 9; People *v.* Melvin, 2 Wheel. Cr. Cas. (N. Y. Gen. Sess.) 262. But see N. Y. Pen. Code, § 170, as *amended* Laws (1882), c. 384 (Birds. Rev. Stat. N. Y. (1896), p. 588, § 3).

By employees to obstruct employers with a view to coerce them to dismiss certain workmen, and to intimidate workmen so as to coerce them to quit their employment. Reg. *v.* Hibbert, 13 Cox C. C. 82; Reg. *v.* Bauld, 13 Cox. C. C. 282.

Conspiracy to impoverish a certain gas company and prevent the said company from carrying on its business. Reg. *v.* Bunn, 12 Cox C. C. 316.

To impoverish a man and prevent him from working at his trade. 1 Cox C. C. Appendix xxvii; Rex *v.* Eccles, 3 Doug. 337, 26 E. C. L. 131.

See also State *v.* Glidden, 55 Conn. 46; State *v.* Donaldson, 32 N. J. L. 151; People *v.* Everest, 51 Hun (N. Y.) 19.

2. This indictment, framed under Tex. Pen. Code (1895), art. 981, contained six counts, of which the above is the first, the four succeeding counts being similar and the sixth further charging the conspiracy at great length. The defendant Hathaway was convicted and appealed, and the decision of the lower court was reversed on the ground that the proof failed to show that the defendant was one of the original conspirators composing the trust, or that he afterward entered into and joined

Court for said county, upon their oaths in said court, present][1] that in said county of *McLennan*, state aforesaid, on or about *October 1*, 1894, *John D. Rockefeller*, *Henry M. Flagler*, *William Rockefeller*, *John D. Archbald*, *Benjamin Brewster*, *Henry H. Rogers*, *Wesley H. Tilford*, *Henry Clay Pierce*, *Arthur M. Finley*, *C. M. Adams*, *J. P. Gruet*, *E. Wells*, *Wm. Grice*, *E. T. Hathaway*, and *F. A. Austin* did unlawfully agree, combine, conspire, confederate, and engage with *William E. Hawkins* and divers other persons to the grand jurors unknown, in a conspiracy against trade, then and there with the said *William E. Hawkins* and the said other persons, creating a trust by a combination of their capital, skill and acts with the said *William E. Hawkins* and other persons, for the purpose, design and effect to create and carry out restrictions in trade, to wit, in the manufacture, production, sale, trade, and shipment of petroleum, petroleum oils, all the products of petroleum, refined oils, illuminating oils, and lubricating oils, the same being commercial commodities, by keeping the price of said oils at a certain price per gallon, and at a certain price as otherwise sold, which price was far above the true market price of said oils, and for the purpose and effect to prevent competition in the manufacture, production, sale, trade and shipment of petroleum, petroleum oils, all the products of petroleum, refined oils, illuminating oils, and lubricating oils, and to limit and reduce the production of such products, and to raise the price thereof above the true market value, and cause the same to be purchased by the actual consumers at a great price above the true market value, and to prevent competition in the manufacture, production, sale, trade and shipment of petroleum, petroleum oils, all the products of petroleum, refined oils, illuminating oils, and lubricating oils, the same being commercial commodities, and products of prime necessity to the people, and for the purpose and effect to fix at a certain standard and figure the price of petroleum, petroleum oils, all the products of petroleum, refined oils, illuminating oils, and lubricating oils, whereby the prices thereof were and are established and fixed in said county of *McLennan* at a fictitious value, greatly in excess of the true market value. And the said *John D. Rockefeller*, *Henry M. Flagler*, *William Rockefeller*, *Benjamin Brewster*, *John D. Archbald*, *Henry H. Rogers*, *Wesley H. Tilford*, *Henry Clay Pierce*, *Arthur M. Finley*, *C. M. Adams*, *J. P. Gruet*, *E. Wells*, *Wm. Grice*, *E. T. Hathaway*, and *F. A. Austin*, did then and there unlawfully make and enter into a trust, combination, contract, agreement, obligation and conspiracy with the said *William E. Hawkins* and other persons in said county, and all of said persons did agree, combine, conspire, confederate and engage with each other, and among themselves, that they would not manufacture, produce, sell, trade, and ship petroleum, petroleum

said conspiracy, but that he was a mere agent. The court said: "In order to convict a person of being an agent of a conspiracy, such as is described in the statute, the indictment must allege that fact, and must also allege that he knew of the conspiracy." No objection was made to the indictment as against Hathaway and the other defendants as principals in the conspiracy.

See a somewhat similar statute in Ky. Gen. Stat. (1894), § 3915.

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

oils, all the products of petroleum, refined oils, illuminating oils and lubricating oils below a certain price, which price was and is far above the true market value of said commercial commodity, and that they would fix and keep the price of said oils in said county at a certain price and graduated figures, and that for the purpose of establishing and setting the prices of said oils amongst themselves, and to preclude and destroy free and unrestricted competition in the manufacture, production, sale, trade and shipment of said oils, they agreed to pool, combine, and unite their interests in the manufacture, production, sale, trade and shipment of said oils, so that the price thereof would be affected and fixed at a certain figure; against the peace and dignity of the state.

[*Andrew Johnson*, Foreman of the Grand Jury.][1]

b. By Obstructing Business of a Corporation.

Form No. 6154.

(Precedent in People *v.* Petheram, 64 Mich. 254.)[2]

State of *Michigan* — The *Circuit* Court for the County of *Newaygo*.

Newaygo County — ss.: *George Luton*, prosecuting attorney in and for the county of *Newaygo*, aforesaid, for and in behalf of the people of the State of *Michigan*, comes into said court, in the *May* term thereof, in the year one thousand eight hundred and *eighty-six*, and gives the court here to understand and be informed that heretofore, to wit, on the *twenty-fourth* day of *January*, 1886, at the village of *Newaygo*, in said county, *J. W. Petheram*, chief engineer, and *Fred. Coleman*, assistant engineer, and *James McLaughlin*, roadmaster, of the *Chicago & West Michigan Railway Company*, and *Adam McNabb*, together with divers other persons whose names are unknown, to the number of *seventy-five*, being persons of evil minds and dispositions, did unlawfully and wickedly conspire, combine, confederate and agree together wilfully and maliciously to obstruct and impede the regular operation and conduct of the business of the *Newaygo Manufacturing Company*, a corporation organized under the laws of this State, to wit, the manufacture of lumber, pails and tubs, flour and feed, by it then and theretofore carried on in said village of *Newaygo*, by acts and means of intimidation, to wit, by then and there assembling together in the night-time, and entering upon the premises of said corporation in said village, and obstructing the usual flow of water in the canal thereon, owned by it, and by means of which its said business was and had been so carried on, and by force and violence preventing the employees of said corporation from removing said obstructions, and thereby preventing the lowering of the water in said canal, and by causing a quantity of hay and other foreign material to float down

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. The defendant was tried and convicted upon this information, and the conviction was affirmed by the supreme court. The information was drawn under How. Anno. Stat. Mich. (1882), § 9275. See also similar statutes as follows:

Kansas. — Gen. Stat. (1889), § 2482.

Mississippi. — Anno. Code (1892), § 1270.

said canal, and clog and obstruct the wheels used in propelling the machinery and mills and factory of said corporation in said village, which were then owned and operated by said corporation for the purpose aforesaid, against the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of *Michigan*.

George Luton, Prosecuting Attorney.

[(*Verification.*)][1]

c. By Preventing Corporation from Employing Certain Workmen.

Form No. 6155.

(Precedent in State *v.* Stewart, 59 Vt. 274.)[2]

[State of *Vermont*, } ss.][3]
Caledonia County. }

Be it remembered, that at the *County* Court begun and holden at *St. Johnsbury*, the grand jurors [within and for said county of *Caledonia*, upon their oath][3] present that *James D. Grant*, *Charles C. Stewart*, *Orrin E. Clay*, *John McGeough*, *Edward O'Toole* and *Lewis Hill*, all of *Ryegate*, in the county of *Caledonia*, with divers other evil-disposed persons, to the said grand jurors unknown, on the *13th* day of *April*, A. D. 1885, at *Ryegate*, in the county of *Caledonia*, did unlawfully combine, conspire, confederate and agree together to prevent, hinder and deter[4] by violence, threats and intimidation,[5] the *Ryegate Granite Works*, a corporation then and there being and existing by law, from retaining and taking into its employment *James O'Rourke*, *William Goodfellow* and other persons, to the said grand jurors unknown, then and there being as laborers in the labor and occupation of granite cutting, to the great damage of the said *Ryegate Granite Works*, and the said *James O'Rourke* and *William Goodfellow* and other persons, to the said grand jurors unknown, then and there being as laborers in the labor and occupation of granite cutting, to the great damage of the said *Ryegate Granite Works*, and the said *James O'Rourke* and *William Goodfellow* and others, and to the evil example of all men and against the peace and dignity of the State.

1. **Verification.**—The information was duly verified, but the verification was not set out in the reported case.

2. This indictment was sustained on defendant's demurrer and motion to quash the same, and the judgment of the county court overruling the demurrer and motion was sustained by the supreme court.

3. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

4. It was held in this case that an averment that the granite works desired or intended to employ said workmen was unnecessary. An allegation that it was in fact prevented from employing them *ex vi termini* implies a purpose to do so.

5. It is not necessary to allege the means, the object of the conspiracy being unlawful at common law, but the *Vermont* statutes (Stat. (1894), §§ 5041, 5042) prescribe a punishment for using threats or intimidation to prevent a person from accepting or continuing an employment in a mill, etc.; hence the first two counts of this indictment were held to charge a conspiracy to do an act unlawful at common law by means unlawful under the statute. In alleging the means it is sufficient to use the language of the statute, without setting out specifically the kind of threats, etc., employed.

And tne grand jurors aforesaid upon their oath aforesaid further present that the said *James D. Grant*, *Charles C. Stewart*, *John McGeough*, *Edward O' Toole* and *Lewis Hill*, all of *Ryegate*, in the county of *Caledonia*, with other evil-disposed persons, to the said grand jurors unknown, at *Ryegate* aforesaid, on the *13th* day of *April*, A. D. 1885, maliciously intending to control, injure, terrify and impoverish the *Ryegate Granite Works*, a corporation then and there being and existing by law, and by violence, threats and intimidation, to force and compel said corporation to conform to the rules, regulations, by-laws and decrees of a branch of the *National Stone Cutters' Union*, an organization then and there existing, and to deprive said corporation of all the workmen and laborers then and there by it employed in its works and shops there situate, unlawfully did conspire, combine, confederate and agree to terrify, frighten, alarm, intimidate and drive away by threats and intimidation, *James O'Rourke*, *Hugh J. O'Rourke*, *William Goodfellow* and others, to the said grand jurors unknown, who were then and there workmen and laborers of the said *Ryegate Granite Works*, to the evil example of all men and against the peace and dignity of the State.

And the grand jurors aforesaid upon their oath aforesaid further present that the said *James D. Grant*, *Charles C. Stewart*, *Orrin E. Clay*, *John McGeough*, *Edward O' Toole* and *Lewis Hill*, being granite cutters by occupation and not being content to allow other granite cutters to pursue their avocation and employment wherever they wished and upon whatever terms might be agreed upon between said other granite cutters and their employers, but contriving and unjustly intending to destroy the effect of free competition in the price and value of labor, to coerce and constrain said other granite cutters and their employers and to compel said other granite cutters to desist from labor and to deprive the employers thereof of all their laborers and apprentices and thereby to ruin and destroy their business, did, on the *13th* day of *April*, A. D. 1885, at *Ryegate* aforesaid, with force and arms combine, conspire, confederate and unlawfully agree together and did enter into an organization and compact whereby it was, among other things, provided that none of the parties to said compact and organization should labor or cut granite for any person or persons or corporation whose shop or works had been by the parties to said compact and organization disapproved of and adjudged to be "scab shops" or works, and that no other granite cutters should be allowed to work or cut granite for or in such "scab shops" or works, and that all other granite cutters in this country should be notified that the shops or works so adjudged to be "scab" were "scab" and that work therein by granite cutters was forbidden by said organization and that all granite cutters who disregarded said prohibition and worked or cut granite in such "scab" shop or works should be called "scabs" and that their names should be published as "scabs" in a certain newspaper called the *Granite Cutters' Journal*, a newspaper of wide circulation among granite cutters in this country, and that all granite cutters in this country should thereby be notified not to associate or work in the same shop with any of the parties so published as "scabs." And the said *James D. Grant*, *Charles C. Stewart*, *Orrin E.*

Clay, *John McGeough*, *Edward O' Toole* and *Lewis Hill*, in pursuance of the said unlawful conspiracy, combination and compact with the intent to prevent the prosecution of work in the shops and works of the said *Ryegate Granite Works* next hereinafter mentioned, did then and there threaten and say to *James O'Rourke*, *Hugh J. O'Rourke*, *William Goodfellow* and others who were then and there laborers, workmen and apprentices as granite cutters in the shops and works there situate of the *Ryegate Granite Works*, a corporation then and there being and existing by law and there carrying on the business of cutting granite and manufacturing granite work, that said shops and works of the said *Ryegate Granite Works* were "scab" shops and "scab" works and that no granite cutters were allowed to work therein and that the said *James O'Rourke*, *Hugh J. O'Rourke*, *William Goodfellow* and others would be "scabs" if they worked in said last named shops or works and that their names would be published as "scabs" in said *Granite Cutters' Journal* if they worked in the last named shops or works and that they would be disgraced in the eyes of all granite cutters and would be avoided and shunned by all granite cutters, and that all other granite cutters would refuse to work or associate with them, if they worked in the said last named shops or works, and were published as "scabs" as aforesaid; and by means of the said sayings and threats, the said *James D. Grant*, *Charles C. Stewart*, *Orrin E. Clay*, *John McGeough*, *Edward O' Toole* and *Lewis Hill* did then and there affright, drive away and prevent the said *James O'Rourke*, *Hugh J. O'Rourke*, *William Goodfellow* and others from accepting, undertaking and prosecuting their said employment in said shops and works of the said *Ryegate Granite Works*, with the intent of them, the said *James D. Grant*, *Charles C. Stewart*, *Orrin E. Clay*, *John McGeough*, *Edward O' Toole* and *Lewis Hill* last aforesaid.

And so the said grand jurors say on their oath aforesaid that the said *James D. Grant*, *Charles C. Stewart*, *Orrin E. Clay*, *John McGeough*, *Edward O' Toole* and *Lewis Hill* did then and there in manner aforesaid, by threats, intimidation and the unlawful and grievous conspiracy aforesaid, carried into execution, affright, drive away and prevent the said *James O'Rourke*, *Hugh J. O'Rourke*, *William Goodfellow* and others from accepting, undertaking and prosecuting the employment and work of stone cutting in said shops and works of the said *Ryegate Granite Works*, with the lawful intent of them, the said *James D. Grant*, *Charles C. Stewart*, *Orrin E. Clay*, *John McGeough*, *Edward O' Toole* and *Lewis Hill*, thereby to prevent the prosecution of work in said *Ryegate Granite Works*, said shops and works, contrary to the form and effect of the statute in such case made and provided, and against the peace and dignity of the State.

And the said grand jurors, upon their oath aforesaid, further present that said *James D. Grant*, *Charles C. Stewart*, *Orrin E. Clay*, *John McGeough*, *Edward O' Toole* and *Lewis Hill*, all of *Ryegate* aforesaid, with the unlawful intent and purpose to prevent the prosecution of work which was then and there carried on by the *Ryegate Granite Works*, a corporation then and there existing under the laws of the State of *Vermont*, in the manufactory of the *Ryegate Granite Works* aforesaid, then and there situate, did then and there threaten the

said *James O'Rourke*, *Hugh J. O'Rourke*, *William Goodfellow* and others, to the said grand jurors unknown, who were then and there at work in said manufactory, that they, the said *James O'Rourke*, *Hugh J. O'Rourke*, *William Goodfellow* and others, would be "scabs" and be called and advertised as "scabs" and that they, the said *James D. Grant*, *Charles C. Stewart*, *Orrin E. Clay*, *John McGeough*, *Edward O'Toole* and *Lewis Hill*, would cause the names of the said *James O'Rourke*, *Hugh J. O'Rourke*, *William Goodfellow* and others to be published in the "scab" list in the *Granite Cutters' Journal*, a paper of wide and extended circulation among granite cutters in the United States, if they, the said *James O'Rourke*, *Hugh J. O'Rourke*, *William Goodfellow* and others, continued work in the said manufactory, and the said term "scab" as so threatened to be used by the said *James D. Grant*, *Charles C. Stewart*, *Orrin E. Clay*, *John McGeough*, *Edward O'Toole* and *Lewis Hill*, is an opprobrious and disgraceful epithet, the use of which, in the manner threatened by the said *James D. Grant*, *Charles C. Stewart*, *Orrin E. Clay*, *John McGeough*, *Edward O'Toole* and *Lewis Hill*, would have the effect to disgrace the said *James O'Rourke*, *Hugh J. O'Rourke*, *William Goodfellow* and others, and make it difficult and impossible for them to get employment in their said employment of cutting stone in places where work of that character was wanted; and the effect of using the term "scab," in the manner threatened, was well known both to the said *James D. Grant*, *Charles C. Stewart*, *Orrin E. Clay*, *John McGeough*, *Edward O'Toole* and *Lewis Hill*, and also to the said *James O'Rourke*, *Hugh J. O'Rourke*, *William Goodfellow* and others, if they, the said *James O'Rourke*, *Hugh J. O'Rourke*, *William Goodfellow* and others continued work in said manufactory and by said threats then and there made, they, the said *James D. Grant*, *Charles C. Stewart*, *Orrin E. Clay*, *John McGeough*, *Edward O'Toole* and *Lewis Hill* did then and there, at *Ryegate*, aforesaid, unlawfully affright, drive away and prevent the said *James O'Rourke*, *Hugh J. O'Rourke*, *William Goodfellow* and others from prosecuting said employment in said manufactory, contrary to the form and effect [of the statute in such case made and provided, and against the peace and dignity of the State.][1]

d. By Preventing Workman from Obtaining Employment.

Form No. 6156.

(Precedent in State *v.* Dyer, 67 Vt. 691.)[2]

[State of *Vermont*, } *County* Court, at their *September* Term, in *Washington* County, ss. } the year of our Lord one thousand eight hundred and *ninety-four*.

Be it remembered, that *J. T. Lamson*, state's attorney within and for said county, in his own proper person comes into court here, and upon his oath of office, gives said court to understand and be informed,][1]

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. This information was sustained as being in substantial compliance with the common-law precedents. It charges

that *Josiah B. Dyer* and *Thomas Quinlan*, of *Barre*, in the county of *Washington*, and *Frank Morrill*, *Patrick Morrison*, *Peter Hernon*, *E. D. Sherburne*, *H. P. Sylvester*, *Thomas Hocking* and *Alex Cruickshank*, of *Montpelier*, in the county of *Washington*, with divers evil-disposed persons, to the state's attorney unknown, on the *22d* day of *November*, in the year of our Lord one thousand eight hundred and *eighty-nine*, at *Montpelier*, in the county of *Washington*, did unlawfully combine, conspire, confederate and agree together to prevent, hinder and deter, by violence, threats and intimidation, one *Jacob McClure*, then and there being a stone cutter by trade and occupation, in the employment of the *Wetmore & Morse Granite Campany* of *Montpelier*, aforesaid, a corporation then and there being and existing by law, from obtaining work or employment, or continuing in his said work and employment,[1] at his said trade or occupation, in the said shops of the said *Wetmore & Morse Granite Company* of *Montpelier* aforesaid, or in any other shops or works for the cutting or manufacture of granite work, with the malicious and unlawful intent, of them the said *Josiah B. Dyer*, *Thomas Quinlan*, *Frank Morrill*, *Patrick Morrison*, *Peter Hernon*, *E. D. Sherburne*, *H. P. Sylvester*, *Thomas Hockin*, and *Alex. Cruickshank* by said violence, threats and intimidation, to prevent the said *Jacob McClure* from obtaining work or employment at his said trade or occupation in the shops and works of the said *Wetmore & Morse Granite Company* of *Montpelier* aforesaid, or in any other shops or works for the cutting or manufacture of granite work, [contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the state.

And the said *J. P. Lamson*, state's attorney as aforesaid, upon his oath of office aforesaid, gives said court further to understand][2] that *Josiah B. Dyer*, *Thomas Quinlan*, of *Barre*, in the county of *Washington*, and *Frank Morrill*, *Patrick Morrison*, *Peter Hernon*, *E. D. Sherburne*, *H. P. Sylvester*, *Thomas Hocking* and *Alex. Cruickshank*, of *Montpelier*, in the county of *Washington*, on the *22d* day of *November*, in the year of our Lord one thousand eight hundred and *eighty-nine*, at *Montpelier*, in the county of *Washington*, being granite cutters by occupation, not being content to allow other granite cutters to pursue their avocations and employment wherever they wished, and on whatever terms might be agreed upon between said other granite cutters and their

a conspiracy to do acts unlawful at common law by means unlawful under the statute of *Vermont*.

In Com. *v.* Hunt, 4 Met. (Mass.) 125, an indictment charging that the defendants formed themselves into a society and agreed not to work for any person who should employ workmen not members of such society, after notice given him to discharge such workmen, was held not to charge a criminal conspiracy. The law of such combinations was examined at length by Shaw, C. J., in the opinion of the court.

1. It was contended that the averment that the conspiracy was to prevent McClure "from obtaining work or employment or continuing in his said work and employment" was alternative and bad, but the court held that as it was alleged that McClure was in the employment of the company when the conspiracy was formed, obtaining employment in its shops and continuing employment there are synonymous terms, and convey a conjunctive and not a disjunctive meaning.

2. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

employers, but contriving and unjustly and unlawfully intending to destroy the effect of free competition in the price and value of labor, to coerce and constrain said other granite cutters to join and become members of a branch of the *National Stone Cutters' Union*, an organization then and there existing, at *Montpelier* aforesaid, and to prevent said other granite cutters from obtaining work at their said trade and occupation, did on the *22d* day of *November*, A. D. 1889, at *Montpelier* aforesaid, with force and arms, combine, conspire, confederate and agree together, and did enter into an organization and compact whereby it was, among other things, provided that no person or persons not members of said branch of the said stone cutters' union should be allowed to work in the shops of the *Wetmore & Morse Granite Company* of *Montpelier* aforesaid, or in any other shop or works for the cutting of granite, or manufacturing of granite work. And the said *Josiah B. Dyer*, *Thomas Quinlan*, *Frank Morrill*, *Patrick Morrison*, *Peter Hernon*, *E. D. Sherburne*, *H. P. Sylvester*, *Thomas Hocking* and *Alex. Cruickshank* in the pursuance of the said unlawful conspiracy, combination and compact, with the intent by violence, threats and intimidation to prevent one *Jacob McClure*, then and there being a stone cutter by trade and occupation, from obtaining or continuing work at his occupation of granite cutting, in the said shops or works of the said *Wetmore & Morse Granite Company* of *Montpelier* aforesaid, or in any other shops or works for the cutting of granite, did then and there threaten and say to *Jacob McClure*, who was then and there a laborer and workman as a granite cutter in the shops and works of the said *Wetmore & Morse Granite Company* of *Montpelier* aforesaid, that if he, the said *Jacob McClure*, did not join and become a member of a branch of the *National Stone Cutters' Union*, then and there organized existing at said *Montpelier*, that they, the said *Josiah B. Dyer*, *Thomas Quinlan*, *Frank Morrill*, *Patrick Morrison*, *Peter Hernon*, *E. D. Sherburne*, *H. P. Sylvester*, *Thomas Hocking* and *Alex. Cruickshank*, and others unknown to the state's attorney, would organize a strike against the said *Jacob McClure*, in the shops and works of the said *Wetmore & Morse Granite Company* of *Montpelier* aforesaid, and would prevent him, the said *Jacob McClure*, from obtaining work at his said trade of stone cutting in said shops of the said *Wetmore & Morse Granite Company* of *Montpelier* aforesaid, or in any other shops or works where granite cutting or manufacturing was carried on. And the said *Jacob McClure* refusing then and there to become a member of the said branch of the *National Stone Cutters' Union*, the said *Josiah B. Dyer*, *Thomas Quinlan*, *Frank Morrill*, *Patrick Morrison*, *Peter Hernon*, *E. D. Sherburne*, *H. P. Sylvester*, *Thomas Hocking* and *Alex. Cruickshank*, did then and there threaten and say, to the said *Wetmore & Morse Granite Company* of *Montpelier* aforesaid, that unless the said *Jacob McClure* was turned away from his employment as a granite cutter, in the said shops and works of the said *Wetmore & Morse Granite Company* of *Montpelier* aforesaid, they, the said *Josiah B. Dyer*, *Thomas Quinlan*, *Frank Morrill*, *Patrick Morrison*, *Peter Hernon*, *E. D. Sherburne*, *H. P. Sylvester*, *Thomas Hocking and Alex. Cruickshank* would organize a strike against the said *Jacob McClure* and would prevent the said *Wetmore & Morse Granite Company* of *Mont-*

pelier aforesaid, from obtaining or employing any workmen or laborers in their said shops or works, and by means of said sayings and threats the said *Josiah B. Dyer*, *Thomas Quinlan*, *Frank Morrill*, *Patrick Morrison*, *Peter Hernon*, *E. D. Sherburne*, *H. P. Sylvester*, *Thomas Hocking* and *Alex. Cruickshank* did then and there affright, drive away and prevent the said *Jacob McClure* from obtaining and continuing his employment and labor in the said shops or works of the said *Wetmore & Morse Granite Company* of *Montpelier* aforesaid. And so the said state's attorney, on his oath aforesaid, says that the said *Josiah B. Dyer*, *Thomas Quinlan*, *Frank Morrill*, *Patrick Morrison*, *Peter Hernon*, *E. D. Sherburne*, *H. P. Sylvester*, *Thomas Hocking* and *Alex. Cruickshank* did then and there, in manner aforesaid, by threats, intimidation and the unlawful and grievous conspiracy aforesaid, carried into execution as aforesaid, prevent the said *Jacob McClure* from obtaining and prosecuting his said employment and work of stone cutting in the said shops and works of the said *Wetmore & Morse Granite Company* of *Montpelier* aforesaid, or in any other shop or works for the manufacture or cutting of granite [contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the state.

J. P. Lamson, State's Attorney.][1]

5. To Obstruct Justice and the Due Administration of Law.[2]

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. **For statutes** prohibiting conspiracies for the commission of any act for the perversion or obstruction of justice or the due administration of the law see as follows:

California. — Pen. Code (1897), § 182.
Florida. — Rev. Stat. (1892), § 2593.
Idaho. — Rev. Stat. (1887), § 6540.
Minnesota. — Stat. (1894), § 6423.
Mississippi. — Anno. Code (1892), § 1006.
Missouri. — Rev. Stat. (1889), § 3780.
Montana. — Pen. Code (1895), § 320.
New Jersey. — Gen. Stat. (1895), p. 1093, § 236.
New York. — Pen. Code, § 168 (Birds. Rev. Stat. (1896), p. 587, § 1).
North Dakota. — Rev. Codes (1895), § 7037.
South Dakota. — Dak. Comp. Laws (1887), § 6425.
Tennessee. — Code (1896), § 6693.
Utah. — Rev. Stat. (1898), § 4156.

For the formal parts of an indictment, information or criminal complaint in a particular jurisdiction consult the titles INDICTMENTS; INFORMATIONS; CRIMINAL COMPLAINTS.

For other indictments for similar conspiracies see as follows:

Defeat of Prohibition Law. — An indictment charging that the defendants "unlawfully and feloniously did conspire and confederate together, with the fraudulent intent to do an illegal act, injurious to the administration of public justice, to wit, did conspire and confederate together, with the said intent, to defeat the enforcement of the prohibitory liquor law, so called, in said county, wrongfully, to wit, with money and other unlawful means, to prevent the grand jury of said county at, etc., from finding and presenting bills of indictments for violation of said prohibitory liquor law, in, etc., contrary to," etc., was held insufficient, in failing to state in what manner the money was to have been used, and in not specifying the other unlawful means intended to be employed. State *v.* Potter, 28 Iowa 554.

Destruction of Warrant. — An indictment for a conspiracy to destroy a warrant in the name of the state, issued against a defendant on a criminal charge, and a recognizance for the appearance of said defendant to answer such charge, with the intent thereby to impede the due administration of jus-

a. By Assaulting a Public Officer.

Form No. 6157.[1]

(*Commencing as in Form No. 6122, and continuing down to* *) that *Henry Ripley*, *John Doe* and *Samuel Short*, being evil-disposed persons, and wickedly devising and intending to do a certain illegal act injurious to the administration of public justice, to wit, to assault, beat, abuse, wound and ill treat one *Henry K. Baker*, in order to hinder and prevent him, the said *Henry K. Baker*, being then and there one of the justices of the peace within and for the said county of *Penobscot*, from the performance and discharge of his duties in his office aforesaid, on the *first* day of *January*, in the year of our Lord one thousand eight hundred and *ninety-seven*, at the county aforesaid, did then and there unlawfully conspire, combine, confederate and agree together, with the malicious intent, wrongfully and wickedly to do a certain illegal act, injurious to the administration of public justice, to wit, to assault, beat, abuse, wound and ill treat the said *Henry K. Baker*, in order to hinder and prevent him, the said *Henry K. Baker*, being then and there one of the justices of the peace within and for the said county of *Penobscot*, from the performance and discharge of his duties in his office aforesaid, contrary to (*concluding as in Form No. 6122*).

b. By Giving False Evidence and Suppressing Facts on Trial.[2]

tice, should positively aver the facts that such warrant did issue, and such a recognizance was acknowledged, and should also set forth so much of the warrant and recognizance as is necessary to show that they were valid, and therefore the destruction of them might be prejudicial to the administration of justice. Hence if the warrant and recognizance be mentioned only by way of reference and recital, and it be not stated with any precision by whom the warrant was issued, nor before whom the recognizance was taken, and if the substance of the warrant and recognizance be not set forth, so that it may be seen whether they or either of them had legal validity, the indictment will be insufficient. State *v.* Enloe, 4 Dev. & B. L. (20 N. Car.) 373.

Violation of Election Laws. — An indictment under section 191 of the *New Jersey* Crimes act as amended (Rev. Sup., p. 199, § 43), charging the defendants with conspiracy to pervert and obstruct the administration of the election laws by doing certain acts with intent to influence the result of a certain election, was held to sufficiently show a crime within the provisions of that section. Moschell *v.* State, 53 N. J. L. 498.

For substance of an indictment for a conspiracy to procure false and fraudulent votes to be cast see Com. *v.* English, 11 Phila. (Pa.) 439.

1. This form is substantially the indictment in State *v.* Ripley, 31 Me. 386, which was objected to, among other things, because it did not aver that the said Baker was a magistrate duly qualified to administer justice, nor that he was in the act of administering justice and performing his duties as magistrate, nor that he had performed or contemplated or undertaken to perform any act by virtue of his office; and because it did not set forth how the said acts would affect the administration of public justice. The court held the indictment good, saying, "If they (the defendants) designed to commit the assault and battery, and unlawfully confederated for that purpose, with the belief that it would hinder the administration of public justice, but it was not known or comprehended precisely in what mode the object would be attained, the crime would be sufficiently charged."

2. For other forms of indictments and informations for similar conspiracies see as follows:

Indictment for conspiracy to induce

Form No. 6158.

(Precedent in 5 Cox C. C. Appendix ix.)

Central Criminal Court, to wit. The jurors of our Lady the Queen upon their oath present, that before the commission of the offense by *William Coes* and *Richard Coes*, hereinafter mentioned to have been committed by them, one *Fred Saunders* had been charged before *John Tunis*, Esq., one of the magistrates of the *police* courts of the metropolis, sitting at the *police* court, *Greenwich*, in the county of *Kent*, and within the metropolitan police district, on suspicion of having committed a felony, to wit, of having feloniously broken and entered the dwelling-house of one *John Martin*, and stolen therein divers goods, chattels and moneys of the said *John Martin*. And the jurors aforesaid, upon their oath aforesaid, do further present, that at the time of the commission of the offense hereinafter alleged to have been committed by the said *William Coes* and *Richard Coes*, to wit, on the *30th* day of *September*, in the year of our Lord 1850, at the parish of *Greenwich*, in the county of *Kent*, they the said *William Coes* and *Richard Coes* knew and were acquainted with divers matters, facts, circumstances and things material to be inquired into by the said *John Tunis*, as such magistrate as aforesaid, touching and concerning the said charge and the said subject matter thereof, all and every of which said matters, facts, circumstances and things it then and there was the duty of the said *William Coes* and *Richard Coes* to make known and reveal to the said *John Tunis* as such magistrate as aforesaid, and which they the said *William Coes* and *Richard Coes* were then and there required on Her Majesty's behalf by the said *John Tunis*, as such magistrate as aforesaid, to make known, discover, and reveal to him the said *John Tunis*, as such magistrate as aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said *William Coes*, late of the parish of *Greenwich*, in the county of *Kent*, laborer, and *Richard Coes*, late of the same place, laborer, being evil-disposed persons, and contriving and intending as much as in them lay to prevent the due course of law and justice, and not regarding their said duty in that behalf, on the *30th* day of *September*, in the year aforesaid, at the parish aforesaid, in the county aforesaid, unlawfully did conspire, combine, confederate and agree together to deceive the said *John Tunis*, so being such magistrate as aforesaid, in the premises, and to withhold and conceal from the said *John Tunis* the said matters, facts, circumstances, and things, and falsely to represent to the said *John Tunis*, so being such magistrate as aforesaid, that they and each of them, the said *William Coes* and *Richard Coes*, were ignorant of all the said

witness to suppress his testimony. People *v.* Chase, 16 Barb. (N. Y.) 495.

For information for conspiracy to prevent a witness from testifying. Rex *v.* Steventon, 2 East 362.

For indictment for a conspiracy to prevent a material witness from giving evidence pursuant to her recognizance on a trial for felony. 2 Cox C. C. Appendix xlv; Reg. *v.* Hamp, 6 Cox C. C. 167.

For form of indictment for conspiracy to defame certain persons so as to discredit their evidence on a trial. Reg. *v.* Knot, 7 How. St. Tr. 763.

several matters, facts, circumstances, and things, and falsely to swear before the said *John Tunis* to the effect last aforesaid, and by such false swearing, and divers deceitful, false, and indirect means, ways, and methods, to perfect and put into effect the said wicked conspiracy, combination, confederacy, and agreement, and to procure the said *John Tunis*, as such magistrate as aforesaid, to dismiss the said charge, and mutually to aid and assist one another in perfecting and putting into execution the said wicked conspiracy, combination, confederacy, and agreement, in contempt of our said Lady the Queen, and her laws, to the evil and pernicious example of all persons in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said *William Coes* on the *30th* day of *September*, in the year aforesaid, at the parish of *Greenwich* aforesaid, in the county of *Kent* aforesaid, unlawfully did conspire, combine, confederate, and agree together, and with divers other persons, whose names to the jurors aforesaid are unknown, wilfully and corruptly to give false evidence,[1] and wilfully and corruptly to swear to that which was false, upon the examinations upon oath of them the said *William Coes* and *Richard Coes*, before the said *John Tunis*, Esq., then being one of the magistrates of the police courts of the metropolis, acting at one of the said courts, to wit, the *Greenwich police* court, in the county of *Kent*, touching and concerning a certain charge then depending before the said *John Tunis*, to wit, a charge against one *Fred Saunders*, of having feloniously broken and entered a certain dwelling-house of one *John Martin*, and stolen therein divers goods, chattels, and moneys of the said *John Martin*, to the great and pernicious example of all others in the like case offending, in contempt of our said Lady the Queen and her laws, to the manifest perversion of public justice, and against the peace of our said Lady the Queen, her crown and dignity.

c. By Unlawfully Obtaining a Decree of Divorce.

Form No. 6159.

(Precedent in Cole *v.* People, 84 Ill. 217.)[2]

[(*Commencing as in Form No. 6128, and continuing down*

1. In an indictment for a conspiracy to produce a false certificate in evidence, it is not necessary to set forth that the defendants knew at the time of the conspiracy that the contents of the certificate were false; it is sufficient that for such purpose they agreed to certify the fact as true, without knowing that it was so. Rex *v.* Mawbey, 6 T. R. 619.

2. This indictment was drawn under Illinois Rev. Stat. (1874), Crim. Code, § 46, providing that if two or more persons conspire and agree together, with the fraudulent or malicious intent wrongfully and wilfully to do any illegal act, injurious to the administration of public justice, every offender, on conviction, shall be imprisoned in the state penitentiary, etc. In sustaining the indictment the court said: "It is suggested in argument that the statute under which defendants were indicted was copied from the Criminal Code of *Iowa*, and prior to its adoption by our legislature it had received a construction by the supreme court of that state, holding that an indictment under this statute must specifically set forth the illegal acts which constitute the offense, and that general

*to**)][1] unlawfully, feloniously, wilfully and fraudulently did conspire and agree together, with the fraudulent intent wrongfully and wickedly to injure the administration of public justice, by then and there unlawfully, wilfully and fraudulently attempting to obtain and procure a decree of divorce [in the *Superior* Court of *Cook* county aforesaid, contrary to (*concluding as in Form No. 6128*).][1]

d. By Unlawfully Taking Intoxicating Liquors Held under Lawful Seizure.

Form No. 6160.

(Precedent in State *v.* Harris, 38 Iowa 243.)[2]

[*District* Court of the County of *Polk*.

State of Iowa
against
William J. Harris and Mark W. Folsom.

The grand jury of the county of *Polk*, in the name and by the authority of the state of *Iowa*, accuse] *William J. Harris* and *Mark W. Folsom* of the crime of conspiracy, committed as follows:

The said *William J. Harris* and *Mark W. Folsom*, on the *27th* day of *March*, A. D. 1871, in the county of *Polk* aforesaid, well knowing that a certain *eight* barrels of intoxicating liquors were then lawfully in the custody and control of one *W. W. Moore*, as deputy marshal, of the city of *Des Moines*, in said county, under and by virtue of a seizure thereof, made on a search warrant legally issued by *G. B. Hammer*, a justice of the peace for *Lee* township in said county, on written information made on oath in due form of law, under the provisions of an act of the General Assembly of the State of *Iowa*, entitled "An act for the suppression of intemperance, passed January 22d, 1855," by one *James Wright*, that he had reason to believe, and did believe that said intoxicating liquors were then owned and kept, in a place described, in said county, by one *McCracken* with intent to sell the same within the state of *Iowa* in violation of said act, and that the said *W. W. Moore*, as such deputy marshal, then held said *eight* barrels of intoxicating liquors in his custody by virtue of said seizure, to await the final judgment on said information, did then and there unlawfully, feloniously, wickedly and maliciously conspire and confederate together, with the fraudulent and malicious intent to injure the administration of public justice, by unlawfully getting the said *eight* barrels of intoxicating liquors out of the possession and control of the said *W. W. Moore*, and secreting the same so that it could not be

averments are not sufficient—*citing* State *v.* Stevens, 30 Iowa 391; State *v.* Potter, 28 Iowa 554; State *v.* Jones, 13 Iowa 269. Even under the construction contended for, we think the illegal act that constitutes the offense is sufficiently set forth, viz: that the accused unlawfully, wilfully and fraudulently attempted to obtain a divorce in the superior court."

1. The matter enclosed by and to be supplied within [ ] will not be found in the reported case.

2. This indictment was excepted to on the ground that it charged no offense under the laws of *Iowa*, the taking of the liquor by the means alleged not being illegal, but the court (Miller, C. J., dissenting) held otherwise and sustained the indictment.

disposed of as might be finally adjudged and ordered on the hearing of said information.

And the said *Wm. J. Harris* and *Mark W. Folsom*, with the intent and for the purpose aforesaid, did then and there unlawfully cause a writ of replevin to be illegally issued by one *William Connor*, a justice of the peace of *Des Moines* township, in said county, in favor of the said *William J. Harris*, for said *eight* barrels and their contents, by means of which said writ of replevin, they, the said *William J. Harris* and *Mark W. Folsom*, did get said *eight* barrels of intoxicating liquors out of the possession and control of the said *W. W. Moore*, and did remove and secrete the same, so that they could not be disposed of under the final judgment of forfeiture rendered by said *G. B. Hammer*, as such justice of the peace on said information, nor the said order issued by said *G. B. Hammer*, as such justice of the peace on said judgment of forfeiture for the destruction of said intoxicating liquors, by reason of which said illegal, fraudulent and malicious acts of the said *William J. Harris* and *Mark W. Folsom*, and of their conspiring and confederating together as aforesaid, great injury was done to the administration of public justice, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of *Iowa*.

[*Daniel Webster*, District Attorney.][1]

e. By Securing Appointment to Public Office.[2]

Form No. 6161.

(Precedent in People *v.* Squire, 20 Abb. N. Cas. (N. Y. Oyer & T. Ct.) 369.)[3]

[Court *of General Sessions of the City and County of New York*.[4]

The People of the State of New York
against
Rollin M. Squire and Maurice B. Flynn.

The grand jury of the (*Here followed the first fifteen counts of the indictment*).][5]

And the grand jury aforesaid, by this indictment, further accuse the said *Rollin M. Squire* and *Maurice B. Flynn* of the crime of conspiracy, committed as follows:

Heretofore, to wit, on the *26th* day of *December*, in the year aforesaid, at the city and county aforesaid, the term of a certain public officer, to wit, the commissioner of public works of the city of *New York*, had then lately before expired, and the mayor of said city was then about to nominate, and by and with the consent of the said board of aldermen of the said city of *New York*, to appoint some

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. For indictment for a conspiracy to procure the return of a member of parliament by the use of bribery see 7 Cox C. C. Appendix xv.

3. The indictment in this case was in twenty-two counts, the form given in the text being the sixteenth count. It was held sufficient under N. Y. Pen. Code, § 168 (Birds. Rev. Stat. (1896), p. 587, § 1).

4. This indictment was found in the court of oyer and terminer, but this court has been abolished and the caption made to conform to the present practice.

5. The words enclosed by and to be supplied within [ ] will not be found in the reported case.

person as such commissioner of public works, for which appointment as such commissioner of public works, the said *Rollin M. Squire* was then and there an applicant and candidate. And the said *Maurice B. Flynn*, on the day and in the year aforesaid, was then and there and for a long time prior thereto had been, and then intended thereafter to continue and remain, engaged and interested in the business of procuring, soliciting and executing awards, orders and contracts, and in the procuring, soliciting and executing of awards, orders and contracts, let and awarded and to be let and awarded by the head of the department of public works, to wit, the commissioner of public works, of the city of *New York*, for work done and supplied and to be done and supplied for and on account of the corporation of the city of *New York*, the expense, price, and consideration of which was payable, and was to be payable, from the city treasury, and was by reason thereof ineligible to the said office of commissioner of public works, as they, the said *Rollin M. Squire*, *Maurice B. Flynn*, *Hubert O. Thompson*, and the other evil-disposed persons hereinafter mentioned, then and there well knew.

Nevertheless, the said *Rollin M. Squire* and *Maurice B. Flynn*, both late of the city and county aforesaid, together with said *Hubert O. Thompson* and the said other evil-disposed persons, unlawfully, wickedly, and corruptly contriving and intending to obstruct, defeat and pervert the due administration of the law, and to get into their hands and control the said office of commissioner of public works, for their own most wicked and corrupt ends and purposes, afterwards, to wit, on the day and in the year aforesaid, at the city and county aforesaid, did unlawfully, wickedly and corruptly conspire, combine, confederate and agree together between and amongst themselves, to cause and procure him, the said *Rollin M. Squire*, by and through the corrupt means and procurement of them, the said *Rollin M. Squire*, *Maurice B. Flynn*, *Hubert O. Thompson*, and the said other evil-disposed persons, to be nominated by the mayor of the said city of *New York*, and by and with the consent of the said board of aldermen of the said city of *New York*, to be appointed as such commissioner of public works, upon a corrupt and wicked understanding and agreement, and with intent that, upon and in the event of the said *Rollin M. Squire* being appointed to the said office, he the said *Rollin M. Squire*, should transact the business of the said office as the said *Maurice B. Flynn* might and should direct, and should and would make no appointment of any subordinates, clerks or employees of and pertaining to the business of the said office, without the approval of the said *Maurice B. Flynn*, and would and should make such removals of any and all of such subordinates, clerks and employees as the said *Maurice B. Flynn* might and should suggest and request, and that the said *Rollin M. Squire* should and would, upon and in the event of such appointment, grant to the said *Maurice B. Flynn* the right and authority to discharge any and all of the functions of the said office, and should and would permit him, the said *Maurice B. Flynn*, to make any and all of the appointments and to perform any and all of the duties necessarily touching and being incidental to the administration of the said office.

And the said *Rollin M. Squire*, in pursuance and furtherance of and according to the said conspiracy, combination, confederacy and agreement between himself and the said *Maurice B. Flynn*, *Hubert O. Thompson* and the said other evil-disposed persons, as aforesaid, afterwards, to wit, on the day and in the year aforesaid, in the city and county aforesaid, did personally appear before the said mayor of the said city of *New York* and did make application to the said mayor to be nominated as such commissioner of public works, in due form of law; and did then and there cause and procure the said mayor to duly nominate him, the said *Rollin M. Squire*, as such commissioner of public works.

And the said *Rollin M. Squire*, in the further pursuance and furtherance of and according to the said conspiracy, combination, confederacy and agreement as aforesaid, afterwards, to wit, on the day and in the year aforesaid, at the city and county aforesaid, did unlawfully, wickedly and corruptly make, sign and subscribe and deliver to the said *Maurice B. Flynn* and *Hubert O. Thompson*, a certain paper in these words following (*Here was set out a copy of the letter*),[1] to the manifest perversion and obstruction of the due administration of the laws, to the pernicious example of all others in like case offending, against the form of the statute in such case made and provided, and against the peace of the people of the state of *New York*, and their dignity.

[*John R. Fellows*, District Attorney of the *City and* County of *New York.*][2]

6. Under Federal Statutes.[3]

1. The letter referred to was as follows:

"*New York, December 26th*, 18*84*.

Maurice B. Flynn, Esq.,

Dear Sir: In consideration of your securing not less than four County Democracy aldermen who shall vote for my confirmation as commissioner of public works, in the event that the mayor shall send in my name for that office, I hereby agree to place my resignation as commissioner, in case of my confirmation, in your hands whenever you may demand the same, and further, to make no appointment in said office without your approval, and to make such removals therein as you may suggest and request, and to transact the business of said office as you may direct.

Very truly yours,

Rollin M. Squire."

2. The words enclosed by [ ] will not be found in the reported case.

3. United States Revised Statutes, § 5440, provides that "If two or more persons conspire, either to commit any offense against the United States, or to defraud the United States in any manner, or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty," etc.

Requisites of Indictment — *Generally.* — An indictment under this section must charge three things in order to be sufficient: (1) That the persons named in the indictment did conspire together and enter into an unlawful agreement and combination, which is the legal signification of the word conspire as there employed. (2) That they so conspired together to commit an offense against the laws of the United States. (3) That one or more of said parties to said conspiracy did some act to effect the object of said unlawful combination and agreement. U. S. *v.* Martin, 4 Cliff. (U. S.) 156; U. S. *v.* Adler, 49 Fed. Rep. 736. See also U. S. *v.* Nunnemacher, 7 Biss. (U. S.) 111; U. S. *v.* Goldberg, 7 Biss. (U. S.) 175.

The conspiracy must be sufficiently charged. It cannot be aided by acts done by one or more of the conspirators in furtherance of the object of the

conspiracy. U. S. *v.* Britton, 108 U. S. 199; U. S. *v.* Walsh, 5 Dill. (U. S.) 58.

Object of Conspiracy. — An indictment under this section, in order to be good, must charge that the conspiracy was to do some act made a crime by the laws of the United States, and it must state with such reasonable certainty the acts intended to be effected by the conspiracy that it can be seen that the object of the conspiracy was a crime against the United States. *In re* Wolf, 27 Fed. Rep. 606; U. S. *v.* Watson, 17 Fed. Rep. 145; U. S. *v.* Gardner, 42 Fed. Rep. 829. But in stating the object of the conspiracy the same certainty and strictness are not required as in the indictment for the offense conspired to be committed. U. S. *v.* Stevens, 44 Fed. Rep. 132; U. S. *v.* Wilson, 60 Fed. Rep. 890.

Averment of Overt Acts. — The indictment, to be sufficient, must charge the execution of some overt act to effect the object of the conspiracy. U. S. *v.* Dennee, 3 Woods (U. S.) 47; U. S. *v.* Martin, 4 Cliff. (U. S.) 156; U. S. *v.* Nunnemacher, 7 Biss. (U. S.) 111; U. S. *v.* Goldberg, 7 Biss. (U. S.) 175; U. S. *v.* Watson, 17 Fed. Rep. 145; U. S. *v.* Reichert, 32 Fed. Rep. 142; U. S. *v.* Milner, 36 Fed. Rep. 890; U. S. *v.* Adler, 49 Fed. Rep. 736; U. S. *v.* Benson, 70 Fed. Rep. 591; Dealy *v.* U. S., 152 U. S. 539. *Compare* the dictum in U. S. *v.* Gardner, 42 Fed. Rep. 829.

But an indictment under this section is sufficient if it correctly charges an unlawful combination and agreement as actually made, and, in addition, describes any act by any one of the parties to the unlawful agreement as an act intended to be relied on to show the agreement in operation, although upon the face of the indictment it does not appear how the act would tend to affect the object of the conspiracy. U. S. *v.* Donau, 11 Blatchf. (U. S.) 168; U. S. *v.* Sanche, 7 Fed. Rep. 715; U. S. *v.* Benson, 70 Fed. Rep. 591. See also U. S. *v.* Graff, 14 Blatchf. (U. S.) 381; U. S. *v.* Boyden, 1 Lowell (U. S.) 266; U. S. *v.* Dustin, 2 Bond (U. S.) 332.

For examples of averments of overt acts held insufficient see U. S. *v.* Milner, 36 Fed. Rep. 890; U. S. *v.* Gardner, 42 Fed. Rep. 829.

Any form of language that shows that some act was done to carry out the agreement is sufficient; it is not necessary to charge that the overt act was done "to effect the object of" the conspiracy, though this is the language of the statute. U. S. *v.* Boyden, 1 Lowell (U. S.) 266.

Averment of Time and Place of Overt Act. — The indictment should aver the time and place of the alleged overt act, so as to identify the act and show that it post-dated the conspiracy and was in fact an act, not a part of the conspiracy, but done to effect its object. U. S. *v.* Milner, 36 Fed. Rep. 890.

Allegation of Means Unnecessary. — An indictment under U. S. Rev. Stat., § 5440, which avers the conspiracy and then sets out the overt acts done to carry it into effect, is sufficient, and it is not necessary to aver the means agreed on to effect the conspiracy. U. S. *v.* Dennee, 3 Woods (U. S.) 47; U. S. *v.* Goldman, 3 Woods (U. S.) 192; U. S. *v.* Dustin, 2 Bond (U. S.) 332; U. S. *v.* Gordon, 22 Fed. Rep. 250; U. S. *v.* Benson, 70 Fed. Rep. 591. *Compare* U. S. *v.* Walsh, 5 Dill. (U. S.) 58.

An indictment for a conspiracy to obstruct the mails need not charge that the overt acts were done feloniously, but it must charge that they were done knowingly, wilfully, or unlawfully; but where the defendants are charged with the overt acts of retarding the mail trains it is not necessary to charge them with knowing at the time that the trains carried the mails, and where the indictment charges that the overt acts consisted in turning switches and overturning cars upon the track, etc., such acts will be presumed illegal, and an allegation that the acts were not done in the lawful exercise of the defendant's rights is unnecessary; nor is the indictment restricted to a single overt act. U. S. *v.* Debs, 65 Fed. Rep. 210.

For an indictment for conspiracy to hinder and prevent a colored person from the enjoyment of personal security, drawn under section 6 of the Enforcement act of 1870, which act is substantially incorporated into the U. S. Rev. Stat. (1878), §§ 5508, 5509, see The Ku Klux Conspiracy, vol. 12, p. 938.

For indictment drawn under this section for a conspiracy to intimidate a citizen in the free exercise and enjoyment of his right to proceed by contempt in the federal court against the defendants for a violation of an injunction granted by said court restraining said defendants from interfering with his title to land, held sufficient, see U. S. *v.* Lancaster, 44 Fed. Rep. 885.

a. To Cast Away Vessel with Intent to Injure Underwriters.

Form No. 6162.[1]

In the *District* Court *of the United States of America* for the *Southern* District of *New York.*

Of the *October* Term in the year of our Lord eighteen hundred and *ninety-seven.*

Southern District of *New York*, sct. The grand jurors for the *United States of America*, inquiring for the *Southern* District of *New York*, upon their oath present,* that *John Doe*, *Richard Roe* and *Samuel Short*, all late of the city, county and state of *New York*, in the *Southern* District of *New York*, on the *fifth* day of *June*, in the year of our Lord one thousand eight hundred and *ninety-seven*, at the said city of *New York*,† did amongst themselves, wilfully and corruptly conspire, combine, confederate and agree together, to injure certain underwriters, hereinafter mentioned, and falsely and fraudulently to cheat and defraud them of divers large sums of money. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said *John Doe*, *Richard Roe* and *Samuel Short* afterwards, to wit, on the (*Here give the date of the policy*), in the year aforesaid, at the city of *New York* aforesaid, in pursuance of, and according to the said conspiracy, combination, confederacy and agreement amongst themselves had as aforesaid, did cause and procure a certain ship called the "*Daniel Webster*," and certain goods in and on board the said ship to be insured by certain underwriters, to wit, by *Leonard A. Ford*, *Charles Mainjoy* and *John T. Hadaway*, and the said underwriters then and there severally executed a certain policy of insurance upon the said ship, and upon the said goods so laden on board the said ship as aforesaid, upon and for a voyage from the port of *New York*, to the port of *Genoa*, in the kingdom of *Italy*. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said *John Doe*, *Richard Roe* and *Samuel Short* afterwards, and after the said ship sailed from the port of *New York* aforesaid, upon the voyage aforesaid, to wit, on the *fourth* day of *August*, in the year aforesaid, in further pursuance of and according to the said conspiracy, combination, confederacy and agreement among themselves had as aforesaid, did remove and unload from on board the said ship, divers goods insured as aforesaid, of great value, to wit, of the value of *two thousand* dollars, before the said ship had reached the port of destination as aforesaid, to wit, at the village of *Patchogue*, in the county of *Suffolk*, in the state of *New York*. And the jurors aforesaid, upon

An indictment charging in the general language of U. S. Rev. Stat., § 5506, that at a certain election the accused did unlawfully combine and confederate with each other to hinder certain persons from voting, without setting forth by what acts and methods the hindering was done, is too vague and general, and the defect is not cured by averments that the accused hindered the voters by unlawfully challenging them and consumed the time for conducting the election by putting frivolous interrogations to such voters, and unlawfully created disorder by pushing and doing and saying disorderly and illegal things to them, such averments being themselves too vague and general. U. S. *v.* Belvin, 46 Fed. Rep. 382.

1. *United States.* — Rev. Stat. (1878), § 5364. See U. S. *v.* Cole, 5 McLean (U. S.) 513.

their oath aforesaid, do further present, that in further pursuance of and according to the said conspiracy, combination, confederacy and agreement amongst themselves had as aforesaid, the said *John Doe*, *Richard Roe* and *Samuel Short*, afterward, to wit, on the *twentieth* day of *August*, in the year aforesaid, on the high seas, did cut, bore and make divers holes in the bottom and sides of the said ship, with intent thereby to sink, cast away and destroy the said ship, and the goods in and upon the said ship so laden as aforesaid, and with intent and design then and there wilfully and maliciously to prejudice and injure the said several persons who had so underwritten the said policy of insurance on the said ship, and upon the goods therein and thereupon laden as aforesaid, to the great damage of the said *Leonard A. Ford*, *Charles Mainjoy* and *John T. Hadaway*, who had so underwritten the said policy as aforesaid, against the peace and dignity of the said *United States*, and contrary to the form of the statute of the same in such case made and provided.

Daniel Webster, United States Attorney.

b. To Defraud the United States.[1]

1. **For other forms** of indictments under U. S. Rev. Stat. (1878), § 5440, see as follows:

By False Accounts. — Where an indictment charges a conspiracy by the superintendent and assistant superintendent of the construction of a government building to defraud the United States out of a large sum of money by "certifying that certain false and fraudulent accounts and vouchers for materials furnished for use in the construction of the said" building "and for labor performed on the said building were true and correct," without stating what accounts or vouchers, the indictment was held bad for uncertainty. U. S. *v.* Walsh, 5 Dill. (U. S.) 58.

By False Survey. — For form of indictment for a conspiracy to defraud the United States by causing a fraudulent and fictitious survey of lands to be made pursuant to a contract with the United States, and fraudulent field notes of said survey, whereby the surveyor-general was deceived into certifying the amount due the surveyor, held sufficient, see U. S. *v.* Benson, 70 Fed. Rep. 591, *reversing In re* Benson, 58 Fed. Rep. 962. For indictment for similar conspiracy held insufficient under the above statute see U. S. *v.* Reichert, 32 Fed. Rep. 142.

By Fraudulent Disposition of Government Property. — An indictment charging that the defendants, one of whom was an Indian trader, "wickedly devising and intending to cheat and defraud the United States, fraudulently, maliciously and unlawfully did conspire, combine, confederate and agree together to cause and procure certain goods, wares and merchandise to be embezzled, and disposed of for money, with the intent thereby to defraud the United States," and that to carry out such conspiracy they did certain acts set forth in the indictment, was objected to on the ground that there is no statute of the United States under which an Indian trader can be indicted for embezzlement, and hence the indictment did not charge an offense within the United States statute against conspiracy. The court held that the word "embezzled" might be omitted from the charge and the indictment was still good for a conspiracy to cheat and defraud the United States. U. S. *v.* Upham, 2 Mont. 170.

By Fraudulently Increasing Weight of Mails Carried. — An indictment charging that certain railway officials, for the purpose of deceiving the postal officials having charge of the weighing of the mails, and of defrauding the United States by falsely causing it to appear that the average weight of mail matter transported was largely in excess of the actual average amount usually carried, and thereby to cause the United States to pay to the railway company a compensation in excess of the amount actually earned, did conspire to defraud the United States by sending over the line a large quantity of old newspapers,

(1) By Means of Pretended Entry of Public Lands.[1]

Form No. 6163.

(Precedent in Dealy *v.* U. S., 152 U. S. 539, 9 Am. Cr. Rep. 161.)[2]

[(*Commencing as in Form No. 6162, and continuing down to* *)][3] that on the *first* day of *April*, in the year of our Lord one thousand eight hundred and *ninety-one*, in the county of *Rolette*, State of *North Dakota*, and within the jurisdiction of this court, one *William W. Allen*, one *Michael Dealy*, one *Edward Laberge*, one *Peter Thibert*, and one *H. H. Fritz*, and others to the grand jury unknown, did commit the

etc., in order to fraudulently increase the weight of the mails, and setting forth the overt acts done in pursuance of the conspiracy, sufficiently charges an offense under U. S. Rev. Stat., § 5440. It is not necessary to aver that the contemplated fraud was successful, or that the matter illegally weighed was of weight sufficient to entitle the company to increased compensation, or that the illegal forwarding was to be continued after the expiration of the time fixed for weighing, nor is it required to state what particular official was to be deceived. U. S. *v.* Newton, 48 Fed. Rep. 218.

Fraudulently Securing Pensions.—For an indictment under sections 5440 and 4746 for a conspiracy to defraud the United States by fraudulently obtaining a pension for one of the defendants in the name of a deceased soldier see U. S. *v.* Adler, 49 Fed. Rep. 736.

For an indictment for a conspiracy to defraud the United States by bribing a member of the board of examining surgeons, so as to influence him in making his report to the commissioner of pensions and thereby secure an allowance of a pension, and of a larger pension than would otherwise have been obtained, see U. S. *v.* Van Leuven, 62 Fed. Rep. 62.

By Prosecuting a False Claim. — U. S. *v.* Dennee, 3 Woods (U. S.) 47.

Other statutes relating to conspiracies to defraud the government are as follows:

U. S. Rev. Stat. (1878), § 5438, which provides that "Every person who enters into any agreement, combination or conspiracy to defraud the government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, shall be imprisoned," etc.

U. S. Rev. Stat. (1878), § 1542, art. 60, par. 3, relating to conspiracies to defraud the government by persons in the military service.

U. S. Rev. Stat. (1878), § 1624, art. 24, relating to conspiracies to defraud the government by persons in the naval service.

U. S. Rev. Stat. (1878), § 3169, which makes it a criminal offense for every officer or agent appointed and acting under the authority of any revenue law of the United States to conspire or collude with any other person to defraud the United States.

1. A count in an indictment under U. S. Rev. Stat. (1878), § 5440, charging a conspiracy to defraud the United States by presenting to the register and receiver of a land office for approval false and fraudulent affidavits and proofs of settlement and improvement under the pre-emption law of twenty-eight persons, to the effect that such persons were entitled to enter the public lands under the pre-emption laws and had severally complied with the said laws, and that they had entered such lands for their own individual benefit and not for purposes of speculation, with an allegation of overt acts, is sufficient. Also a count charging a conspiracy to defraud the United States by hiring twenty-eight persons to enter certain public lands at the land office under color of the pre-emption laws, for the purpose of selling such lands to the defendant and others on speculation. U. S. *v.* Gordon, 22 Fed. Rep. 250.

2. This is the first count of the indictment, on which the defendants were found guilty. A motion for a new trial and one in arrest of judgment was overruled, and this judgment was affirmed by the United States supreme court. The indictment is drawn under U. S. Rev. Stat. (1878), § 5440.

3. The matter to be supplied within [ ] will not be found in the reported case.

crime of conspiracy to defraud the United States, committed as follows:

That at the time and place aforesaid, the said *William W. Allen*, *Michael Dealy*, *Edward Laberge*, *Peter Thibert*, and *H. H. Fritz*, and others, to the grand jury unknown, did falsely, unlawfully, and wickedly conspire, combine, confederate, and agree together among themselves, to defraud the United States out of large tracts of land in said county of great value,[1] by means of false, feigned, illegal, and fictitious entries[2] of said lands under the homestead laws of the United States, the said lands being then and there public lands of the United States, open to entry under said homestead laws at the local land office of the United States at *Devil's Lake City*, in said state, and that according to and in pursuance of[3] said conspiracy, combination, confederacy, and agreement among themselves, had as aforesaid, the said *Allen* did persuade and induce one *Charles Pattnaude* to make filing under said homestead laws, and thereafter to make proof and final entry under said laws for the lands known and described as follows: The south half of the northeast quarter and lots one and two of section six, in township one hundred and sixty-three north, of range seventy west, of the fifth principal meridian, said lands lying and being in said county, on which said lands said *Pattnaude*, as said *Allen* then and there well knew, had never made settlement, improvement, or residence, contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the United States.

[*James F. Smith*, United States Attorney.]

(2) By Removing Distilled Liquors to Evade Internal Revenue Tax.

Form No. 6164.

(Precedent in U. S. *v.* Babcock, 3 Dill. (U. S.) 623, note.)[4]

United States of America, *Eastern* District of *Missouri*, ss.

In the *district* court *of the United States*, for the *eastern* district of *Missouri*. At the *November* term of said court, A. D. 1875.

The grand jurors of the *United States of America*, duly impaneled, sworn, and charged to inquire in and for the *eastern* district of *Mis-*

1. **Description of Lands.** — It was objected that there was no specification of the particular tract or tracts of which the defendants conspired to defraud the United States, but the court held the above general description sufficient.

2. **Description of Means.** — It was further objected that the indictment was defective in its statement of the means by which the conspiracy was to be carried into effect, the word "entry" in homestead cases having a technical meaning, referring simply to the initiation of the proceedings, but the objection was not sustained, the court taking the word in its popular sense so as to include the proceedings as a whole.

3. **Description of Overt Act.** — It was held unnecessary to use the language of the statute that the overt act was done "to effect the object of the conspiracy." Nor was it necessary to specifically state the time of the overt act, or that it was done within the limits of the United States.

4. This indictment was framed upon U. S. Rev. Stat. (1878), § 5440. For the substance of similar indictments see U. S. *v.* Fehrenback, 2 Woods (U. S.) 175; U. S. *v.* Nunnemacher, 7 Biss. (U. S.) 111; U. S. *v.* Smith, 2 Bond (U.

souri, on their oaths present that *Orville E. Babcock* and *John A. Joyce*, late of said district, on the *first* day of *January*, in the year of our Lord one thousand eight hundred and *seventy-four*, at the said district, did conspire, combine, confederate, and agree together among themselves, and with *John McDonald*, *Joseph M. Fitzroy*, *Alfred Bevis*, *Edward B. Fraser*, *Rudolph W. Ulrici*, *Louis Teuscher*, *John Busby*, *Gordon B. Bingham*, and *John W. Bingham*, with certain other persons, to the grand jurors aforesaid unknown, to defraud[1] the United States of the internal revenue tax of *seventy* cents, then and there imposed by law upon each and every proof gallon of a large quantity, to wit, *one million* proof gallons of distilled spirits,[2] thereafter to be produced at certain distilleries, then and there situated in the city of *St. Louis*, within said district, to wit, the distillery then and there occupied by the said *Alfred Bevis* and *Edward B. Fraser*, and then and there situated at the northeast corner of Barton street and De Kalb street, in said city of *St. Louis*, and within said district; the distillery then and there occupied by the said *Rudolph W. Ulrici*, and then and there situated at the southwest corner of Cedar street and Main street in said city of *St. Louis*, and within said district; the distillery then and there occupied by the said *Louis Teuscher*, and then and there situated at Nos. 2808, 2810, 2812, 2814 and 2816, inclusive, North Second street, in said city of *St. Louis*, and in said district; the distillery then and there occupied by the said *John Busby*, and then and there situated at the southwest corner of Cass avenue and Eleventh street, in said city of *St. Louis*, and within said district; the distillery then and there occupied by said *Gordon B. Bingham* and *John W. Bingham*, and then and there situated at No. 1313 Papin street, in said city of *St. Louis*, and within said district.

That afterward, to wit, on the *fifteenth* day of *July*, in the year of our Lord one thousand eight hundred and *seventy-four*, and at the *eastern* district of *Missouri*, the said *Alfred Bevis* and *Edward B. Fraser*, in pursuance of, and in order to effect, the object of said conspiracy, combination, confederacy, and agreement, so had as aforesaid, did remove from the said distillery situated as aforesaid at the northeast corner of Barton street and De Kalb street, in the said city of *St. Louis*, to a place other than a distillery warehouse situated upon and constituting a part of the distillery premises, to wit, to a

S.) 323; U. S. *v.* Dustin, 2 Bond (U. S.) 332.

For cases relating to this celebrated conspiracy to defraud the revenue in St. Louis, in the years 1871–1875, see U. S. *v.* McKee, 3 Dill. (U. S.) 551; U. S. *v.* Babcock, 3 Dill. (U. S.) 581; U. S. *v.* McDonald, 3 Dill. (U. S.) 543.

1. Intent to Defraud. — An indictment against a distiller for conspiracy to defraud the United States of the internal revenue tax need not state, in addition to an intent to defraud, the facts showing such intent. U. S. *v.* Ulrici, 3 Dill. (U. S.) 532.

2. Description of Goods Removed. — The subject matter of the conspiracy is sufficiently described as "the taxes arising from and imposed by law upon certain divers proof gallons and quantities of distilled spirits, distilled in the United States, then and there situated in a certain bonded warehouse," describing said warehouse. U. S. *v.* Boyden, 1 Lowell (U. S.) 266. In an indictment for a conspiracy to remove goods without paying duty thereon, the goods and means of effecting the conspiracy may be described in very general terms. Reg. *v.* Blake, 6 Q. B. 126, 51 E. C. L. 126; Reg. *v.* Thompson, 16 Q. B. 832.

place to the jurors aforesaid unknown, a large quantity of spirits, to wit, *ten thousand* proof gallons thereof, upon which said spirits the internal revenue tax of *seventy* cents, then and there imposed by law upon each and every proof gallon thereof, had not been first paid, and thereby did then and there defraud the United States of said tax (*Here followed in precisely similar terms charges of similar overt acts by Ulrici, Teuscher, Busby, and Bingham respectively*).

That afterward, to wit, on the *first* day of *February*, in the year of our Lord one thousand eight hundred and *seventy-four*, at the said *eastern* district of *Missouri*, the said *John A. Joyce*, in pursuance of, and in order to effect, the object of said conspiracy, combination, confederacy, and agreement, so had as aforesaid, did aid and abet in the removal from the said distillery of *Alfred Bevis* and *Edward B. Fraser*, to a place to the jurors aforesaid unknown, of a large quantity of distilled spirits, to wit, *one thousand* proof gallons thereof, upon each and every proof gallon of which said spirits the internal revenue tax of *seventy* cents, then and there imposed by law, had not first been paid, contrary to the form of the statute of the United States in such cases made and provided, and against their peace and dignity.

David P. Dyer,
United States Attorney for the *Eastern* District of *Missouri*.

c. To Make Fictitious Census Returns.

Form No. 6165.

(Precedent in U. S. *v.* Stevens, 44 Fed. Rep. 132.)[1]

District of *Minnesota*, ss.

The grand jury of the *United States of America* within and for said district, on their oath present that heretofore, to wit, on the *second* day of *June*, in the year of our Lord one thousand eight hundred and *ninety*, at the city of *Minneapolis*, in this district, *Edward A. Stevens*, *Thaddeus S. Dickey*, *Louis E. Strum*, and other persons to the grand jurors aforesaid unknown, meditated and devised a scheme to procure false, exaggerated and fictitious schedules and returns of the population of said city on the *first* day of *June*, in the year of our Lord one thousand eight hundred and *ninety*, to be made and forwarded to the

1. This indictment, based on U. S. Rev. Stat. (1878), § 5440, was demurred to on the ground that the defendants Stevens and Dickey, not being capable of committing the offense denounced in section 13 of the Census act of 1889, which could be committed by Strum only, could not conspire with the latter to commit said offense, but the court overruled the demurrer, the gravamen of the charge being the conspiracy.

The indictment contained three other counts, all similar to the above, except that the second charged a conspiracy to write different fictitious names in the blank schedule. The third charged a conspiracy to write one set of such names on one schedule and the other on another, and the fourth charged a conspiracy to write three hundred fictitious names on fifty such schedules and three hundred more names on fifty other schedules. Several of said three hundred names in the first instance were stated as fictitious. It was objected to this count that the charge of a conspiracy to put three hundred false and fictitious names in the blanks was too general, but the averments were held sufficient.

supervisor of the *second* census district of *Minnesota* by the several enumerators employed, and to be employed, to take the *eleventh* census of the *United States* within said city. That on the *second* day of *June* one *Edward J. Davenport* was one of the supervisors of census, to wit, the supervisor of census within and for the *second* supervisor's district of *Minnesota*, duly appointed, qualified, and acting as such, under and pursuant to the provisions of an act of congress of the United States, to wit, an act entitled "An Act to provide for Taking the Eleventh and Subsequent Censuses," approved March first, A. D. one thousand eight hundred and eighty-nine, and one *Louis E. Strum* was an enumerator duly employed, appointed, and qualified, and acting as such, under and pursuant to the provisions of said act, within and for a certain subdivision of and within said census district, to wit, subdivision number *367*; he, the said *Louis E. Strum*, lately before then, to wit, on said *second* day of *June*, having taken and subscribed the oath required by [section eight] of said act.

That the said *Louis E. Strum* on said *second* day of *June* had in his custody and possession, as such enumerator, divers, to wit, *three hundred* blank schedules of the form approved by the secretary of the interior to be filled in the course of the enumeration to be by him made, according to the provisions of said act, and being the same blank schedules that had been issued, pursuant to the provisions of said act, from the census office, and to him, the said *Louis E. Strum*, before then, lately, to wit, on said *second* day of *June*, transmitted and delivered by said supervisor of census.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that afterwards, to wit, on the said *second* day of *June*, in the year of our Lord one thousand eight hundred and *ninety*, at the city of *Minneapolis*, in this district, the said *Davenport* still being and acting as the supervisor of census within and for said census district, and the said *Louis E. Strum* still being and acting as an enumerator within and for his said subdivision, and still having in his custody and possession as such enumerator the said blank original schedules, the same being of the kind and form known as "Schedule No. *1*," and relating to and containing inquiries touching and concerning population and social statistics, *Edward A. Stevens*, *Thaddeus S. Dickey*, and the said *Louis E. Strum*, yeomen, late of said city, together with other evil-disposed persons whose names are as yet to the jurors aforesaid unknown, did unlawfully and maliciously conspire, combine, and confederate together and with each other, in and upon one of said schedules then and there unlawfully, wilfully and knowingly to put, place, insert, and write the following imaginary, false and fictitious names of persons, that is to say: *Gordon Douglas*, *Grace Douglas*, *David Douglas* (*and six others*), — in the several blanks left and provided thereon for the names of persons respectively to be enumerated thereon, pursuant to the provisions of said act, and imaginary, false, pretended, and fictitious answers, items of information, particulars, facts, and statistics in the several blanks left and provided in said blank schedules for answers to the several inquiries respectively set forth and contained therein concerning the persons to be enumerated thereon; and required by said act to be answered

in and upon said schedule, and the same schedule afterwards, to wit, on said day, with said names and said imaginary, false, pretended, and fictitious answers, items of information, particulars, facts, and statistics, put, placed, inserted, and written therein, in manner and form aforesaid, to wilfully and knowingly duly certify, and have and procure to be duly certified, in form of law, by him, the said *Louis E. Strum*, as enumerator, as aforesaid, within and for said subdivision, and the same schedule filed and certified as aforesaid afterwards, to wit, at said city of *Minneapolis*, on said day, to unlawfully, knowingly, and wilfully forward, with other like schedules, to the said supervisor as his, the said *Louis E. Strum's*, returns under the provisions of said act, they, the said *Edward A. Stevens*, *Thaddeus S. Dickey*, and *Louis E. Strum*, then and there, to wit, when they conspired, combined, and confederated together as aforesaid, well knowing that the said names, answers, items of information, particulars, facts, and statistics, and each and every one of them, were imaginary, pretended, false, and fictitious, and that none of said imaginary, pretended, and fictitious persons were, on the *first* day of *June*, in the year of our Lord one thousand eight hundred and *ninety*, or ever, residents or inhabitants of his, the said *Louis E. Strum's*, said subdivision; and he, the said *Louis E. Strum*, not having obtained said names, answers, items of information, particulars, facts, and statistics, or any or either of them, by any inquiry made by him, the said *Louis E. Strum*, of any one, nor by visit by him, the said *Louis E. Strum*, personally to any dwelling-house or family in his said subdivision, nor in the course of enumeration or canvass by him, the said *Louis E. Strum*, of his said subdivision, as they, the said *Edward A. Stevens*, *Thaddeus S. Dickey*, and *Louis E. Strum*, then and there well knew.

That afterwards, to wit, on the said *second* day of *June*, in the year of our Lord one thousand eight hundred and *ninety*, at the city of *Minneapolis*, in said district, pursuant to said conspiracy, and to promote and effect the object thereof, the said *Louis E. Strum*, he, the said *Louis E. Strum*, still being and acting then and there as enumerator as aforesaid, within and for his said subdivision, and still having in his custody and possession, as such enumerator, the said schedules, and the said *Davenport* still being and acting then and there as supervisor of census within and for said *second* census district, in and upon one of said blank schedules, to wit, the blank schedule last hereinbefore mentioned, did then and there unlawfully, wilfully and knowingly put, place, insert and write the several imaginary, false and fictitious names aforesaid, in the several blanks left and provided thereon for the names of persons respectively to be enumerated thereon, pursuant to the provisions of said act, and divers imaginary, false, pretended and fictitious answers, items of information, particulars, facts and statistics in the several blanks left and provided in said blank schedule for answers to the several inquiries respectively set forth and contained therein concerning the persons to be enumerated thereon and required by said act to be answered in and upon said schedule. * * * And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said *Edward A. Stevens*, *Thaddeus S. Dickey* and *Louis E. Strum*, then and

there, to wit, at the said city of *Minneapolis*, on the said *second* day of *June*, in the year of our Lord one thousand eight hundred and *ninety*, unlawfully and maliciously did conspire, combine and confederate together and with each other to unlawfully, wilfully and knowingly make the fictitious returns aforesaid, in manner and form aforesaid, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

Geo. N. Baxter, Special Assist. U. S. Attorney.

d. To Plunder a Wrecked Steamboat.

Form No. 6166.

(Precedent in U. S. *v.* Sanche, 7 Fed. Rep. 716.)[1]

[(*Commencing as in Form No. 6162, and continuing down to* †)][2] did conspire, combine, confederate, and agree together, between and among themselves, to plunder certain goods and merchandise, a more particular description of which said goods and merchandise being to the grand jurors aforesaid unknown, then and there belonging to the steamboat "*City of Vicksburg*," the said steamboat being then and there wrecked in distress on the waters of the *Mississippi river*, within the admiralty and maritime jurisdiction of the United States, while engaged in commerce and navigation on the said river, to wit, between *Vicksburg*, in the state *Mississippi*, and *St. Louis*, in the state of *Missouri*; and that, to effect the object of the said conspiracy, the said *Hercules Sanche* then and there furnished and loaned to the said *John Woods* and *Elias Boatright*, a certain skiff to be used by them, the said *Woods* and the said *Boatright*, in plundering said goods and merchandise from the said steamboat [against the peace (*concluding as in Form No. 6162*).][2]

e. To Prevent Enjoyment of Elective Franchise and Civil Rights of Citizens.

(1) By Preventing Homestead Entry.

Form No. 6167.[3]

(*Commencing as in Form No. 6162, and continuing down to* *) that *Burrell Lindsey*, a citizen of the United States, made on the *thirtieth* day of *December*, in the year of our Lord one thousand eight hundred

1. This indictment was drawn under U. S. Rev. Stat. (1878), § 5440, for a conspiracy tocommit the offense denounced by U. S. Rev. Stat. (1878), § 5358, and the defendants moved to quash it on two grounds, the first, that section 5440 does not make it indictable to conspire to commit a trespass against private persons or property, although such trespass may be a violation of the criminal laws of the United States; the second, that the averment of the overt act was insufficient to show an act done to effect the object of the conspiracy. The motion was overruled on both points.

2. The words enclosed by and to be supplied within the [ ] will not be found in the reported case.

3. This indictment, drawn under U. S. Rev. Stat. (1878), § 5508, contains substantially the facts set out in the information in U. S. *v.* Waddell, 112 U. S. 76, which information was held on

and *eighty-two*, at the United States land office at *Little Rock*, a homestead entry on a quarter section of land subject to entry at that place. That afterward, to wit, on the *tenth* day of *January*, in the year of our Lord one thousand eight hundred and *eighty-three*, while residing on and cultivating said land for the purpose of perfecting his right to the same under the laws of the United States on the subject, namely, sections twenty-two hundred and eighty-nine, twenty-two hundred and ninety, and twenty-two hundred and ninety-one of the Revised Statutes of the United States, the defendants, *David Waddell*, *John Smith* and *Frank Johnson* conspired to injure and oppress him, and to intimidate and threaten him in the free exercise and enjoyment of that right, and because of his having exercised it, and prevent his compliance with the laws. And the jurors aforesaid, upon their oath aforesaid, do further present that in pursuance of said conspiracy, the defendants, *David Waddell*, *John Smith* and *Frank Johnson* did, upon said homestead tract, to wit, on said *tenth* day of *January* in the year of our Lord one thousand eight hundred and *eighty-three*, with force and arms fire off loaded guns and pistols in the cabin of said *Lindsey* and did then and there thereby drive him, said *Lindsey*, from his home on said homestead entry. And the jurors aforesaid on their oath aforesaid, do further present, that said defendants, *David Waddell*, *John Smith* and *Frank Johnson*, to wit, on said *tenth* day of *January*, in the year of our Lord one thousand eight hundred and *eighty-three*, went in disguise upon the premises of said homestead entry, while occupied by said *Lindsey*, with intent to prevent and hinder the free exercise of and enjoyment by him of the right and privilege to make said homestead entry on the lands of the United States, secured to him by the constitution and laws of the United States and the right to cultivate and improve said land and mature his title as provided by the said sections twenty-two hundred and eighty-nine, twenty-two hundred and ninety, and twenty-two hundred and ninety-one of the Revised Statutes of the United States, against the peace (*concluding as in Form No. 6162*).

(2) By Preventing Exercise of Right of Suffrage.

Form No. 6168.

(Precedent in *Ex p.* Yarbrough, 110 U. S. 655.)[1]

We, the grand jurors of the *United States*, chosen, selected and sworn in and for the *Northern* District of *Georgia*, upon our oaths, present: That heretofore, to wit, on the *twenty-fifth* day of *July*, in the year of our Lord one thousand eight hundred and *eighty-three*, *Jasper Yarbrough*, *James Yarbrough*, *Dilmus Yarbrough*, *Neal Yar-*

demurrer to charge an offense under the said section of the United States statutes.

See also an insufficient indictment under this statute for a conspiracy to interfere with one's enjoyment of a mining claim in U. S. *v.* Ringeling, 8 Mont. 353.

1. This indictment, drawn under U. S. Rev. Stat. (1878), §§ 5508, 5520, was held sufficient.

For other forms drawn under these sections see U. S. *v.* Crosby, 1 Hughes (U. S.) 448; U. S. *v.* Butler, 1 Hughes (U. S.) 457; U. S. *v.* Goldman, 3 Woods (U. S.) 187.

brough,[1] *Lovel Streetman*, *Bold Emory*, *State Lemmons*, *Jake Hayes*, and *E. H. Green*, all late of said *Northern* District of *Georgia*, did, within the said *Northern* District of *Georgia*, and within the jurisdiction of this court, commit the offense of conspiracy, for that the said *Jasper Yarbrough*, *James Yarbrough*, *Dilmus Yarbrough*, *Neal Yarbrough*, *Lovel Streetman*, *Bold Emory*, *State Lemmons*, *Jake Hayes*, and *E. H. Green*, did then and there, at the time and place aforesaid, combine, conspire, and confederate together, by force, to injure, oppress, threaten, and intimidate *Berry Saunders*, a person of color and a citizen[1] of the United States of America of African descent, on account of his race, color, and previous condition of servitude, in the full exercise and enjoyment of the right and privilege of suffrage in the election of a lawfully qualified person as a member of the congress of the United States of America, and because the said *Berry Saunders* had so exercised the same, and on account of such exercise, which said right and privilege was secured to the said *Berry Saunders* by the constitution and laws of the United States of America, the said *Berry Saunders* being then and there lawfully entitled to vote in said election, and having so then and there conspired the said *Jasper Yarbrough*, *James Yarbrough*, *Dilmus Yarbrough*, *Neal Yarbrough*, *Lovel Streetman*, *Bold Emory*, *State Lemmons*, *Jake Hayes*, and *E. H. Green* did unlawfully, feloniously, and wilfully beat, bruise, wound, and maltreat the said *Berry Saunders*, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the *United States of America*.

Second count. — And the jurors aforesaid, upon their oaths aforesaid, do further present, that heretofore, to wit, on the *twenty-fifth* day of *July*, in the year of our Lord one thousand eight hundred and *eighty-three*, *Jasper Yarbrough*, *James Yarbrough*, *Dilmus Yarbrough*, *Neal Yarbrough*, *Lovel Streetman*, *Bold Emory*, *State Lemmons*, *Jake Hayes*, and *E. H. Green*, all late of said *Northern* District of *Georgia*, within the said *Northern* District of *Georgia* and within the jurisdiction of this court, did commit the offense of conspiracy, for that the said *Jasper Yarbrough*, *James Yarbrough*, *Dilmus Yarbrough*, *Neal Yarbrough*, *Lovel Streetman*, *Bold Emory*, *State Lemmons*, *Jake Hayes*, and *E. H. Green*, having then and there conspired together, by force, to injure, oppress, threaten, and intimidate *Berry Saunders*, a person of color and a citizen of the United States of America of African descent, on account of his race, color, and previous condition of servitude, did then and there unlawfully, wilfully, and feloniously go in disguise on the highway, and on the premises of *Berry Saunders*, with the intent to prevent and hinder his free exercise and enjoyment of the right to vote at an election for a lawfully qualified person as a member of the Congress of the United States of America, which said right had then and there been guaranteed to the said *Berry Saunders* by the constitution and laws of the United States of

1. An indictment under U. S. Rev. Stat. (1878), §§ 5508, 5509, is bad that does not aver that the parties conspired against were citizens, and an allegation that they were officers conspired against in the discharge of their official duties is not sufficient. U. S. *v.* Patrick, 53 Fed. Rep. 356.

America, the said *Berry Saunders* being then and there lawfully qualified to vote at said election; and having so conspired, with intent as aforesaid, the said *Jasper Yarbrough*, *James Yarbrough*, *Dilmus Yarbrough*, *Neal Yarbrough*, *Lovel Streetman*, *Bold Emory*, *State Lemmons*, *Jake Hayes*, and *E. H. Green* did then and there beat, bruise, wound, and maltreat the said *Berry Saunders*, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Emory Speer, U. S. Atty.

A true bill. *Oct. 12th*, 1883.

J. C. Kirkpatrick, Foreman.

(3) By Procuring Inspector of Elections to Neglect his Duty.

Form No. 6169.

(Precedent in *In re* Coy, 127 U. S. 743.)[1]

[(*Caption and venue as in Form No. 6162.*)][2]

The grand jurors of the *United States*, within and for the District of *Indiana*, impaneled, sworn, and charged in said court, at the term aforesaid, to inquire for the *United States* within and for the District of *Indiana* aforesaid, upon their oath present that *Simeon Coy*, *Henry Spaan*, *John H. Councilman*, *Charles N. Metcalf*, *John E. Sullivan*, *Albert T. Beck*, *George W. Budd*, *Stephen Mattler*, *William F. A. Bernhamer*, and *John L. Reardon*, late of said district, at the district aforesaid, on the *third* of *November*, in the year of our Lord one thousand eight hundred and *eighty-six*, unlawfully, knowingly and feloniously did then and there conspire, confederate, and combine and agree together, with one *Samuel E. Perkins*, to commit an offense against the United States in this, to wit: The grand jurors aforesaid, impaneled and sworn as aforesaid, do charge and present that on the *2d* day of *November*, in the year of our Lord one thousand eight hundred and *eighty-six*, an election for a Representative in the Congress of the United States from the *Seventh* Congressional District of the State of *Indiana*, was lawfully had and held in and for said *Seventh* Congressional District of *Indiana*; that the county of *Marion* in said State, and the city of *Indianapolis*, situated in said county, are, and on said *2d* day of *November*, in the year of our Lord one thousand eight hundred and *eighty-six*, were in and constituted parts of said congressional district, and that at said election for Representative in Congress, so held in said district and in said county and city, a Representative in Congress was lawfully voted for at each and every voting precinct of said district and of said county and city, including the precincts hereinafter particularly named; that at said election one *Allen Hisey* served (as) and was the lawful inspector of the election at and for the *second* precinct of the *thirteenth* ward of said city of *Indianapolis*, and at said election said *John H. Council-*

1. This indictment is drawn under U. S. Rev. Stat. (1878), § 5440, for a conspiracy to violate the provisions of U. S. Rev. Stat. (1878), § 5515. See also the indictment in *In re* Coy, 31 Fed. Rep. 794.

2. The matter to be supplied within [] will not be found in the reported case.

man served (as) and was the lawful inspector of election at and for the *second* precinct of the *fourth* ward of said city of *Indianapolis*, and that at said election said *Stephen Mattler* served as and was the lawful inspector of election at and for the *third* precinct of the *thirteenth* ward of said city of *Indianapolis*, and that at said election one *Lorenz Schmidt* served as and was the lawful inspector of election at and for the *first* precinct of the *twenty-third* ward of said city of *Indianapolis*, and one *Joel H. Baker* served as and was the lawful inspector of election at and for the *sixth* precinct of *Center* township in said county of *Marion*, and one *Joseph Becker* served as and was the lawful inspector of election at and for the *second* precinct of the *eleventh* ward of the city of *Indianapolis* aforesaid, and one *Andrew Oehler* served as and was the lawful inspector of election at and for the *first* precinct of the *seventeenth* ward of said city of *Indianapolis*, and one *John Edwards* served as and was the lawful inspector of election at and for the *second* precinct of the *eighteenth* ward of said city of *Indianapolis*.

That at and after the close of the election aforesaid, and until delivery was made to the clerk of said county and to the board of canvassers of said county, each of said inspectors had in his lawful possession the ballots, tally papers, poll lists, and certificates of the board of judges of election of and for the precinct of which he was and had been inspector as aforesaid; said ballots, poll lists, tally papers, and certificates each contained evidence in respect to said election of Representative in Congress, and said grand jurors aforesaid do charge and present that at said district, on said *third* day of *November*, in the year of our Lord one thousand eight hundred and *eighty-six*, said defendants *Simeon Coy*, *Henry Spaan*, *John H. Councilman*, *Charles N. Metcalf*, *John E. Sullivan*, *Albert T. Beck*, *George W. Budd*, *Stephen Mattler*, *William F. A. Bernhamer* and *John L. Reardon*, intending to obtain unlawful possession of said papers and election returns so in the custody of said inspectors, and feloniously to mutilate, alter, forge, and change[1] the said poll lists, tally papers, and certificates of the judges of election, did unlawfully and feloniously conspire, confederate, combine, and agree together, and with said *Samuel E. Perkins*, unlawfully and by false and deceitful speeches, statements, assertions, and promises, and by other unlawful means to the grand jurors unknown, to counsel, assist, aid, procure, and induce said *Allen Hisey*, *Lorenz Schmidt*, *John H. Councilman*, *Stephen Mattler*, *Joel H. Baker*, *Joseph Becker*, *Andrew Oehler*, and *John Edwards*, inspectors as aforesaid, and each of them, unlawfully to omit, neglect, fail, and refuse to perform the duties imposed by the laws of the State of *Indiana* upon them and each of them safely to guard, keep and preserve from harm and danger the papers, poll lists, tally papers, and certificates of the judges of election so deposited with them, the said inspectors, and each of them respectively, until lawfully delivered to the board of canvassers of said county of *Marion*, and to the clerk of said county, and that to effect

1. It is not necessary to set out in the indictment the precise nature of the alterations, nor to aver that they were designed to affect, or in fact affected, the result of the election. *In re* Coy, 31 Fed. Rep. 794.

the object of said conspiracy the said *Samuel E. Perkins* unlawfully advised, persuaded, and procured the said *Allen Hisey*, inspector as aforesaid, unlawfully, and negligently to deliver to him, the said *Samuel E. Perkins*, the poll lists, tally papers, and certificates of the judges of election deposited with him, the said *Allen Hisey*, for return to the board of canvassers of said county before the same had been returned to the said board of canvassers; and said *Samuel E. Perkins* and *Simeon Coy* unlawfully persuaded, advised, and procured the said *Stephen Mattler* unlawfully and negligently to deliver, and he, the said *Stephen Mattler*, consented to and did then and there unlawfully and negligently deliver to said *Perkins* and *Coy* the poll lists, tally papers, and certificate of the board of judges of election deposited with him, the said *Stephen Mattler*, for return to the board of canvassers of said county, before the same had been returned to and canvassed by said board of canvassers; and the said *John E. Sullivan* and *George W. Budd* unlawfully received and took from *Lorenz Schmidt* the poll list, tally paper and certificate of the board of judges of election deposited with said *Lorenz Schmidt* as aforesaid for return to the board of canvassers aforesaid; and the said *John H. Councilman*, negligently and in disregard of his duty, parted with and surrendered to a person or persons, to the grand jurors unknown, the poll list, tally paper and certificate of the judges of election deposited with him, the said *John H. Councilman*, for return to the board of canvassers; and said *Simeon Coy* unlawfully received, procured and took from *Andrew Oehler*, inspector as aforesaid, the poll list, tally paper and certificate of the judges of election deposited with him, the said *Andrew Oehler*, as aforesaid, to be returned to the board of canvassers of said county; and the said defendants, *Simeon Coy*, *Henry Spaan*, *John E. Sullivan*, and others of the defendants, to the grand jurors unknown, advised, persuaded and procured the said *Joel H. Baker* unlawfully and negligently to surrender and deliver to some person or persons, to the grand jurors unknown, the poll list, tally paper and certificate of the judges of election deposited with him for return to the said board of canvassers; and said defendants, *Simeon Coy*, *Henry Spaan*, *John E. Sullivan*, and other defendants, to the grand jurors unknown, advised, procured and persuaded said *John Edwards*, inspector as aforesaid, to unlawfully and negligently deliver and to surrender to some person or persons, to the grand jurors as aforesaid unknown, the poll list, tally paper and certificate of the judges of election deposited with him, the said *John Edwards*, as aforesaid to be returned to the said board of canvassers; and said *Simeon Coy*, *John H. Councilman*, *Henry Spaan*, *Charles N. Metcalf*, *John E. Sullivan*, *Albert T. Beck*, *George W. Budd*, *Stephen Mattler*, *William F. A. Bernhamer* and *John L. Reardon* procured the election of said *William A. Bernhamer* as chairman of the board of canvassers of said election in and for said county of *Marion*, in said State and district, and said *William F. A. Bernhamer*, as such chairman, refused to accept the poll list, tally paper and certificate of the judges of election deposited with said *John H. Councilman* as inspector as aforesaid, when first presented by said *John H. Councilman* to said board of canvassers and until the said tally paper and certificate of the judges of

election had been unlawfully altered and forged; and further to effect the object of said conspiracy, said *Simeon Coy* sent one *William H. Eden* to said *Joseph Becker*, inspector as aforesaid, and to other inspectors, to the grand jurors unknown, with direction, instruction and request to said *Joseph Becker* and other inspectors, respectively, not forthwith to return and deliver the returns of said election contained in sealed bags to the clerk of the *Circuit* Court of the county of *Marion* aforesaid, but to unlawfully bring the same to him, the said *Simeon Coy*; the said *Simeon Coy*, *Samuel E. Perkins*, *Henry Spaan*, *Charles N. Metcalf*, *John E. Sullivan*, *George W. Budd*, *Albert T. Beck*, *John L. Reardon* and said persons to the grand jurors unknown, to whom said tally papers, poll lists and certificates of judges of election were so unlawfully surrendered and delivered to said *John H. Councilman*, *John Edwards*, *Allen Hisey*, *Lorenz Schmidt*, *Andrew Oehler*, *Stephen Mattler*, *Joseph Becker* and *Joel H. Baker*, respectively, as aforesaid, not being then and there officers of said election, and not being then and there persons authorized by law to have the possession and custody of said poll lists, tally papers and certificates of the judges of election aforesaid, contrary to the form of the statutes of the United States in such case made and provided, and against the peace and dignity of the *United States of America*.

Emory B. Sellers,
Attorney for the U. S. for the District of *Indiana*.

II. CIVIL ACTIONS FOR CONSPIRACY.[1]

1. Requisites of Complaint, etc. — The complaint, declaration or petition must state facts showing a combination or confederation on the part of the defendants to do an unlawful act by reason of which the civil rights of the plaintiff were infringed, and an injury to his person, property or business sustained. Schulten *v.* Bavarian Brewing Co., 96 Ky. 224. But the rule is to allow great latitude in setting out the particular acts relied upon from which the conspiracy is to be inferred, even so far as to allow the individual acts of the conspirators to be averred. Mussina *v.* Clark, 17 Abb. Pr. (N. Y. Supreme Ct.) 188.

But the gist of the action is not the conspiracy alleged but the tort committed by the defendants, and the damage resulting therefrom. To charge all the defendants, joint action must be proved, and the allegation of a conspiracy may be a proper mode of alleging it, but for any other purpose it is wholly immaterial, and it does not change the nature of the action or add anything to its legal force and effect. Garing *v.* Fraser, 76 Me. 37, *citing* Dunlap *v.* Glidden, 31 Me. 438, Parker *v.* Huntington, 2 Gray (Mass.) 124; Taylor *v.* Bidwell, 65 Cal. 489; Jenner *v.* Carson, 111 Ind. 522; Wellington *v.* Small, 3 Cush. (Mass.) 145; Hayward *v.* Draper, 3 Allen (Mass.) 551; Rice *v.* Coolidge, 121 Mass. 394; Randall *v.* Hazelton, 12 Allen (Mass.) 414; Bohn Mfg. Co. *v.* Hollis, 54 Minn. 233; Jones *v.* Baker, 7 Cow. (N. Y.) 445; Hutchins *v.* Hutchins, 7 Hill (N. Y.) 104; Tappan *v.* Powers, 2 Hall (N. Y.) 277; Hood *v.* Palm, 8 Pa. St. 237; Sheple *v.* Page, 12 Vt. 519; Barber *v.* Lesiter, 7 C. B. (N. S.) 184, 97 E. C. L. 182.

And it is necessary to aver in the complaint, in a competent form, that the consequence of the conspiracy, or the acts done in furtherance thereof, resulted in some damage to the plaintiffs. Douglass *v.* Winslow, 52 N. Y. Super. Ct. 439.

For the formal parts of a complaint, petition or declaration in a particular jurisdiction consult the title COMPLAINTS, vol. 4, p. 1019, and DECLARATIONS.

For other forms of declarations, complaints or petitions in civil actions for various conspiracies see as follows:

To extort money. Hablichtel *v.* Yambert, 75 Iowa 539.

1. Falsely to Accuse Plaintiff of Criminal Offense.[1]

To defraud plaintiffs of certain merchandise under color of purchase. Tappan *v.* Powers, 2 Hall (N. Y.) 277.

To defraud creditor. Penrod *v.* Morrison, 2 P. & W. (Pa.) 126, 8 S. & R. (Pa.) 522; Mott *v.* Danforth, 6 Watts (Pa.) 304. See also Wellington *v.* Small, 3 Cush. (Mass.) 145.

By selling plaintiff a sick cow. Newton *v.* Brown, 49 Vt. 16.

By fraudulently inducing plaintiff to pay certain notes. Sheple *v.* Page, 12 Vt. 519.

See also the substance of declarations, complaints and petitions for similar causes of action in the following cases: Gardner *v.* Preston, 2 Day (Conn.) 205; Spaulding *v.* Knight, 116 Mass. 148; Hoosac Tunnel Dock, etc., Co. *v.* O'Brien, 137 Mass. 424; O'Connor *v.* Jefferson, 45 Minn. 162; Jones *v.* Morrison, 31 Minn. 140; Verplanck *v.* Van Buren, 76 N. Y. 247; Eason *v.* Westbrook, 2 Murph. (6 N. Car.) 329.

Conspiracy to Slander. — In an action on the case for a conspiracy to defame by spreading false statements that the plaintiff had cheated and defrauded a third person (the words not being actionable), and also by composing a libellous statement to the same effect, it was held in *Pennsylvania* that the declaration need not aver special damage, the damage being implied. Hood *v.* Palm, 8 Pa. St. 237.

But in *Indiana* a demurrer to a complaint alleging that the defendants conspired and agreed with each other to slander and defame the plaintiff by accusing her of perjury, and that in pursuance of such conspiracy one of the defendants spoke of the plaintiff certain false and defamatory words, setting them out, was sustained, such a conspiracy not being the subject of indictment in that state as in *Pennsylvania*. Severinghaus *v.* Beckman, 9 Ind. App. 388.

Where the plaintiff in his declaration averred that he was by profession a teacher, that the defendants conspired with their confederates to ruin him in his profession, and in pursuance and in execution of their said conspiracy maliciously spoke and published of him, in his profession as teacher, words, set forth at length with innuendoes, which imputed to him the want of integrity and capacity, mental and moral, followed by an averment of special damage, it was held to be error to sustain a demurrer to the sufficiency of the declaration. Wildee *v.* McKee, 111 Pa. St. 335.

A complaint alleging in substance that the defendants, maliciously conspiring together with intent to injure, defame and destroy the plaintiff's character and to deprive her of her means of support and to force her to leave the community where she lived, wilfully maliciously and falsely sued out an inquisition of lunacy against her, whereby she was greatly injured in her reputation and business as a dressmaker, and brought into public scandal and disgrace, to her damage two thousand dollars, states a good cause of action. Smith *v.* Nippert, 76 Wis. 86. See also Smith *v.* Nippert, 79 Wis. 135.

1. Conspiring to Have Plaintiff Indicted for Perjury. — The declaration need not set out any agreement to do any act in itself unlawful, or any act lawful in itself by unlawful means, the gist of the action not being the conspiracy but the damage done the plaintiff. Parker *v.* Huntington, 2 Gray (Mass.) 124.

Declarations Held Insufficient. — A declaration in two counts, the first charging that the defendants, devising and intending unjustly, etc., to extort money from the plaintiff, falsely, etc., conspired to accuse him of being the father of a bastard, and in pursuance thereof maliciously threatened to accuse him thereof and to cause a criminal prosecution to be commenced against him therefor, whereby they procured from the plaintiff a large sum of money; the second count being like the first, except that it charged that the intent of the defendants was to deprive the plaintiff of his good name and subject him without cause to the punishment prescribed by law for bastardy, and that they threatened to cause bastardy proceedings to be carried on against him, was held fatally defective in that it failed to state that the charge was false or that it was known to the defendants to be false, and did not allege such facts and circumstances as would constitute fraud. Wright *v.* Bourdon, 50 Vt. 494.

For substance of complaint for conspiracy to charge plaintiff with arson held insufficient to state a cause of action see Taylor *v.* Bidwell, 65 Cal. 489.

Declarations Held Sufficient. — For

Form No. 6170.

(Precedent in Garing *v.* Frazer, 76 Me. 38.)

[(*Commencement.*)][1] In a plea of the case, for that the said plaintiff being a good, true and faithful citizen of this state, and having behaved and conducted herself as such from her nativity to the present time, and so among her neighbors as well as others was known and reputed. Yet the said defendants, not ignorant of the premises, but contriving and maliciously intending to hurt, wound and injure the plaintiff, and her unjustly to vex, molest and disturb, and to cause her to suffer punishment and to be fined, and also imprisoned for a long space of time, and thus to be deprived of her liberty, and thereby to impoverish, oppress and wholly ruin her; did at *Portland*, in the county of *Cumberland* and state of *Maine*, on the *second* day of *January*, A. D. 1883, maliciously and wickedly conspire, combine, confederate and agree together amongst themselves to falsely accuse, and by means of false testimony, to procure the plaintiff to be indicted and convicted of the crime of maintaining a common nuisance, an indictable offense by the laws of the state of *Maine*, and punished by a fine and imprisonment; and did then and there, at the *January* term of the *Superior* Court, within and for the county of *Cumberland*, held at *Portland*, aforesaid, on the *first Tuesday* of *January*, A. D. 1883, by false, fabricated and perjured testimony, accuse the said plaintiff of the crime aforesaid before the grand jury of the county aforesaid, whereby said grand jury returned into said court a certain bill of indictment in words and figures as follows, viz: (*Here was set out the indictment*), which said indictment the court aforesaid caused to be read, and caused said plaintiff to answer thereto in said court before a jury of the court aforesaid duly impaneled to try said plaintiff on said indictment procured as aforesaid, and said plaintiff was put on her trial on said indictment in said court on the *nineteenth* day of *January* aforesaid, and the said defendants then and there at said trial before the court and jury aforesaid, gave said false, frabricated and perjured testimony against said plaintiff and in support of the allegations contained in said indictment procured as aforesaid; [and the said plaintiff was in due manner and according to due course of law by the verdict of said jury acquitted of the said crime charged in the said indictment, and the said court thereupon ordered that the said plaintiff be discharged,][2] as by the records and proceedings remaining in said court appears.

substance of declaration in action for conspiracy to falsely charge an unmarried woman with being pregnant of a bastard see Haldeman *v.* Martin, 10 Pa. St. 369. In this case it was held unnecessary to aver that the reports and charges were made falsely and maliciously or to set forth the words spoken.

For substance of a declaration in an action on the case in the nature of a writ of conspiracy charging the defendants with conspiring to falsely accuse a judge with taking illegal fees and to cause him to be removed from office see Griffith *v.* Ogle, 1 Binn. (Pa.) 172. In this case it was held unnecessary to aver special damage, as the law implies damage from such a conspiracy.

See also Skinner *v.* Gunton, 1 Saund. 228.

1. For the commencement and conclusion of the declaration in *Maine* consult the title DECLARATIONS.

2. The words enclosed by [ ] are supplied in place of an allegation that the defendant was found guilty, and the

By means of the premises aforesaid and the said false, fabricated and perjured testimony given in said court as aforesaid, the plaintiff has suffered great anxiety and pain of body and mind, and has been forced and obliged to lay out and expend divers sums of money in the whole amounting to a large sum of money, to wit, *six hundred and fifty* dollars, in and about defending herself in the premises, and has been greatly hindered and prevented by reason of the premises from transacting her lawful and legal affairs for the space of *twenty-six* days, and also by reason and means of the said premises she, the plaintiff, has been, and is, otherwise greatly injured in credit and circumstances. To the damage of the said plaintiff (as she says) the sum of *fifteen thousand* dollars. [(*Conclusion.*)][1]

2. To Cheat and Defraud.

Form No. 6171.

(Precedent in Boston *v.* Simmons, 150 Mass. 461.)[2]

[*The City of Boston* against *William A. Simmons and James Wilson.*] { *Suffolk*, *Sup.* Ct. Plaintiff's Declaration.][3]

And the plaintiff says that at the time of the acts and doings hereinafter set forth it was, and now is, a municipal corporation duly established by law, in the county of *Suffolk*, in this *Commonwealth*, and was duly authorized by law to purchase land on which to construct a reservoir to be used in supplying said city and its inhabitants with pure water.

That the defendant *Simmons* was a member and the chairman of the Boston Water Board, a board duly established by law, and authorized and empowered to purchase for the plaintiff land to be used for the purpose aforesaid. That said *Simmons*, by virtue of his said official position, knew and had a part and share in determining the action of said Water Board, under said authority, in making such purchase; that said defendant *Wilson* well knew of said position, knowledge, and authority of said *Simmons*; and that said defendants corruptly took advantage of said position, knowledge, and authority, and, intending and contriving to cheat and defraud the plaintiff, did corruptly and fraudulently conspire and agree with each other that the said *Simmons* should impart to said *Wilson* knowledge of the doings of the said Water Board in the selection of said land, and of the piece of land which said board should consider suitable for a site for said reservoir, did conspire and agree that said *Wilson* should become the purchaser and owner of the lot of land which should be

court, on motion and hearing thereon, set aside the verdict because of the false testimony, and thereafter the county attorney entered a *nolle prosequi* to the indictment on the records. The court held that a simple *nol. pros.* was not sufficient to entitle the plaintiff to maintain the action. The declaration has therefore been changed as above.

1. See *supra*, note 1, p. 218.

2. This declaration was held to disclose a good cause of action against both defendants for the injury sustained by the city.

3. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

so considered suitable for a site for said reservoir, did conspire and agree that said Water Board, acting for the plaintiff, should purchase the said land for the plaintiff from said *Wilson*, at an advance or increase above the price paid therefor by said *Wilson*, and did so conspire and agree to divide the profits of said transaction between themselves.

And the plaintiff further says, that in consequence and pursuance of said corrupt and fraudulent conspiracy and agreement, said *Simmons* did impart to said *Wilson* said knowledge, and that said Water Board had considered a certain lot of land suitable for a site for said reservoir (which said Water Board had in fact done); that said *Wilson* did thereupon purchase said lot of land (more particularly described in a certain deed thereof to the plaintiff, which will be produced if required), and thereafter said Water Board, acting in behalf of the plaintiff, being thereto influenced by said *Simmons*, did purchase said land for said city to pay therefor the sum of $*91,934*, being in excess over the sum paid therefor by said *Wilson*, and over the price at which said Water Board could have purchased the same but for said corrupt and wrongful agreement and acts of said defendants, and purchase of said *Wilson*, by the sum of $*50,488*. And said defendants did divide the profits of said fraudulent transaction between themselves.

And the plaintiff further says, that by said corrupt and fraudulent conspiracy, agreement, and acts of said defendants, the plaintiff was unjustly, unlawfully and wrongfully deprived, defrauded, and cheated of said sum of $*50,488*.

[*A. J. Bailey*, for the Plaintiff.][1]

3. To Hinder Trade or Commerce.[2]

a. By Boycotting Manufacturer.

Form No. 6172.

(Precedent in Olive *v.* Van Patten, 7 Tex. Civ. App. 630.)[3]

[The State of *Texas*, } *District* Court,
County of *McLennan*. } *January* Term, A. D. 1894.
To the Honorable Judge of said Court:

The petition of *John Olive* and *August Sternenberg*, of *Waco*, in said county of *McLennan*, plaintiffs, against *A. Van Patten*, *John Doe* and *Richard Roe*, of said city and county, defendants, respectfully shows:

That at the dates of the transactions hereinafter mentioned, the

1. See *supra*, note 3, p. 219.

2. **For other forms** of complaints for conspiracies to interfere with trade, etc., see as follows:

To control the coal trade. Murray *v.* McGarigle, 69 Wis. 483.

By corporation to destroy business of rival corporation by inducing customers of latter to cease dealing with him. Buffalo Lubricating Oil Co. *v.* Standard Oil Co., 106 N. Y 669, 12 N. E. Rep. 825.

To hiss an actor and ruin him in his profession. Gregory *v.* Brunswick, 6 M. & G. 205, 46 E. C. L. 205, 6 Scott (N. R.) 809.

To cause minister to lose his position. Fisher *v.* Schuri, 73 Wis. 370.

3. It was held on the authority of Delz *v.* Winfree, 80 Tex. 400, that this petition stated a good cause of action.

plaintiffs were, and still are partners in business, under the firm name and style of *Olive & Sternenberg*; and that][1] on the *16th* day of *May*, 1*888*, and for a long time prior thereto, plaintiffs were owners of a large and extensive sawmill in *Hardin* county, Tex., capable of cutting and manufacturing *twelve million* feet of lumber annually; of planing mills used in connection with the sawmill; of *six* miles of well equipped tram railway, leading from the mill to their timber lands, suitable to carry logs to the mill; of *8,000* acres of heavy pine timber, suitable for the manufacture of lumber, near the mills, from which the timber had not been cut; and of *7,000* acres of heavy timbered land contiguous to the mills, from which only a part of the timber had been cut, all suitable for first class lumber. The plant was worth *two hundred and seventy thousand* dollars; the *8,000* acres of timbered land worth *sixty-four thousand* dollars; and the *7,000* acres, *fourteen thousand* dollars. Of the *twelve million* feet of lumber, the annual output plaintiffs were able to make, and were making, with their mills, and preparing for market, they were able to plane upon their planing mills annually *six million* feet of dressed lumber, and all the lumber manufactured they were able to sell at advantageous prices in the markets of the state and elsewhere, making an annual profit of $*100,000*, up to the time of the interference of the defendants.

That defendants, each being engaged in the lumber business in *Texas*, envying the prosperity of plaintiffs and seeking to oppress, boycott and ruin them and to deter them from selling to actual consumers, and to dissuade and influence dealers in lumber in *Texas* who had been in the habit of purchasing lumber from plaintiffs, and with a view to advance their own pecuniary and selfish interest, on *May 16*, 1*888*, entered into a trust, styled "*The Lumber Dealers' Association of Texas*," the object of which was to confederate together for the purpose of maintaining a high price for lumber against citizens of the state as consumers, and to conspire against legitimate prices on lumber, and against all persons who sought to reach the demands of legitimate trade by legitimate methods, and to force, by such unlawful confederacy and conspiracy, all mill men and manufacturers of lumber into such unlawful combination or trust, so that the lumber business on the part of mill men or manufacturers should present a solid array against the consumer and retail dealer, and thus control, by means of such trust, extravagantly high prices for lumber, for the enrichment of themselves, and to the impoverishment of the consumer and small dealer. And so it is charged that defendants became guilty of a conspiracy against the public, as well as plaintiffs, such as is unlawful, in all its acts in furtherance thereof. That in furtherance of this unlawful design, defendants, as members of the association, and as chief members thereof, assembled together about the date mentioned, and adopted and published by-laws for carrying out its unlawful designs, which by-laws provided as follows: "Sec. 13. When any manufacturer or wholesale dealer, or his agent or agents, shall sell to any person not a dealer, excepting railroad

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

companies, and at such points where there are no dealers, such sales shall be reported to the secretary, and he shall notify the members of the association, whereupon it shall be the duty of all members of this association to discontinue their patronage with such manufacturer or wholesale dealer: provided, however, that if said manufacturer or wholesale dealer shall promise and furnish a guaranty to the secretary of this association that he will not again sell to any person not a dealer, notice shall be sent by the secretary to all members of the association, when said manufacturer or wholesale dealer shall again be considered in good repute. Sec. 14. No dealer belonging to this association shall ship to any point where any other member may be engaged in the retail trade, at less than the regular price at that point."

That plaintiffs having incurred the displeasure of said trust, of which they were not members, because they had seen fit, in the exercise of their rights as citizens, to sell lumber to others than dealers, or for some other cause unknown to plaintiffs, defendants, pursuant to the by-laws quoted, did, it is alleged, on or about the *10th* day of *September*, 1*888*, unlawfully and maliciously, and with intent to oppress and ruin petitioners and other mill men of *Texas* not members of their unlawful trust, confederacy, and conspiracy, issue, promulgate, print, distribute, and mail and deliver, to nearly every lumber dealer in *Texas*, and especially to those with whom petitioners had theretofore been dealing and selling lumber to, a circular in form as follows: (*Here was set out a copy of the circular letter*), which, when received by such lumber dealers to whom same were mailed and delivered, had the effect — because many of them were co-conspirators with defendants, and belonging to said organized conspiracy — to cause all of such lumber dealers and sellers of lumber to refuse to make further purchases from your petitioners, thereby causing a complete cessation of their former prosperous trade and business from then until the present time, and causing your petitioners, to prevent their absolute ruin and failure of business, to resort to a trade with the consumer, direct, and almost exclusively. And your petitioners aver that the effect of the malicious issuance of said circular, and the distribution of same, as aforesaid, coupled with said trust and conspiracy aforesaid, caused them damage, in loss of sales of lumber, from the date thereof to the present time, in the way of net profits arising from such sales, and affected their business, and retarded same, and the probable and material effect thereof will result in damages to them and their business in the future, which cannot be overcome or prevented by petitioners, to the extent of *one hundred thousand* dollars, and in which sum petitioners have been damaged by defendants, by the wrongful, wilful and malicious acts of defendants, in the manner and by the means aforesaid, persisted in and kept up from *May 16*, 1*888*, to the present time, by sundry acts and conduct of defendants, carrying out the general designs of their unlawful trust, confederacy and conspiracy.

And by reason of the premises, and by reason of the unlawful trust, confederacy, and conspiracy, and malicious conduct and acts

of the defendants aforesaid, petitioners have been further damaged in the sum of *twenty-five thousand* dollars, in addition to their aforesaid damages of $100,000, and which sum of $25,000 they claim as exemplary damages. Premises considered, your petitioners sue and pray that defendants be cited, in terms of law, to appear and answer this petition; and, on a final hearing, petitioners pray for judgment against defendants for the sum of *one hundred and twenty-five thousand* dollars, their actual and exemplary damages aforesaid, and for injunction restraining defendants in the further perpetration and continuation of their wrongful and unlawful acts, and for all costs of this suit, and for general and special relief; and, as in duty bound, will ever pray, etc.

[*Alexander & Campbell*, Plaintiffs' Attorneys.][1]

b. By Extorting Money from Employer by Threatening to Induce Workmen to Leave his Employ.

Form No. 6173.

(Precedent in Carew *v.* Rutherford, 106 Mass. 2.)[2]

[(*Caption as in Form No. 6171.*)][1]

And the plaintiff says he was carrying on the business of cutting freestone in said *Boston*, and employed a great many workmen, and had entered into contracts with builders to furnish them with such stone in large quantities; and the defendants, conspiring and confederating together to oppress and extort money from the plaintiff, and pretending that the plaintiff had allowed some of the said builders, with whom he had made contracts as aforesaid, to withdraw from the plaintiff's shop a part of the work he had so contracted to do, and to procure the same to be done by other contractors out of the state, caused what they called a vote of the *Journeymen Freestone Cutters' Association of Boston and vicinity* (named as defendants in the writ) to be passed at a meeting of said association, and to be written out upon records of said association, to the effect that a fine of $500 was levied upon the plaintiff for allowing said builders to withdraw said work and procure it to be done out of the state as aforesaid; and the defendants caused said vote to be communicated and read to the plaintiff, and threatened the plaintiff that unless he paid to them said fine of $500 they would by the power of said association cause a great number of the workmen employed by the plaintiff as aforesaid to leave his premises; and the plaintiff refused to pay said $500, and the defendant caused a great number, to wit, *twelve*, of the workmen employed by the plaintiff as aforesaid to leave his service, and said workmen left his service solely for the reason that

1. The words enclosed by and to be supplied within [ ] will not be found in the reported case, but have been added to render the form complete.

2. Judgment was rendered on this declaration for the defendants and the plaintiff alleged exceptions, which were sustained, but the case was afterward settled by the parties without further trial. In sustaining the exceptions the court held that the money was illegally demanded from the plaintiff (who was not a member of the association) and that he might recover the same with damages in an action of tort.

he refused to pay said $*500* demanded of him as aforesaid, and at the instigation of the defendants; and the defendants thereafter threatened the plaintiff that unless he paid to them said fine of $*500* they would by the power of said association prevent the plaintiff from obtaining suitable workmen for the carrying on of his said business; and the defendants did prevent the plaintiff from so doing, for a long time, and until the plaintiff paid to the defendants said fine of $*500* on the *26th* day of *August*, 1*868*; and the plaintiff says the defendants extorted said sum of $*500* from him by means of said threats, and that he paid the same to the defendants by compulsion of the defendants, against his will, to avert the injury threatened to his business as aforesaid.

[*E. F. Hodges & J. F. Barrett*,
Attorneys for the Plaintiff.]

c. By Injuring Credit of Retail Dealer and Preventing his Obtaining Supplies.

Form No. 6174.

(Precedent in Schulten *v.* Bavarian Brewing Co., 96 Ky. 225.)[1]

[*Kenton Circuit* Court.

Clem. Schulten, plaintiff,
against
The Bavarian Brewing Company and
The John Hauck Brewing Company, defendants. } Petition.][2]

The plaintiff *Clem. Schulten* says, that at the time of the doing of the wrongs and injuries hereinafter set forth, and for many years thereafter, the defendant, *The Bavarian Brewing Company*, was a corporation duly organized under the general statute laws of *Kentucky*, and the defendant, *The John Hauck Brewing Company*, was a corporation duly organized under the statute laws of *Ohio*, both for the sole purpose of brewing and selling malt liquors, and were members of a certain unlawful combination, consisting of all the brewers of the city of *Cincinnati*, *Ohio*, and *Covington* and *Newport*, *Kentucky*, and the vicinity; all the members whereof were and are in conspiracy with

1. It is not unlawful for wholesale dealers to protect themselves against insolvent and dishonest customers, and to compel such customers to pay their debts to them, and for this purpose and for the purpose of otherwise assisting each other in their business they may agree among themselves not to deal with such customers, and hence a petition by a retail dealer setting forth such an agreement made in good faith does not state a cause of action for an injury resulting therefrom to such dealer. Schulten *v.* Bavarian Brewing Co., 96 Ky. 224; Delz *v.* Winfree, 6 Tex. Civ. App. 11, 80 Tex. 400. But where a petition by a butcher charging a conspiracy among cattle dealers to his injury went further than to charge that the defendants refused to sell to him and charged that they not only did that but that they induced a third person to do so, and it did not appear from the petition that their interference with the business of the plaintiff was done to serve any legitimate purpose of their own, but that it was done wantonly and maliciously, and that it caused, as they intended it should, pecuniary loss to him, the petition alleges a good cause of action. Delz *v.* Winfree, 80 Tex. 400.

2. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

each other, and other persons, to the plaintiff unknown, to prevent the obtaining of any malt liquor by any retail dealer therein, who might be in debt or alleged to be in debt to any member of said combination, and thereby to injure and destroy his business, and unlawfully compel him to pay such debt or alleged debt, without any judicial ascertainment or due process of law. And the plaintiff says that at the same time he was a retail vendor of malt liquors in the city of *Covington*, *Kentucky*, duly licensed as such and carrying on said business, as the sole means of subsistence for himself and his wife and five children, and was therein wholly dependent for his supplies of such liquors upon the defendants and other members of said combination, and was able, ready and willing to pay for such supplies, and tendering and offering to purchase the same for cash of the defendants and other members of said combination. Yet on the *twenty-seventh* day of *November*, 1891, the defendants and other members of the said combination to the plaintiff unknown, intending to injure the plaintiff and destroy his said business and to prevent his earning a subsistence for himself or his family, and to unlawfully and oppressively coerce him into paying to the said *Bavarian Brewing Company* the sum of *one hundred and eighty-four* dollars and *fifty* cents, then falsely alleged to be owing by him to it [whereas in truth and in fact the plaintiff was not indebted to the said defendant in the said sum nor in any sum whatever],[1] did wrongfully and maliciously combine, conspire and confederate together so to do, and therein to, and they then did, wrongfully, falsely, libelously and maliciously write, utter and publish to each other and to all the members of the said combination, and others to the plaintiff unknown, that plaintiff was indebted as aforesaid, and so to prevent, and they did thereby prevent, the plaintiff from obtaining any supplies of malt liquors, and from carrying on his said business, and by means of the premises the plaintiff's said business then was and remains injured and wholly destroyed, to his damage in the sum of *ten thousand* dollars. Wherefore he prays judgment for *ten thousand* dollars damages, and for costs and all proper relief.

[*Jeremiah Mason*, Attorney.][2]

1. The petition was held insufficient in that it did not aver specifically that the plaintiff was not indebted to the defendant in the sum named. The allegation by inference that the plaintiff was not so indebted, being a mere conclusion of the plaintiff, is not sufficient. The words in [ ] have been supplied in accordance with the judgment of the court.

Alleging Means. — In an action on the case in the nature of a conspiracy charging that the defendants combined to injure the plaintiff's credit, it is necessary for the plaintiff to aver, in his declaration, the means by which such injury was intended to be effected. Setzar *v.* Wilson, 4 Ired. L. (26 N. Car.) 501.

2. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

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CROSS-REFERENCES.

See also the titles ANSWERS IN EQUITY, vol. 1, p. 854; *ATTORNEYS*, vol. 2, p. 969; *and the GENERAL INDEX to this work.*

For matters of Practice, see the title CONTEMPT, 4 ENCYCLOPÆDIA OF PLEADING AND PRACTICE, p. 764.

I. PROCEEDINGS AGAINST CONTEMNOR.[1]

1. For statutes relating to the subject of contempt, and the powers of the courts and method of procedure to punish the same, see as follows:

Alabama. — Civ. Code (1886), §§ 648–650, 675, subs. 6, §§ 723, 756, subs. 4, §§ 788, 826, 840. Crim. Code (1886), §§ 4066, 4194, 4298, 4694, 4790.

Arizona. — Rev. Stat. (1887), §§ 796, 1091, 1092, 1828, 1829, 2142, 2202, 2593.

Arkansas. — Sand. & H. Dig. (1894), §§ 684–695.

California. — Code Civ. Proc. (1897), §§ 128, 177, 178, 183, 906, 910, 1097, 1209–1222, 1460, 1461, 1991–1994.

Colorado. — Mills' Anno. Stat. (1891), §§ 872, 896, 898, 1312, 1457, 1470, 1495, 2117, 2210, 2416, 2661, 2662, 2666, 2741, 3510, 3522, 4662, 4669, 4738, 4796, 4815, 4830–4832; Mills' Anno. Code (1896), §§ 149, 188*a*, 209, 251, 306, 319, 321–334, 355, 364, 380, 433.

Connecticut. — Gen. Stat. (1888), §§ 91, 526, 843, 1037, 1198, 1270, 1272, 1299, 2016.

District of Columbia. — Comp. Stat. (1894), c. 10, §§ 41, 42, 44, 51, c. 35, § 33.

Florida. — Rev. Stat. (1892), §§ 975, 976, 1099, 1557, 1791, 2794, 2795.

Georgia. — 2 Code (1895), §§ 4046, 4082, 4207, 4233, 4261, 4267, 5498, subs. 6, § 5631.

Idaho. — Rev. Stat. (1887), §§ 3862, 3911, 3912, 3921, 4750–4754, 4989, 5155–5168, 5433, 5434, 7613, 8153.

Illinois. — Starr & C. Anno. Stat. (1896), p. 339, par. 114, p. 348, par. 131, p. 528, par. 12, 577, par. 24, p. 589, par. 41, p. 592, par. 47, p. 1257, par. 118*a*, p. 1400, par. 611, p. 2093, par. 40, p. 2395, par. 15, p. 2462, pars. 161, 162, p 3769, par. 16, p. 3770, par. 23, p. 3819, par. 33.

Indiana. — Horner's Stat. (1896), §§ 426, 668, 679, 974, 1005–1014, 1160, 1170, 1272, 1303, 1322, 1354, 1400, 1436, 1649, 1664, 1676, 1790, 1828, 2253, 2255, 2383, 2393, 2394, 2582, 2661, 3169, 5744.

Iowa. — Code (1897), §§ 345, 500, 520, 2119, 2128, 2407, 3611, 3739, 3954, 4082, 4171, 4180, 4335, 4372–4376, 4444, 4457, 4460–4470, 5478, 5495.

Kansas. — 2 Gen. Stat. (1889), p. 38, § 2, p. 40, §§ 10–15, p. 196, §§ 343–347, p. 461, §§ 16–18.

Kentucky. — Bullitt's Civ. Code (1895), §§ 151, 193, 205, 220, 226, 232, 257, 286, 304, 424, 440, 443, 467, 535, 537, 539, 633, 762.

Louisiana. — Rev. Laws (1897), §§ 124, 125.

Maine. — Rev. Stat. (1883), c. 63, § 1, c. 70, § 4, c. 77, §§ 2, 78, c. 99, § 26, c. 106, § 19, c. 107, § 29, c. 133, § 17.

Maryland. — Pub. Gen. Laws (1888), art. 16, § 151, art. 26, § 4, art. 47, § 30, art. 93, §§ 233–243.

Massachusetts. — Pub. Stat. (1882), c. 22, § 19, c. 155, § 41, c. 156, § 45, c. 157, § 5, c. 162, § 13, c. 169, § 5, c. 185, § 31, c. 212, §§ 18, 54.

Michigan. — How. Anno. Stat. (1882), §§ 3611, 5670, 6470, 6610, 6766, 7076–7079, 7235–7238, 7257–7289, 7379, 7484, 7951, 8083, 8115, 8663, 9478.

Minnesota. — Stat. (1894), §§ 227, 228, 788, 1074, 4810, 5082–5091, 5117, 5218, 5284, 5328, 5446, 5487, 5494, 5555, 6155–6171, 7179–7184.

Mississippi. — Anno. Code (1892), §§ 283, 310, 506, 641, 2370, 2388, 2680, 2681.

Missouri. — Rev. Stat. (1889), §§ 2150, 2151.

Montana. — Code Civ. Proc. (1895), §§ 110, 191, 192, 201, 310, 397, 1650–1654, 1730, 1836, 1973, 2170–2183, 2572, 2573, 3309.

Nebraska. — Comp. Stat. (1897), §§ 572, 917, 1082, 1265, 1322, 1670, 2473, 3558, 3826, 3854, 4056, 4060, 5787, 5831, 5847, 5931, 6138, 6254, 6266, 6282–6284, 6315, 6459, 6489, 6621.

Nevada. — Gen. Stat. (1885), §§ 600, 1719, 2481, 3182, 3269, 3400, 3417, 3482–

1. Preliminary Proceedings.

a. Affidavit.

(1) For Contemptuous Publication.

Form No. 6175.

(Precedent in *Ex p.* Barry, 85 Cal. 604.)[1]

State of *California*,
City and County of *San Francisco*. } ss.

William J. Dixon, being duly sworn, deposes and says that one *Henry Bingham* is the defendant in an action wherein the people of the state of *California*, upon the relation of *Charles J. Swift*, is plaintiff; that said action is now pending in the *superior* court of the *city*

3495, 3596–3599, 3734, 3786, 3787, 4070, 4100, 4427.

New Hampshire. — Pub. Stat. (1891), c. 207, § 11, c. 213, § 7, c. 224, § 7, c. 239, §§ 25, 29.

New Jersey. — Gen. Stat. (1895), p. 106, § 46, p. 384, § 69, p. 392, § 103, p. 403, § 166, p. 1216, § 3, p. 1406, § 52, p. 1625, §§ 18, 19, p. 1965, § 38, p. 2303, § 342, p. 2377, § 92, p. 2387, § 130, p. 2568, § 214, p. 2600, §§ 381, 382, p. 3114, § 22, p. 3116, § 26.

New Mexico. — Comp. Stat. (1884), §§ 2322, 2323; Laws (1897), c. 73, §§ 120, 121, 146, 151.

New York. — Birds. Rev. Stat. (1896), p. 15, § 21, pp. 630–637, p. 795, §§ 8–14, p. 875, § 6, p. 1393, § 27, subs. 2, p. 2794, § 7, p. 3077, § 79.

North Carolina. — Code (1883), §§ 381, 648–656, 1400.

North Dakota. — Rev. Codes (1895), §§ 459, 1902, 5410, 5501, 5562, 5573, 5644, 5650, 5935–5954, 6734–6737, 7999, 8370.

Ohio. — Bates' Anno. Stat. (1897), §§ 52, 119, 193, 258, 310, 538, 543, 605, 1130, 1720, 1791, 1844, 1912, 2773, 3012, 3684, 5178, 5189*j*, 5252–5256, 5397, 5481, 5549, 5556, 5581, 5593, 5605, 5610, 5639–5650, 6541, 6542, 6779, 6783, 6906, 7201, 7289.

Oklahoma. — Stat. (1893), §§ 701, 2039, 3099, 3133–3135, 4084, 4150, 4222–4224, 4377, 4392, 4600, 4679, 4846–4848, 4908, 5487, 5569, 6124.

Oregon. — Hill's Anno. Laws (1892), §§ 171, 310, 406, 521, 525, 633, 650–664, 797, 912, 1262, 1465, 2184, 2185.

Pennsylvania. — Bright. Pur. Dig. (1894), p. 132, § 54, p. 382, §§ 1–6, p. 784, § 52, p. 1744, § 4, p. 1745, §§ 13, 14.

Rhode Island. — Gen. Laws (1896), c. 209, §§ 15, 19, c. 211, § 8, c. 221, § 6, c. 262, § 22, c. 274, § 37.

South Carolina. — Rev. Stat. (1893), §§ 725, 726, 735, 887, 2245, 2291, 2301, 2302, 2306, 2329, 2338, 2343.

South Dakota. — Dak. Comp. Laws (1887), §§ 584, 667, 5022, 5112, 5185, 5251, 5257, 5267, 5268, 5529, 5977, 6118–6122, 7200, 7538, 7850.

Tennessee. — Code (1896), §§ 4033, 5912, 5918–5924, 5937, subs. 9.

Texas. — Rev. Stat. (1895), arts. 262, 948, 999, 1101, 1161, 1455, 1570.

Utah. — Rev. Stat. (1898), §§ 112, 697, 713–716, 1998, 3358–3373, 3474, 3752–3756, 4534, 4542, 5170.

Vermont. — Stat. (1894), §§ 1005, 1455, 1607, 1610–1612, 2707, 4527.

Virginia. — Code (1887), §§ 3290, 3428, 3768–3771, 4050, 4051, 4053, 4104, 4200.

Washington. — Ballinger's Anno. Codes & Stat. (1897), §§ 91–94, 355, 2034 2036, 2189, 4696, 4701, 5405, 5445–5447, 5726, 5727, 5798–5811, 6828.

West Virginia. — Code (1891), c. 50, §§ 190–192, c. 147, §§ 27–29.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), §§ 102, 103, 720, 1504, 2433, 2434, 2565–2569, 3037, 3477–3497, 3575–3581, 3648, 3726, 3856, 4064–4066, 4096, 4097.

Wyoming. — Rev. Stat. (1887), §§ 2600, 2602, 2743, 2829, 2097, 2941, 2953, 3393, 3563, 3590–3598.

United States. — Rev. Stat. (1878), §§ 725, 1070, 4073, 4104, 4973, 4999, 5002, 5005, 5006, 5037.

1. It was held in this case that the publication set out in the affidavit was an "unlawful interference with the proceedings of a court" and was, therefore, punishable under the provisions of Cal. Code Civ. Proc. (1897), § 1209 subs. 9. See also statutes cited *supra*, note 1, p. 228.

and county of *San Francisco*, state of *California*, and is still undetermined; that said *Henry Bingham* did interpose and file a demurrer to the complaint in said action, which said demurrer was, after full argument, on the *second* day of *August*, 1889, by the said court sustained, and on said last mentioned day the said plaintiff was given leave to amend his said complaint within *ten* days thereafter; that the time granted said plaintiff by said court to amend his said complaint has not yet expired; that one *James H. Barry* is the editor of a paper published weekly in the *city and* county of *San Francisco*, state of *California*, which said paper is called the *Weekly Star*; that on the *third* day of *August*, 1889, and while said action was then and there pending in said *superior* court, said *James H. Barry* did publish and cause to be published at the *city and* county of *San Francisco*, state of *California*, in the said paper, the *Weekly Star*, the following false, malicious, untrue, libelous, and defamatory matter of and concerning Honorable *F. W. Lawler*, judge of the *superior* court of the said *city and* county of *San Francisco*, state of *California*: (*Here was set out a copy of the contemptuous publication*);[1] with intent then and there unlawfully to interfere with the proceedings of a court of justice and to insult the said *Francis W. Lawler*, Esquire, judge of said court, in the discharge of the duties of his office, and to expose him to obloquy and contempt.

W. J. Dixon.

Subscribed and sworn to before me this *ninth* day of *August*, 1889.
George H. Pippy, Deputy County Clerk.

1. The contemptuous publication set out in the affidavit was in the language following, to wit:

"A Criminal Judge.

We charge *Francis W. Lawler*, judge of the *superior* court of *San Francisco*, with deliberate lying about the law, deliberate intentional falsification in his official capacity, and deliberate intentional denial of justice. He is not merely a fool, but an impudent rascal; a criminal on the bench. He ought to be impeached and removed from office, and disfranchised, indicted and punished by fine and imprisonment; made a convict of. But our criminal machinery and our legislature are so often elected and used (just as *Lawler* acts), not to punish wrong-doing, but on purpose to protect it, that such a proceeding is hopeless. If the information which we have received is wrong, let the editors of the *Weekly Star* be at once arrested on a charge of criminal libel. We invite and defy *Lawler* to venture to defend himself even in a *San Francisco* court by this proceeding. We shall make the crime of this judge so plain that even the wayfaring men, though fools, shall not err therein.

The case is this: A suit has been brought against Supervisor *Henry Bingham*, to determine whether he is entitled to the office of supervisor. This suit was assigned by the *Buckley* judge, *Levy*, to the other *Buckley* judge, *Lawler* (upon which every lawyer in town knew beforehand what *Lawler* would do, though they could not have foreseen just how he would begin to do it). When the case came up before *Lawler* yesterday, *Bingham's* attorney 'demurred,'—that is, he said the *superior* court had [no] authority to try a case like this. In reply, the complainant's attorney showed that the constitution expressly provides that the *superior* court had jurisdiction over all such cases. And this impudent falsifier of the law and denier of justice, *Francis W. Lawler*, allowed the demurrer, absolutely giving for a reason that 'although the constitution does give the *superior* court jurisdiction over all such cases, yet this is not all cases, but only one case, and therefore this court had no jurisdiction over it.'

This seems impossible. But we affirm it to be true, and upon the affirmation we are deliberately taking the risk of being publicly dishonored unless Judge *Lawler* remains publicly dishonored.

(2) For Failure to Obey Process or Orders.

(a) *Injunction.*

aa. Against Board of Aldermen.

Form No. 6176.[1]

John D. Negus
against
The City of Brooklyn, The Brooklyn Elevated Railway Company and others.

County of *Kings*, } ss.
City of *Brooklyn*. }

David Barnett, being duly sworn, says: That I am one of the counsel for the plaintiff in the above entitled action.

The action was commenced by the service of a summons and complaint on the defendants and on the members of the common council of the city of *Brooklyn*, on the *twenty-seventh* day of *December last past*, as will more fully appear by the affidavits of service hereto annexed.[2]

On the *twenty-sixth* day of *December last past* an injunction order, with an order to show cause, on the *twenty-eighth* day of *December last past*, why said injunction should not be made perpetual, was made by the *county judge* of *Kings* county[3] and duly served on the members of the common council of said city, as will more fully appear by the affidavit of service hereto annexed, and that a copy of said injunction order so made is also hereto annexed.

That on the return day of said order to show cause the motion thereon was duly heard before the Hon. *Jasper W. Gilbert*, one of the justices of this court, and upon the hearing of said motion the members of the said common council appeared by their counsel, *Winchester Britton*, Esq., who argued in opposition to said motion in their behalf.

The said justice reserves his decision thereon until this day, when the said justice rendered the decision of the *special* term of this court continuing said injunction order, and thereupon said order was entered.

That between the hearing of the motion and the decision of the same, said common council kept adjourning from day to day until this morning, when by its action, as hereinafter stated, the members thereof, and hereinafter named, violated the said injunction order.

It is exactly as if the burglar *Jimmy Hope* had been discharged by Judge *Toohy* without trial on the ground that the 'law only provided for the trying of all burglars, and therefore did not provide for trying this one.'"

1. This affidavit is copied from the record in the case of People *v.* Dwyer, 90 N. Y. 402. See Birds. Rev. Stat. N. Y. (1896), p. 795, § 8, p. 796, § 14, and statutes cited *supra*, note 1, p. 228.

2. An objection was taken on the hearing that it did not appear that the summons and complaint in the original action had been served on the city of Brooklyn and that there was no formal proof of service. It was held that the attachment papers sufficiently showed that the city had been served and so was a party.

3. Although issued by the county judge the injunction was no less the mandate of the court. People *v.* Dwyer, 90 N. Y. 402, *citing* N. Y. Code Civ. Proc., §§ 606, 3343; Erie R. Co. *v.* Ramsey, 45 N. Y. 646.

That this morning, about the hour of *eleven* o'clock, I called on *Dennis McNamara*, the city clerk of *Brooklyn* and clerk of the common council, for the purpose of ascertaining from him whether any action had been taken by the common council at its meeting today in reference to its passing any resolution to override the mayor's veto of the resolution heretofore passed by the common council in relation to the defendant's railway. Mr. *McNamara* informed me that the common council, at its meeting this morning, had passed a resolution to adopt the resolution heretofore passed by it, notwithstanding the mayor's veto. I then asked him to show me the roll-book of the board showing the result of the vote thereon, and what members voted for the resolution, which he did, and I examined the roll with him, and found thereby that the following named aldermen voted in the affirmative:

William Dwyer, *John McCarty*, *James Kane*, *James Weir*, *Jr.*, *Daniel O'Connell*, *Philip Casey*, *James Donovan*, *William J. LePine*, *Felix W. Doyle*, *William Allison*, *Philip Schmitt*, *William H. Waters*, *Thomas Bowers*, *Richard S. Roberts*, *Benjamin D. Seaman*, *Patrick J. Kelly* and *Thomas R. Armitage.*

And those voting in the negative were:

Aldermen *Harry O. Jones*, *Robert Black* and *Theodore D. Dimon*, as will more fully appear by a certified copy of said resolution hereto annexed.

That deponent was also informed by Alderman *Richard S. Roberts* that they had passed the resolution over the mayor's veto.

Deponent further says that at the time of the passage of said resolution the injunction in this action was still in full force and effect, and that the passing of said resolution was a gross violation of said injunction.

Deponent therefore asks that an order be made herein directing that an attachment be issued to the sheriff of *Kings* county against each and every one of the said persons named above who voted in the affirmative to pass said resolution, and that they be punished according to law.

D. Barnett.

Sworn to before me the *thirty-first* day of *December*, 1881.

E. J. Bergen, Commissioner of Deeds.

bb. To Restrain Operation of Mine.[1]

1. Sufficient Affidavit. — Where the affidavit alleged that since service on defendants of the injunction which had been issued on the sixteenth day of January, and served on defendants on the thirtieth day of the same month, the said defendants had been working and operating by the hydraulic process the mine described in the complaint, in wilful and gross disobedience of the orders and processes of the court, and described particularly the manner in which the mine had been operated, and alleged that large quantities of material had been deposited in Deer creek, tributary to the Yuba river, in violation of the writ of injunction, the allegations were sufficient. *Ex p.* Ah Men, 77 Cal. 198. See also Hedges *v.* Superior Ct., 67 Cal. 405.

Form No. 6177.

(Precedent in People *v.* District Ct., 19 Colo. 344.)[1]

[State of *Colorado*, } ss. In the *District* Court within and for
County of *El Paso*. } said County.][2]

The People [*of the State of Colorado, ex relatione Samuel S. Bernard,*][2]
v.
Thomas L. Darby and ——— *Bradford.*

Samuel S. Bernard being duly sworn on oath says, that heretofore an injunction was issued out of said court in a certain suit wherein *Samuel McDonald* and others were plaintiffs and the *Elkton Mining and Milling Company* was defendant; and also another injunction in a certain other suit wherein *Thos. L. Cathcart* was plaintiff and said company defendant; and also another injunction in a certain other suit in said court wherein *Hull* and others were plaintiffs and said company defendant; that each of said injunctions was issued on behalf of said company restraining the plaintiffs in each of said cases, their agents and employees and all persons acting for them and all persons claiming under any contract or agreement into which the plaintiffs or any of them after commencement of said suits and all persons in privity with said plaintiffs or any of them, from removing and from mining and selling any of the ores or minerals of or within the boundaries of the *Walter* lode mining claim in *Cripple Creek* mining district in the county of *El Paso* and from disposing of any of said ores already mined or the proceeds thereof.

Deponent says that defendant *Darby* was present in court and had full knowledge of the granting of said injunctions and that defendants have, as deponent is informed and believes, full knowledge of the issuance thereof; that said injunctions are still in force.

Upon information and belief, deponent says that each of said defendants claim the right to work, mine and remove ores of said *Walter* lode under some agreement made between them and plaintiffs, since the commencement of each of said suits, and that whatever rights said defendants have in or to the ores of said *Walter* lode have been acquired since the commencement of said suits.

Deponent further says, that a large force of men have been since the issuance of said writs of injunction, and still are, as deponent is informed and believes, engaged in mining and removing the valuable minerals from said *Walter* lode, under and by direction of defendants, the property of defendant company; that at the time of granting of said injunctions and the issuance of said writs there was already

1. In this case violation of the injunction was admitted; but the defense was based on an alleged purchase of the property after commencement of suit but before any affirmative relief had been granted. The defendant in the present suit, however, was included in the terms of the restraining orders and was present in court and had full knowledge of the nature and extent of these orders, and he violated, at his peril, the injunction order which he was bound to obey implicitly.

See Mills' Anno. Code Colo. (1896), § 149, and list of statutes cited *supra*, note 1, p. 228.

2. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

mined and in transit to mills or smelters large quantities of said *Walter* ores and minerals, and that said defendants have since that time, and after full knowledge of said injunctions, disposed of such ores and the proceeds thereof.

Wherefore deponent says that defendants are guilty of a violation of said injunction, contrary to the laws and the statutes, and against the peace and dignity of the people of the state of *Colorado.*

Deponent says that he is secretary of said mining company, a corporation, and prays that defendants be required to show cause why they should not be punished for contempt for violation of said injunctions.

[*Samuel S. Bernard.*

Subscribed and sworn to before me this *eighth* day of *January*, 1893.

John Hancock, Clerk *District* Court.][1]

(*b*) *Judgment.*

Form No. 6178.

(Precedent in State *v.* McKinnon, 8 Oregon 487.)[2]

In the *Circuit* Court for the county of *Douglas*, State of *Oregon.*

State of Oregon, ex rel. J. H. Mahoney, Plaintiff, v. *J. D. McKinnon, Alva Pike, J. H. Shupe, E. J. Page and George R. Sacry*, Defendants.	Action at law to prevent the usurpation of office.

State of *Oregon*, County of *Douglas*. } ss.

I, *William R. Willis*, being duly sworn, say I am attorney for plaintiff above named; that said plaintiff did, on the *twenty-fifth* day of *June*, 1879, recover judgment in the above entitled court and cause against the said defendants, *J. H. Shupe*, *E. J. Page*, and *George R. Sacry*; that they were guilty of usurping and unlawfully exercising the office of trustees of the city of *Oakland*, and that they be excluded therefrom; that I am informed and believe that the said defendants, *E. J. Page* and *John H. Shupe*, in disobedience of said lawful judgment, continue to and do now usurp and exercise the office of trustees of said city of *Oakland*, and refusing and neglecting obedience to said judgment.

William R. Willis.

Subscribed and sworn to before me *August 26*, 1879.

T. R. Sheridan, Clerk.

1. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. This affidavit sufficiently shows the facts constituting the contempt; but the final determination adjudging the defendant guilty of contempt was reversed by the supreme court on the ground that the judge had no power under the statute or at common law to hear and determine charges of contempt during vacation. See Hill's Anno. Laws Oregon (1892), § 650, subs. 5, and list of statutes cited *supra*, note 1, p. 228.

(*c*) *Mandamus.*

aa. Directed to Canvassers of Elections.

Form No. 6179.[1]

Supreme Court, *Albany* County.

The People of the State of New York on the relation of John L. Platt and William C. Dailey,
against
The Board of State Canvassers of the State of New York and Frank Rice, Secretary of the State; Edward Wemple, Comptroller; Charles F. Tabor, Attorney-General; Elliott F. Danforth, Treasurer, and John Bogart, State Engineer and Surveyor, as members thereof, and each of them.

Dutchess County, ss.:

John L. Platt, being duly sworn, deposes and says: That he is one of the relators in the above entitled proceeding; that on the *twenty-ninth* day of *December*, 1891, the said defendants held a meeting, as the *Board of State Canvassers of the State of New York*, at which meeting they canvassed the returns from the board of canvassers of the counties of *Columbia*, *Putnam* and *Dutchess* of the votes for candidates for the office of senator for the *fifteenth* senatorial district composed of said counties; that said defendants thereupon regarded a certain return, known as the "Mylod return," and referred to in the order entered herein *December 7*, 1891, hereinafter referred to; that the said defendants did not consider a certain other return, known as the "Correct return," herinafter referred to, and that they made a certificate of election whereby they certified and declared that one *Edward B. Osborne* had received the greatest number of votes in the counties of *Columbia*, *Putnam* and *Dutchess* for the position of senator from the *fifteenth* senatorial district, whereas, in fact, upon said returns, he had not received the greatest number of votes, as hereinafter more particularly shown;

And this deponent further says that hereto annexed, marked Ex. *A*, is a copy of the said return known as the "Mylod return," in so far as it contains the statement of the votes in *Dutchess* county for the office of senator from said district.

1. This form is copied from the record in the case of People *v.* Rice, 144 N. Y. 249, in which case there was a conviction. What constituted the contempt here was the fact that the defendants, knowing of the order for the issuance of a peremptory writ of mandamus, did the thing which the issuance of the writ was intended to prevent. The court in that case said, *citing* Hull *v.* Thomas, 3 Edw. Ch. (N. Y.) 236, and English cases therein cited: "It is no new principle that a person may be held guilty of the offense of contempt, for having done an act after the court had decided to enjoin its doing; although that decision had not been formally and technically carried out, or formulated, into an order or writ."

See Birds. Rev. Stat. N. Y. (1896), p. 796, § 14, subs. 2, and list of statutes cited *supra*, note 1, p. 228.

He further says that hereto annexed, marked Ex. *B*, is a copy known as the "Correct return," in so far as it gives the true statement of the votes in said *Dutchess* county for said office.

Deponent further says, that hereto annexed, marked Ex. *C*, is a copy of the said order of *December 7*, 1891, which was duly filed in the office of the clerk of *Albany* county on that day.

Deponent further says that hereto annexed, marked Ex. *D*, is a copy of a certain stipulation hereinafter more particularly referred to.

Deponent further says that hereto annexed, marked Ex. *E*, is a copy of an order of the *general* term of this court, dated *December 7*, 1891, and duly entered and filed in the office of the clerk of *Albany* county on *December 9*, 1891.

Deponent further says that hereto annexed, marked Ex. *F*, is a copy of the decision and order of the Court *of Appeals* upon an appeal by the defendants from the said order of the *general* term, in so far as said order modifies the said order of *December 7th.*

Deponent further says that hereto annexed, marked Ex. *G*, is a statement showing how the said order of *December 7th* would read as modified by the said decision of the Court *of Appeals*, and what the mandamus, if issued pursuant thereto, would have commanded the defendants to do.

And this deponent further says that the returns from the board of canvassers from the counties of *Columbia* and *Putnam*, before the said defendants as such board of state canvassers, showed that the said *Edward B. Osborne* had received in said counties of *Columbia* and *Putnam 6,669* votes, and that one *Gilbert A. Deane* had received *6,839* votes for the office of said senator, and that upon those returns, and upon the said "Correct return," it appeared that the said *Edward B. Osborne* had not received the greatest number of votes for said office of senator in said counties of *Columbia*, *Putnam* and *Dutchess*, but that said *Deane* had received the greatest number thereof.

And this deponent further says that in determining and declaring that the said *Osborne* had received the greatest number of votes for the said office of senator from said district, and in subscribing their certificate of such determination, said defendants canvassed and regarded the said "Mylod return" and failed and omitted to consider the said "Correct return."

And deponent further says that the stipulation, hereinbefore referred to (the original of Ex. *D*), was entered into by the said defendants for the purpose of obtaining a stay of the issuance of the writ of mandamus which was directed by the said order of *December 7th*, and the issue of the said writ of mandamus was thereupon stayed by the relators herein in reliance upon said stipulation.

Deponent further says that the said "Correct return" (the original of Ex. *B*) was the return referred to in the said order of *December 7th* (the original of Ex. *C*) as the return which, by said order, the said defendants were directed to consider. Said "Correct return" was filed with the governor of the state, the comptroller of the state, and the secretary of state, as required by law, on or about the *twenty-first* of *December*, 1891, and was, as a matter of fact, before said defendants at the time they held their said meeting on *December 29*, 1891.

This deponent makes this last allegation upon information and belief, derived from the following facts:

Upon *December 5*, 1891, in a certain proceeding in this court, in *Dutchess* county, wherein the *People*, upon the relation of the relators in this case, the plaintiff, and the *Board of County Canvassers of Dutchess County* and these defendants were defendants, an order was duly entered whereby it was ordered that a writ of mandamus should issue to the said *Board of County Canvassers of Dutchess County*, requiring them to make certain corrections in their canvass of the votes of *Dutchess* county for the office of senator from said district, and that they cause their correct determination and statement to be certified, attested, and filed, as required by law, which mandamus was issued and executed, and pursuant to which the said "Correct return" (the original of Ex. *B*) came into existence, was filed with the clerk of *Dutchess* county, as required by law, and certified copies thereof were transmitted to the said governor, comptroller and secretary of state, as hereinafter shown, and it was such return which the said order of *December 7th* (the original of Ex. *C*) contemplated and referred to — the proceedings to obtain which correct return having been started at the same time as the proceedings in this case, and being well known to all the parties to this proceeding and their attorneys.

The object of the said proceeding in the *Dutchess* county case being to obtain a correct return, and the object of their proceeding being to compel the defendants to canvass and regard the correct return instead of the false one, the said proceedings in the *Dutchess* county case were brought to a successful determination. The correct return was obtained and forwarded and was before the said defendants, as is shown in the annexed affidavit of *Charles F. Cossum.*

Deponent further says that the said defendants and each of them, respectively, had full knowledge and notice of the said orders, decisions and stipulation hereinbefore referred to.

Deponent makes this last allegation upon information and belief, derived as follows:

From the affidavits of service hereto annexed; from the fact that the defendants were officials, the duties of whose position required them to make themselves acquainted with the proceeding herein detailed as affecting their official action, and from the fact that all of said proceedings were matters of public notoriety published in the newspapers throughout the state, the time being one of great political excitement, the papers giving full account of what was done each day in the courts.

And deponent further says that between the dates *December 7* and *December 29*, 1891, they, the said defendant, together with their counsel, *Isaac H. Maynard* and *Delos McCurdy*, entered into a conspiracy by which they agreed that in case any correct return from *Dutchess* county should be transmitted to them, pursuant to the said mandamus in the *Dutchess* county case, so issued, as hereinbefore set forth, they, the said defendants, would refuse it and would return it to the county clerk of *Dutchess* county so that it should not be before them.

Deponent makes this allegation upon information and belief, derived as follows:

From a certain open letter, bearing date *March 16*, 1892, and signed

by *Isaac H. Maynard*, published by him, in the course of which and on page *9* he states that he and the said *McCurdy* and the said defendants had a consultation (which by said letter appears to have been held about the middle of *December*, 1891), in which it was agreed that they would not receive any such return, and if the attempt was made to transmit it, the said defendant should return it to the county clerk of *Dutchess* county; and the said *Maynard* further states in said letter that upon said returns (being the ones mailed by the said *Storm Emans* on *December 21st* to the governor, secretary of state and comptroller) being received by those respective officers at *Albany*, they were all taken from them or from their offices and handed back to the said *Storm Emans*.

Also from the fact that deponent saw in a report of the *New York* newspapers of a meeting of the *Bar Association* that the said *Delos McCurdy* made a similar statement in the *Bar Association* of *New York City*.

Deponent further says that, as he is informed and believes, and charges the fact to be, that the said defendants were guilty of an abuse of their said appeal to the *general* term from the said order of *December 7th* and of their appeal from said order of said *general* term to the Court *of Appeals* and of the stay of proceedings obtained by them upon the faith of their said stipulation in that the said defendants made use of the same for the purpose of enabling them to take measures to defeat the said order of *December 7th*, so appealed from, in case the decision should be against them in the Court *of Appeals*, and by holding their meeting on the *29th* day of *December*, 1891, which was the day when the Court *of Appeals* rendered its said decision, they regarded the said "Mylod" certificate and issued their said false certificate of election, before the judgment of the Court *of Appeals* could be made the judgment of this court, by filing the remittitur and entering the usual order thereon, and before any mandamus could be issued against them, pursuant to the said order of *December 7th* as so modified.

And deponent further says that, as he is informed and believes, and charges the fact to be, that they, the said defendants, were guilty of deceit in entering into said stipulation, in that they entered into the same without any intention of being bound thereby, but with the fraudulent and deceitful purpose to obtain a stay of the issuance of the writ therein directed; they intending, as soon as the Court *of Appeals* should render a decision upon said appeal, that they would, in case such decision was adverse to them, immediately meet as the board of canvassers and canvass the said "Mylod return" and refuse to consider the "Correct return," before an order upon the remittitur could be entered in this court and before any writ of mandamus, as provided in said order of *December 7th*, could be issued, and the said defendants carried out said fraudulent and deceitful purpose and did, upon the said decision of the Court *of Appeals* being rendered against them, meet and act, as hereinbefore set forth, and issue their certificate declaring said *Osborne* to be elected, as hereinbefore stated, before any mandamus could be issued.

And this deponent further says that he has instructed his attorneys to commence these proceedings as for contempt of court out of a sol-

emn sense of the duty which he owes as a citizen and as a relator in this action; deponent has waited until the passion and strife immediately occasioned by them have calmed down, the matters in controversy having been contested election cases and the voters of the state having been very much excited in regard to them; deponent has felt that an atmosphere of public clamor was not appropriate in which to have such proceedings as these carried on; the year 1892 being what is called a presidential year, during which the nominations for the presidency and the election following the same is held, deponent felt that those matters were of such absorbing interest that it was the part of wisdom to suspend such proceedings as these, especially when, if started before election, the charge might be made that they were instituted or prosecuted merely for political effect, and deponent has waited until after the presidential election was over and men's minds had fully settled down before giving instructions to start this prosecution.

And further deponent saith not.

John I. Platt.

Sworn to before me this *thirtieth* day of *January*, 1893.

Edgar M. Meeks, Notary Public.

bb. DIRECTED TO JUDGE.

Form No. 6180.

(Precedent in People *v.* Pearson, 4 Ill. 271.)[1]

State of *Illinois*, } ss.
Cook County. }

J. Young Scammon doth solemnly, sincerely and truly declare and affirm, that at the *April* term of the *Circuit* Court of *Cook* county, held at *Chicago* in said county, in the year eighteen hundred and *forty*, this affiant delivered in person, in open court, to *John Pearson*, judge of said court, the original writ of mandamus of which the foregoing and within is a true copy, and presented to him a copy of the bill of exceptions therein mentioned, to sign, to wit, on the *twenty-fifth* day of *April last past*, in a most respectful manner, and thereupon said judge caused the clerk of said court to enter the order hereto annexed, marked *A*, and made a part of this affidavit; and afterward, to wit, on the ——— day of *May*, A. D. eighteen hundred and *forty*, during said term of the court, said judge caused the following papers, marked *B*, to be served upon this affiant, by the sheriff of *Cook* county, and compelled this affiant to appear and answer the same, which he did. And thereupon the said judge declared that he should not sign said bill of exceptions, and did not sign the same, and has not since signed it, as this affiant is informed, and believes to be true.

J. Young Scammon.

1. It was held in this case that where a writ of mandamus is delivered to a judge or other person to whom it is directed, and he refuses to obey it, an attachment will issue for contempt of court.

In People *v.* Judges, 2 Cai. (N. Y.) 97, it was held that it should appear from the affidavit that the persons who were served with the writ of mandamus were those who ought to have signed the bill.

Affirmed to according to law, *May 29th*, 1840, before the clerk of the *Cook Circuit* Court, and the seal of said court affixed.

(SEAL) *Richd. J. Hamilton*, Clk.

(*d*) *Orders.*

aa. For Examination.

(*aa*) *Of Party Before Trial.*

Form No. 6181.[1]

New York Supreme Court, *City and* County of *New York.*

Rochester Lamp Company, plaintiff, against *John R. Brigham*, defendant. } Moving Affidavit.

City and County of *New York*, ss.:

Edward C. Perkins, being duly sworn, deposes and says as follows, to wit:

I. I am one of the attorneys for the plaintiff in the above entitled action, which was commenced by personal service of the summons upon the defendant on the *sixth* day of *June*, 1895.

II. The defendant appeared in this action on the *sixth* day of *June*, 1895, by *Brigham & Baylis*, attorneys and counselors-at-law of *New York City*, as his attorneys.

III. This action is brought by the plaintiff in order to recover from the defendant certain amounts due upon a contract by which the defendant, for a valuable consideration, agreed to pay to the plaintiff certain royalties upon all lamps of the description known as *central-draft lamps*, which might hereafter be purchased, directly or indirectly, by the defendant of the firm of *Edward Miller & Company*, of *New York City*.

IV. The complaint in this action has never been served, for the reasons which will hereafter appear, and the time of the plaintiff to serve the said complaint has, from time to time, been extended, and was, on the *eighteenth* day of *November*, 1895, by order of the Hon. *Abraham R. Lawrence*, one of the justices of this court, extended to and including the *eighth* day of *December*, 1895.

V. On the *twenty-eighth* day of *June*, 1895, plaintiff, by its attorneys, made application to the Hon. *Abraham Lawrence*, one of the justices of this court, for an order directing the defendant to appear for examination before trial in this action, upon the ground that such examination was necessary, both in order that the plaintiff might frame its complaint, and on the ground that it could not safely proceed to trial without such examination. On the same day an order for such examination was made by Mr. Justice *Lawrence*, and a copy whereof was served personally upon the said defendant, *John H. Brigham*, on the *twenty-eighth* day of *June*, 1895. The said order and an affidavit proving due service thereof are hereto annexed.

VI. At the time, place and hour at which the said defendant was

1. This form is copied from the records in Rochester Lamp Co. *v.* Brigham, 1 N. Y. App. Div. 490, wherein it was held that the defendant was guilty of contempt. See Birds. Rev. Stat. N. Y. (1896), p. 796, § 14, subs. 2, and list of statutes cited *supra*, note 1, p. 228.

in and by the said order directed to appear for such examination, the attorneys for the said defendant appeared and moved before Mr. Justice *Stover*, who was then sitting at chambers, to vacate the said order upon the papers upon which the same was granted. Thereupon, on the application of the plaintiff's attorneys, the said examination was adjourned by Mr. Justice *Stover* until the *tenth* day of *July*, 1895, at the same time and place, and thereafter and on the *tenth* day of *July*, 1895, an order was entered in this action of Mr. Justice *Lawrence*.

VII. Thereafter the plaintiff in due season appealed in the *general* term of the *Supreme* Court from the order of the *tenth* day of *July*, 1895, aforesaid, and said appeal having duly come on to be heard, the said order of the *tenth* day of *July*, 1895, was reversed and an order to that effect was duly entered in this court on the *eighteenth* day of *October*, 1895, whereby in addition the defendant was ordered to appear for his examination in pursuance to the aforesaid order of Mr. Justice *Lawrence* at chambers of this court on the *twenty-second* day of *November*, 1895, at *10:30* o'clock, as will more fully appear from the copy of said order, which is hereto annexed and made a part of this affidavit.

VIII. Deponent is advised and believes that the said *John H. Brigham* left the United States either shortly before or immediately after the *tenth* day of *July*, 1895, and has not since been within the state of *New York*.

IX. On the *tenth* day of *November*, 1895, a certified copy of said *general* term order was served personally upon the defendant, *John H. Brigham*, at *Birmingham*, *England*, as will further appear from the affidavit of *A. G. Johnson* hereto annexed.

X. On the *first* day of *November*, 1895, a certified copy of the said *general* term order and notice of the entry thereof was served upon Messrs. *Brigham & Baylis*, the attorneys for the defendant, in the city of *New York*.

XI. The defendant wholly failed to appear for his examination as directed by the order of Mr. Justice *Lawrence*, aforesaid, and pursuant to the said order of the *general* term fixing the date for such examination, as will appear from the minutes of his default made by Mr. Justice *Ingraham* hereunto annexed.

Edward C. Perkins.

Sworn to before me this *second* day of *December*, 1895.

Henry H. Abbott, Notary Public,
New York Co., *112*.

(*bb*) *In Supplementary Proceedings.*

Form No. 6182.[1]

Supreme Court, *New York* County.

John Doe, plaintiff,
against
Richard Roe, defendant.

1. *New York.* — Code Civ. Proc., § 2457 (Birds. Rev. Stat. (1896), p. 3031, § 26). Where a defendant is ordered to show cause why he should not be punished as for a contempt in disobeying an

State of *New York*,
City and County of *New York*. } ss.

Edward Green, being duly sworn, deposes and says:

I. That he is the attorney[1] of *John Doe*, plaintiff in the above entitled action, and that on the *eighth* day of *July*, 1896, judgment in said action was duly recovered and entered against the said *Richard Roe*, defendant above named.

II. That thereafter execution against the property of the said defendant, *Richard Roe*, was duly issued, and thereafter returned wholly unsatisfied.[2]

III. That thereafter and on the *tenth* day of *October*, 1896, an order for the examination of the said *Richard Roe*[3] in supplementary proceedings was duly obtained, and the said order was, on the *eleventh* day of *October*, 1896, duly served upon the said *Richard Roe*; and that a copy of the said order and of the affidavit of the service of said order upon *Richard Roe* are annexed to this affidavit and made a part hereof.

IV. That on the *twenty-second* day of *October*, 1896, at *eleven* o'clock in the *fore*noon of said day, the deponent attended before Honorable *Roger A. Pryor*, one of the justices of this court, at the chambers thereof held in the *county court-house* in the city of *New York*, and there remained for the space of one hour prepared to take the deposition of the said *Richard Roe*, pursuant to the said order, but that the said *Richard Roe*, judgment debtor herein, failed to appear before the said justice at the place aforesaid during the time above mentioned, thus disobeying the aforesaid order.

V. That at the said time and place the deponent caused the said *Richard Roe* to be duly and repeatedly called, but that he failed to appear, whereupon deponent had his default duly noted.

Edward Green.

Sworn to before me this *twenty-eighth* day of *October*, 1896.

Charles Rice,
Notary Public, *N. Y.* County.

bb. To Pay Money to Receiver.[4]

order, in proceedings supplementary to execution, "enjoining and restraining the debtor from making any transfer or other disposition of his property not exempt by law from execution, or from any interference therewith," the affidavits must show affirmatively that the money or property which the defendant has received or paid out, or that some part of it, was due him or was earned by him prior to the date of the order. Potter *v.* Low, 16 How. Pr. (N. Y. Supreme Ct.) 549.

1. Affidavit by Attorney. — Where the affidavit is made by an attorney, he need not swear to or prove his authority to act. Miller *v.* Adams, 52 N. Y. 409.

2. Execution Returned Unsatisfied. — Where it did not appear that the execution had been returned unsatisfied, a motion to punish a third person for contempt in not appearing was denied. Sloan *v.* Higgins, 1 Law Bul. 59.

3. Misnomer of Defendant. — Where the name of the defendant is wrongly stated both in the judgment and the order, it is not a contempt for him to fail to comply with the order for examination, even though he is the real person intended. Muldoon *v.* Pierz, 1 Abb. N. Cas. (N. Y. Supreme Ct.) 309. But by appearance and examination without objection, the right to raise the question of misnomer is waived. Matter of Johns, 1 Law Bul. 75.

4. Demand Necessary. — To bring a party into contempt for disobedience of an order or judgment requiring the payment of money or the delivery of property, it is not sufficient that the

Form No. 6183.

(Precedent in Cartwright's Case, 114 Mass. 233.)

Respectfully represents to the Justices of the *Supreme Judicial* Court *James C. Davis*, who has been heretofore appointed one of the receivers of the *Hide & Leather Insurance Company*, that *John W. Cartwright*, one of the receivers of said company, has failed and neglected to comply with the order of this court made on the *thirteenth* day of *December current*, whereby he was directed to pay into the hands of the said *James C. Davis*, receiver as aforesaid, on or before *Wednesday*, the *seventeenth* day of *December current*, the sum of *thirteen thousand five hundred and sixty-five and ninety-seven one-hundredths* dollars, to be administered as part of the assets of the said company, and that the said *Cartwright* has not paid to him any part of the said sum.

And the said *James C. Davis* further represents unto your honors that the account which was annexed to the said order of *December 13th* was prepared by him from the books of the receivers of the said company, and that it is just and true; that of the amount appearing to be due from said *Cartwright* to said receivers by said account, being $*13,565.97*, in all, the sum of *thirteen hundred and forty-two and fifty-three one-hundredths* dollars ($*1342.53*) was charged for interest, at the rate of *six* per cent. per annum, upon the indebtedness of said *Cartwright* to said receivers; and the sum of *sixteen hundred and fifty* dollars ($*1650*), for money loaned to said *Cartwright* by said *Hide & Leather Insurance Company* before the appointment of said receivers, which has never been paid to the said receivers; and that the remaining sums charged in said account, amounting to *ten thousand five hundred and seventy-three and forty-four one-hundredths* dollars ($*10,573.44*), are sums of money which were withdrawn by the said *Cartwright* from the assets of the said company, in the hands of the receivers thereof, from time to time at the dates and in the amounts shown by said account, and appropriated by him to his own personal use, as the said *James C. Davis* is informed and believes; and that such withdrawal and appropriation has not been at any times directed or authorized by any order of this court.

James C. Davis, Receiver,
December 18, 1873.

Suffolk, ss.
Subscribed and sworn to before me,
James G. Freeman, Justice of the Peace.

(*e*) *Subpœna.*

Form No. 6184.[1]

The *Circuit* Court for the County of *Wayne*.

order or judgment be served upon him and he be made fully acquainted with its effect; but, in addition thereto, a compliance with the order or judgment must be explicitly demanded by a party who has a right to make such a demand; and where the order is to deliver property over to a receiver the property must be demanded by the receiver personally. McComb *v.* Weaver, 11 Hun (N. Y.) 271.

1. *Michigan.* — How. Anno. Stat.

John Doe
against
Leonard A. Ford.

State of *Michigan*, } ss.
County of *Wayne*. }

Leonard A. Ford, the defendant in this cause, being duly sworn, deposes and says, that on the *ninth* day of *April*, at the city of *Detroit* in said county, he served the annexed subpœna on *Richard Roe*, the witness named therein, personally, by then and there showing to the said *Richard Roe* the said subpœna, with the seal of the court thereon, and delivering to him a true copy thereof, and paying to the said *Richard Roe*, at the same time and place aforesaid, the sum of *one* dollar and *ten* cents, for his fees for traveling to and from the court named in the said subpœna, and for his attendance thereat. And this deponent further says that the said *Richard Roe* is a material witness for him on the trial of this cause, without whose testimony he cannot safely proceed to the trial thereof, as he is advised by *Joseph Story*, Esq., his counsel therein, to whom he has fully and fairly stated the case in this cause, and what he expects to prove by the said *Richard Roe*, and as this deponent verily believes. And this deponent further says that the said *Richard Roe* has wholly failed to attend this court as a witness for this deponent in pursuance of the said subpœna, without any reasonable excuse known to this deponent.

Leonard A. Ford.

Sworn to and subscribed this *seventeenth* day of *April*, A. D. 1*896*.
Abraham Kent, Justice of the Peace.

b. Information for Contemptuous Publication.[1]

Form No. 6185.

(Precedent in People *v.* Wilson, 64 Ill. 197.)

State of *Illinois*, } ss. *Northern Grand Division.*
Supreme Court. } *September* Term, A. D. 1*872*.

The People of the State of Illinois
v.
Charles L. Wilson and Andrew Shuman. } Information.

And now come the said People, by *Washington Bushnell*, Attorney General, and represent to the court that on the *16th* day of *October*,

(1882), §§ 7257, subs. 5, § 7259. See also list of statutes cited *supra*, note 1, p. 228.

1. In State *v.* Frew, 24 W. Va. 416, it was held that although in cases of constructive contempt the proceedings are usually based on an affidavit or other sworn statement of the facts constituting the contempt, yet such an affidavit or statement is not always essential, but that the court may act on its own information or on the unsworn statement of a member of the bar in clear and unmistakable cases, such as contemptuous publications in a newspaper. The statement in this case, which was sufficient, was as follows:

"To the Honorable Judges of the *Supreme* Court *of Appeals* of *West Virginia*.

As is well known to the court, there was pending here on the *18th* day of *June*, 1*884*, and there is now pending and undetermined, a proceeding by mandamus, at the relation of *Joseph S. Miller*, Auditor, against *T. H. Buchanan*,

A. D. 1872, there was, and still is, pending in this court, a certain cause for the adjudication and determination of this court, wherein one *Christopher Rafferty* is plaintiff in error and *The People of the State of Illinois* are defendants in error, and that, on the same day there was published in the city of *Chicago*, in said State, a certain daily newspaper called the *Chicago Evening Journal*, of which said paper on said day the said *Charles L. Wilson* was proprietor and the said *Andrew Shuman* was editor, and that said *Charles L. Wilson* and *Andrew Shuman*, on the said day caused to be published in said paper, of and concerning said cause so pending in this court, and of and concerning this court and its supposed action with reference to said cause, a

assessor of *Brooke* county. This proceeding involves the constitutionality of the exemption act, contained in section 43 of chapter 12 of Acts of 1881, and the propriety of what is well known throughout the State as the 'supplemental assessment order.'

I have the honor to be a member of the bar of this Court and to be the counsel for the relator in the cause referred to.

On the *18th* day of *June*, the *Wheeling Intelligencer*, a newspaper of general circulation published in the city of *Wheeling*, contained an editorial article, referring expressly to the questions I have mentioned as involved in said cause and referring by implication to that cause itself. This article stated that three out of the four judges of your honorable Court had told a Democratic caucus, more than a year ago, in effect that the Court would sustain the 'supplemental assessment order' and hold the exemption statute unconstitutional. The article then says that it was not intended that 'the purpose of the Court' should be made public, and intimates that the publication of its purpose 'may induce the Court to change its mind.' I beg leave to submit with this communication a copy of the newspaper containing the article referred to.

This article has every appearance of an attempt to affect the decision of the Court in the case of *Miller* v. *Buchanan*, and to intimidate it into deciding against the relator. While I do not believe that any effect will be produced upon the Court which will affect the case, still I deem it my duty as an officer of the Court and as counsel for the relator, not to permit so palpable an assault upon the purity and independence of the administration of justice to pass unnoticed.

The firm of *Frew, Campbell & Hart*, composed of *John Frew*, *A. W. Campbell* and *C. B. Hart*, are, as I am informed, the publishers of the *Wheeling Intelligencer*.

Should the members of this Court so far forget their duty and dignity as to express in advance, for political or other purposes, their opinions upon cases which may come before them, as judges, no one would be quicker than I to condemn such a practice. If it could be shown me that any of your honors had been guilty of what the *Intelligencer* lays to your charge, I would willingly join the editors of that paper in bringing the matter before the proper tribunal at the proper time. But whether these matters are true or false, the case of *Miller* v. *Buchanan* is now pending and you alone must decide it. While it is before you, your conduct with respect to the case itself and the questions in it is not the proper subject, in my opinion, of public criticism.

Disclaiming any feeling of resentment or animosity against the publishers of the *Intelligencer*, and acting solely from a desire to do my professional duty, I now lay the matter before the court, and shall not feel that I am called upon either to suggest to the Court what it shall do in the matter or to take part in the prosecution of any proceedings, which may be instituted, should the Court see fit to act.

With great respect,

Henry M. Russell.

June 23, 1884."

An information for contempt on account of a newspaper article which charges that the publication was "false and grossly inaccurate" is insufficient if it fails to specify in what respects the article is false. Worland *v.* State, 82 Ind. 49.

certain article, in the words following, that is to say: (*Here was set out a copy of the contemptuous article*).[1]

Wherefore the said Attorney General, for and on behalf of the said People, moves this court for a rule upon the defendants, *Charles L. Wilson* and *Andrew Shuman*, to be and appear before this court, on a day to be named, and show cause, if any they or either of them have, why an attachment should not issue against them for a contempt of this court in respect to the publication of said article.

Washington Bushnell, Attorney General.

c. Motion for Attachment for Failure to Obey.[2]

(1) Injunction.

Form No. 6186.

(Precedent in Fort Worth St. R. Co. *v.* Rosedale St. R. Co., 68 Tex. 163.)[3]

Fort Worth Street Railway Company, Appellant,
v.
Rosedale Street Railway Company, Appellee.

In the *Supreme* Court of the State of *Texas*. Appeal from *Tarrant* county.

1. The contemptuous publication was in the language following, to wit:

"The Case of Rafferty.

At the time a writ of supersedeas was granted in the case of the murderer Chris. Rafferty, the public was blandly assured that the matter would be examined into by the supreme court and decided at once; that possibly the hanging of this notorious human butcher would not be delayed for a single day. Time speeds away, however, and we hear of nothing definite being done. Rafferty's counsel seems to be studying the policy of delay, and evidently with success. The riffraff who contributed fourteen hundred dollars to demonstrate that 'hanging is played out' may now congratulate themselves on the success of their little game. Their money is operating splendidly. We have no hesitancy in prophesying clear through to the end just what will be done with Rafferty. He will be granted a new trial. He will be tried somewhere, within a year or two. He will be sentenced to imprisonment for life. Eventually he will be pardoned out. And this in spite of all our public meetings, resolutions, committees, virtuous indignation, and what not. And why? Because the sum of fourteen hundred dollars is enough nowadays to enable a man to purchase immunity from the consequences of any crime. If next winter's session of the legislature does not hermetically seal up every chink and loop-hole through which murderers now escape, it will deserve the bitter censure of ever honest man in Illinois. We must simplify our modes of procedure in murder trials. The criminal should be tried at once, and when found guilty should be hanged at once, and the quicker hanged the better. The courts are now completely in the control of corrupt and mercenary shysters — the jackals of the legal profession — who feast and fatten on human blood spilled by the hands of other men. All this must be remedied. There can be found a remedy, and it must be found."

2. See also forms of motion in 2 Rev. Swift's Dig., p. 776; Baldwin *v.* State, 11 Ohio St. 681.

3. In this case the defendants were adjudged not guilty of contempt because the injunction order was limited in duration on its face "only until the hearing." The cause was not kept alive, therefore, after the hearing by appeal, but as these facts do not appear in the motion and the form is otherwise good, it serves as a model where the injunction has been disobeyed.

To the Honorable *Supreme* Court of the State of *Texas*.

Your complainant, the *Fort Worth Street Railway Company*, respectfully respresents to the court:

That, heretofore, to wit, on the *seventeenth* day of *September*, 1884, your complainant applied to the *district* court of *Tarrant* county, *Texas*, for an injunction to enjoin and restrain the *Rosedale Street Railway Company* from building or constructing any street railway track on *Houston* street, in the city of *Fort Worth*, in *Tarrant* county, *Texas*, until the respective rights of complainant and said *Rosedale Street Railway Company* had been adjudicated and settled by the hereinafter mentioned suit, then pending in said *district* court of *Tarrant* county, to determine the question as to which of said two companies had the superior right to build and construct a street railway on said *Houston* street; that said *district* court of *Tarrant* county granted said application and issued a writ of injunction enjoining and restraining said *Rosedale Street Railway Company*, its officers, agents and servants from building or constructing any street railway track on said *Houston* street until the respective rights of complainant and said *Rosedale Street Railway Company* had been adjudicated and settled by said suit.

That complainant was defendant in the suit in which it obtained said injunction, namely the suit of the *Rosedale Street Railway Company* v. *The Fort Worth Street Railway Company*; that said suit is now in appeal in this (the *Supreme*) court.

Said *Fort Worth Street Railway Company* being appellant, and said *Rosedale Street Railway Company* being appellee, and the said suit was brought to determine which of the parties complainant or said *Rosedale Street Railway Company*, had the superior right to build and construct a street railway on said *Houston* street. That in said suit, said *district* court of *Tarrant* county, *Texas*, on the *fifteenth* day of *May*, 1885, rendered a judgment decreeing the dissolution of said injunction and holding same for naught and adjudging the superior right to construct and build a street railway on said *Houston* street to be in said *Rosedale Street Railway Company*.

That this complainant has prosecuted an appeal from said judgment to the *Supreme* Court of the State of *Texas*, and said appeal is now pending in said *Supreme* Court at *Austin*, *Texas*.

That the effect of said appeal is to continue in force said injunction. That heretofore, to wit, on the ——— day of *March*, 1887, said *Rosedale Street Railway Company*, its officers, agents and servants, under the guise and color and in the name of the *Queen City Street Railway Company*, which, complainant is informed and believes, and therefore charges, has no legal corporate existence, commenced the construction and building of a street railway track on said *Houston* street, and is now prosecuting said work.

That said *Queen City Street Railway Company* filed articles of incorporation in the office of the Secretary of State of the State of *Texas*, as far back as *October 20*, 1881, but it never legally organized or took any steps to begin active operation to construct a line of railway until after said injunction was sued out as aforesaid. That at some time during the year 1887 said *Queen City Street Railway Company* organized, or pretended to do so, by electing officers, the names of

whom are unknown to complainant, except that *P. M. Willing* was elected president, *Joe Mayer*, treasurer, and *J. C. Scott*, secretary, and *Theo. Vogel*, *David Boaz*, *P. M. Willing*, and *J. C. Scott*, directors. That *John Tierney* is a stockholder in said *Queen City Company*; that said *Theo. Vogel* is secretary and treasurer of said *Rosedale Street Railway Company*; that said *Joe Mayer* is treasurer of said *Queen City Street Railway Company*; that said *John Tierney* is president of said *Rosedale Street Railway Company* and one of its directors as well as a director of the said *Queen City Street Railway Company*; that said *David Boaz* is director of said *Rosedale Street Railway Company*, as well as of said *Queen City Railway Company*, and that said *John Tierney* is a director of said *Rosedale Street Railway Company*, as well as a stockholder of the *Queen City Street Railway Company*.

The complainant is informed and believes, and so charges, that said *Vogel*, *Boaz*, *Mayer* and *Tierney* own a majority of the stock of said *Queen City Railway Company*, and they are each large shareholders in said *Rosedale Street Railway Company*; that before said work of constructing and building said street railway track on said *Houston* street as aforesaid by said *Rosedale Company* in the name of said *Queen City Company*, said *Vogel*, *Boaz*, *Tierney* and *Mayer* each had notice of said injunction sued out by complainant against said *Rosedale Street Railway Company* as aforesaid. That the work of constructing and building said street railway track, begun and now being prosecuted on said *Houston* street in the name of and ostensibly for said *Queen City Railway Company*, but really in the interest of and for the benefit of said *Rosedale Street Railway Company*, has been and is now being done on and over the same territory from the building and construction of a street railway track on which said *Rosedale Street Railway Company* was enjoined and restrained as aforesaid, and on which it claimed the right to build and construct said railway track in said suit, the determination of its right to do so in preference to and exclusive of complainant, being the main object of said suit. That said pretended organization of said *Queen City Street Railway Company* was made by the officers and directors of said *Rosedale Street Railway Company*, and was made for the purpose of enabling said *Rosedale Street Railway Company* to evade the effect of said injunction, and that said building and construction of said street railway track on said *Houston* street in the name of said *Queen City Street Railway Company*, is being done for the use and benefit of the said *Rosedale Street Railway Company*, with an agreement that when completed said *Rosedale Street Railway Company* is to run and operate its cars thereon; that the said *Vogel*, *Boaz*, *Mayer* and *Tierney* are encouraging, advising and aiding in the work of building the road of the pretended *Queen City Railway Company*; that the said parties reside in *Tarrant* county, and the place of business of the said street railway companies is *Fort Worth*, in said county.

Wherefore complainant prays that said *Rosedale Street Railway Company* and said *Queen City Railway Company*, and said *Theo. Vogel*, *David Boaz*, *John Tierney* and *Joe Mayer* be attached, and required to show cause why they should not be punished for contempt for disobeying said injunction, and that they be required to tear up the

track which they have built on said *Houston* street in violation of said injunction, and restore said *Houston* street to the same condition in which it was before they disregarded said injunction, and complainant prays for general relief.

John D. Templeton,
J. W. Terry,
Counsel for Appellant.

[(*Verification.*)][1]

(2) Judgment.

Form No. 6187.

(Precedent in State *v.* McKinnon, 8 Oregon 488.)[2]

Now comes the plaintiff above named, and moves the Hon. *J. F. Watson*, judge of the above entitled court, upon the foregoing affidavit, for a warrant of arrest against the said defendants, *E. J. Page* and *John H. Shupe*, to answer for contempt in neglecting and refusing to obey said judgment.

W. R. Willis, Plaintiff's Attorney.

d. Petition for Attachment for Failure to Obey Injunction.[3]

Form No. 6188.[4]

Carroll, ss. To the Hon. *John Marshall*, Chief Justice of the *Supreme* Court:

Jane Doe, of *Ossipee*, in said county of *Carroll*, complains against *John Doe*, of said *Ossipee*, and says that she is the wife of said *John Doe*, and on the *sixteenth* day of *October*, 1897, she caused to be filed, in the office of the clerk of said court of said county, her libel praying for a divorce from said *John Doe*, and for other relief, for the causes therein set forth; and upon her petition a writ of injunction was duly issued by said justice on the *twentieth* day of *October*, 1897, enjoining and prohibiting said *John Doe* from imposing any restraint upon her personal liberty during the pendency of said libel, which was duly served upon said *John Doe* on the *twentieth* day of *October*, 1897.

Yet the said *John Doe* well knowing the premises, but wholly regardless of the said injunction, on the *twenty-fifth* day of *October*, 1897, at *Ossipee* aforesaid, in the county of *Carroll* aforesaid, with

1. The motion was verified by the agent of the Fort Worth Street Railway, but the verification is not set out in the reported case. For the form of verification in a particular jurisdiction consult the title Verifications.

2. This motion was annexed to the affidavit set out *supra*, in Form No. 6178.

3. See also the substance of petitions as follows:

Where the contempt consisted in the disobeying, a writ of injunction issued to restrain defendants from removing certain machinery in their possession. Stimpson *v.* Putnam, 41 Vt. 238.

Where the contempt consisted in the contemnor, a newspaper reporter, having concealed himself in the jury room during the deliberations of the jury. Matter of Choate, (Oyer & T. Ct.) 8 N. Y. Crim. Rep. 1.

4. This form is adapted from the form set out in 56 N. H. 620. See also the form in 38 N. H. 623.

force and arms made an assault upon the said *Jane Doe*, and beat and bruised her, and imprisoned and deprived her of her personal liberty for the space of *twenty* days, from said *twenty-fifth* day of *October*, 1897, to the *fourteenth* day of *November*, 1897; in contempt of said injunction, and against the peace and dignity of the state.

Wherefore she prays that said *John Doe* may be held to answer for said contempt, and that justice may be had in the premises.

Jane Doe.

Carroll, ss. *November 15*, 1876.

Jane Doe personally appeared, and made oath that the above complaint, by her subscribed, is, in her belief, true.

Before me,

Abraham Kent, Justice of the Peace.

2. Order to Show Cause.[1]

a. For Contemptuous Petition for Rehearing.

Form No. 6189.

(Precedent in *In re* Woolley, 11 Bush (Ky.) 101.)[2]

The *Commonwealth* of *Kentucky*,
Court *of Appeals*, *July 2*, *1874*.

Whereas, *Robt. W. Woolley*, an attorney and officer or this court, did, on the *27th* day of *June*, 1874, while exercising his functions and privileges as attorney and officer aforesaid, file[3] in open court a printed petition for a rehearing of the appeal in the case of *P. D. B. O. Gray* v. *J. M. Reamer and others*, then pending therein, which contains language not only disrespectful, but insulting to the court; and whereas, on the *1st* day of *July*, the said *Woolley*, of his own motion, filed in open court, a paper denominated or styled "Statement of *R. W. Woolley*," in which, while disclaiming intentional disrespect to the court in the matter of the petition in the case of *Gray* v. *Reamer and others*, he reiterates some of the most offensive charges and imputations contained therein.

Now therefore the said *Robert W. Woolley*, attorney and officer aforesaid, is hereby ruled and required to appear in the Court *of Appeals*, at the *capitol* in *Frankfort*, on the *8th* day of *September*, 1874, and show cause, if any he can, why his authority to practice as an attorney and officer of said court shall not (on account of the filing of said

1. **Precedents.** — See also forms in People *v.* Pearson, 4 Ill. 271; Wicker *v.* Dresser, 14 How. Pr. (N. Y. Supreme Ct.) 466; Spinning *v.* Ohio L. Ins., etc., Co., 2 Disney (Ohio) 336; State *v.* Kaiser, 20 Oregon 51; U. S. *v.* Church of Jesus Christ, 6 Utah 79.

2. It was claimed in this case that the rule was not sufficiently specific, in that it did not specifically aver or state the language deemed disrespectful and insulting and does not in terms set out the charges and imputations regarded as offensive. This was held unnecessary, as the petition for a rehearing is not a pleading, but an argument addressed to the court, and the contempt was therefore committed in presence of the court.

3. Where the contempt consists in filing an offensive brief or paper, the party cited to show cause, why he should not be punished for filing the same may rest upon his exceptions to the sufficiency of the citation if it fails to charge that he wrote, signed or filed the offensive brief or paper. *Ex p.* Rust, 38 Tex. 344.

petition and statement) be revoked, and he be otherwise punished for the contempt hereinbefore set out.

b. For Contemptuous Publication.[1]

Form No. 6190.

(Precedent in State *v.* Judge, 45 La. Ann. 1251.)[2]

State of *Louisiana.*
Civil District Court for the Parish of *Orleans.*

Peter Fabacher v. *Bryant & Mathers.* } Division "*C.*"

1. Precedent. — In State *v.* Frew, 24 W. Va. 419, it was held that the notice plainly and explicitly notified the defendants of the cause and nature of the offense and that they were the persons charged with its commission. Omitting formal parts, the rule was as follows:

"*Henry M. Russell*, esq., a member of the bar of this Court, this day presented a written communication addressed to the Court referring to the fact that on the *18th* day of the present month of *June*, the case of the *State of West Virginia ex rel. Joseph S. Miller, Auditor*, v. *T. H. Buchanan, assessor of Brooke county*, upon a petition for mandamus, was in this Court pending and undetermined; that said case involved the constitutionality of the exemption act, contained in section 43, chapter 12 of the Acts of 1881, and the propriety of what is well known throughout the State as the 'supplemental assessment order'; that he was the counsel for the relator in said case; and that on the said *18th* day of *June*, the *Wheeling Intelligencer*, a newspaper of general circulation published in the city of *Wheeling*, contained an editorial article referring to the question involved in said case, and by implication to the said case itself. With this communication is presented a copy of said newspaper containing said article. The Court is informed that *Frew, Campbell & Hart*, consisting of *John Frew, A. W. Campbell* and *C. B. Hart* are the proprietors and publishers of said newspaper, and that said *C. B. Hart* is the chief editor thereof. The said editorial article is as follows:

'The State campaign seems to be shaping itself. It leaks out that the Supreme Court of Appeals is to be brought to the rescue in a decision affirming the constitutionality of the exemption act, and declaring the supplemental assessment order to be lawful and right. This is in effect, what was promised by the three Supreme Court judges to the Democratic caucus before the order was issued.

It might be thought strange that anybody could know what the decision of the Supreme Court is to be on any question. But it seemed equally strange that three out of four judges of the Supreme Court told the Democratic caucus more than a year ago to go ahead and rely on the backing of the Court.

The present understanding is that the decision is to be rendered before the meeting of the Democratic State Convention in order to simplify the situation. It is also understood that this move is not intended to advance the interests of Hon. E. Boyd Faulkner.

Of course it was not intended that the purpose of the Court should be made public, and publicity may induce the Court to change its mind, just to show that somebody has been taking liberties with the text and misrepresenting the Court. We shall see what we shall see.'

It is therefore considered and ordered by the Court that a rule be and is hereby awarded against the said *John Frew, A. W. Campbell* and *C. B. Hart*, proprietors and publishers of said *Wheeling Intelligencer*, and said *C. B. Hart*, chief editor thereof, commanding them and each of them to appear before this Court on *Saturday morning, June 28*, at *ten* o'clock, to show cause, if any or either of them can, why they and each of them, shall not be attached for their contempt of this Court in publishing the aforesaid article.

It is further ordered that service of a copy of this order on the said parties above named, shall be considered as service of the said rule."

2. It was held in this case that the

Thomas Egan, Jr., called in Warranty.

On motion of *Lazarus, Moore & Lemie*, of counsel for *Peter Fabacher*, plaintiff herein, of *E. W. Huntington* and *Horace L. Dufour*, of counsel for *Bryant & Mathers*, defendants, and of *White, Parlange & Saunders*, of counsel for *Thomas Eagan*, called in warranty — and on giving this court to be informed and to understand that there is now pending before this court in this division a cause as above entitled wherein *Peter Fabacher* is plaintiff, *Bryant & Mathers* are defendants, and *Thomas Eagan* is defendant called in warranty of said *Bryant & Mathers*; that issue was joined in said cause upon the main demand and upon the call in warranty; that after issue so joined said cause was in due course of procedure fixed for trial; that upon the prayer of the plaintiff it was to be tried by jury.

And on further giving the court to be informed and to understand that said case was regularly called for trial on *Thursday, March 16, 1893*, and a jury impaneled and sworn to try the issues in said case — that the trial of said case was continued until *Friday, March 17*, and testimony administered for and on behalf of plaintiff in support of his demand, and that there were two witnesses sworn on said trial, to wit: *Peter Fabacher*, the plaintiff, and *John Mahone*, a witness for and on behalf of the plaintiff; that prior to the adjournment on *March 17*, the jury being allowed their liberty and freedom, they were instructed by the court to hold no converse with reference to the case or the issues therein, and were especially instructed and directed not to allow any one to discuss the case which they the jury held as jurors under consideration for a verdict.

And on further giving the court to be informed and to understand that the case was only partially tried, that all the witnesses for the plaintiff had not been heard, that none had been called for the defendants, *Bryant & Mathers*, and none for *Thomas Eagan*, called in warranty, and that the case was continued for further consideration by the court and the jury until *Tuesday, March 21, 1893*, at *11* o'clock *A.* M., when the jury were by said court directed to be present in court to hear the further testimony in the case and to pass upon the issues therein.

And on giving the court to be further informed and to understand that a newspaper known as the *Times-Democrat*, and published by the *Times-Democrat Publishing Company*, of which *Ashton Phelps* is president, and *Page M. Baker* is the manager, did on *Sunday, March 19, 1893*, publish or cause to be published and circulated throughout the city of *New Orleans* the daily issue of said paper, in which was contained a commentary or criticism upon the case now pending before

civil district court for the parish of Orleans is a court of record of original general jurisdiction, and is not an inferior court, in the technical sense of that term. It has the power and authority to punish for contempt of court, and though the proceedings in cases of constructive contempt differ from those in cases of actual contempt, the power of that court, under proper proceedings, extends to both. It was further held that where a publication in a newspaper being read by jurors and attendants on the courts would have a tendency to interfere with the proper and unbiased administration of the laws in pending cases, it may be adjudged a contempt and accordingly punished.

this court and the jury, and to give their opinion for the public's perusal, of the relative positions of the parties to this controversy, and their comments upon the testimony of the witnesses who had testified in said case, and that the effect of the said publication was to operate to the injury of all the parties to said case, and was a discussion of the case out of the hearing of the court, and had the effect of influencing the judgment of the jurors, who have been sworn to try the issues upon the evidence as adduced in court and upon the law as given to them by the court.

And on further giving the court to be informed and understand that the statements contained in said article are in many respects not true and not justified by any evidence received in the case.

And on further giving the court to be informed and understand that if in the said comments upon the case depending before the court and the jury the said newspaper was acting upon its own motion, it was guilty of a breach of the license and privilege of the press; and if acting from other motives they should disclose to the court at whose suggestion or instance the said publication was made in order that justice may be done, and that there should be no miscarriage of justice in consequence of said publication; that by their acts and doings in the premises they have been guilty of a flagrant breach of the decorum of this court and are in contempt thereof.

It is ordered that the *Times Publishing Company*, through its manager, *Page M. Baker*, and its president, *Ashton Phelps*, do show cause on *Tuesday*, *March 21*, 1893, at *11* o'clock *A.* M., in open court, why the said manager and president should not disclose to the court the party at whose instance the said publication was made, and from whom the information was received, and whether the said publication was paid for, and if so, by whom; or in default thereof, why they should not stand committed for contempt of the authority of this court under the statutes and laws of the State of *Louisiana* in such cases made and provided.

c. For Failure to Obey.[1]

1. Failure to Pay Money to Receiver. — In Cartwright's Case, 114 Mass. 234, the rule to show cause why the defendant should not be punished for contempt for failing to pay over to his coreceiver certain moneys as ordered by the court was in the words following, to wit:

"And now, it appearing to the court here, upon the statement of *James C. Davis*, one of the receivers of the said company, that *John W. Cartwright*, one of the receivers of the said company, has failed and neglected to obey and comply with the order of this court passed in said cause on the *thirteenth* day of *December current*, and also that the said *Cartwright* has appropriated to his own use, without the direction of this court, and without the authority of law, a portion of the assets of the said *Hide & Leather Insurance Company*, it is ordered that the said *Cartwright* be notified, by the service upon him of an attested copy of this order, to be and appear before some one of the justices of this court, at the *court-house* in *Boston*, on *Saturday*, the *twentieth* day of *December current*, at *nine* o'clock in the *fore*noon, then and there to show cause, if any he has, why an attachment should not issue against him, the said *John W. Cartwright*, as and for a contempt of this court, as well for the disobedience of the said order as for an unlawful appropriation of the assets of the said *Hide & Leather Insurance Company* to his own use.

Charles Devens, Jr., J. *S. J.* C."

(1) Order for Examination Before Trial.

Form No. 6191.[1]

New York Supreme Court, *City and* County of *New York*.

Rochester Lamp Company, plaintiff, against *John H. Brigham*, defendant. } Order to Show Cause.

On reading the annexed affidavits of *Edward C. Perkins* and *A. G. Johnson*, and the paper annexed thereto, and on such other affidavits as may be served by the attorneys for the plaintiffs herein on the defendant, or his attorneys, on or before the *seventh* day of *December*, 1895, let *John H. Brigham*, the defendant above named, show cause at a *special* term of this court, to be held at chambers thereof, at the *county court-house*, in the city of *New York*, on the *eleventh* day of *December*, 1895, at *eleven* o'clock in the *fore*noon, or as soon thereafter as counsel can be heard, why he should not be punished as for a contempt for his misconduct in failing to obey the mandate of this court, as alleged in the said affidavit of *Edward C. Perkins*, and why the plaintiff should not have such other and further relief as may be just, with costs of this motion. Service of this order on the above named defendant, *John H. Brigham*, or on Messrs. *Brigham & Baylis*, his attorneys, on or before the *fourth* day of *December*, 1895, shall be sufficient.

Dated *New York*, *December 3*, 1895.

George P. Andrews, J. S. C.

(2) Summons.

Form No. 6192.

(Precedent in State *v.* Bourne, 21 Oregon 225.)[2]

In the *circuit* court of the state of *Oregon* for the county of *Multnomah*.

The State of Oregon, plaintiff, v. *Jonathan Bourne, Jr.*, defendant. }

And now this day the affidavit of *A. C. Emmons*, Esq., having been filed in this court, in the matter entitled, "In the matter of letters rogatory from the *superior* court at *Suffolk* county, *Massachusetts*, in the case of *Annie B. Everett* v. *John Stetson*, pending therein," and it being shown to the court by said affidavit that the above named *Jonathan Bourne, Jr.*, has disobeyed the process of this court duly served upon him requiring him to appear and testify before said *A. C. Emmons*, notary public, as commissioner, under commission from the *superior* court of *Suffolk* county, *Massachusetts*, in said case of *Everett* v. *Stetson* pending therein, by failing to appear before said

1. This form is copied from the records in Rochester Lamp Co. *v.* Brigham, 1 N. Y. App. Div. 490. See Birds. Rev. Stat. N. Y. (1896), p. 796, § 14, subs. 2, and list of statutes cited *supra*, note 1, p. 228.

2. *Oregon.*— Hill's Anno. Laws (1892), § 797. See *supra*, note 1, p. 228.

commissioner at the time and place named in said process, upon motion of *Annie B. Everett*, by *W. M. Gregory*, her attorney, it is therefore ordered that said *Jonathan Bourne, Jr.*, be required to be and appear before this court at *1:30* o'clock *P.* M. of this day, or if service hereof be not so soon made upon him, then forthwith upon service hereof, then and there to show cause why he should not be arrested to answer for contempt of this court, in disobeying the lawful process of this court as above mentioned duly served upon him. It is further ordered that a duly certified copy of this order be forthwith served upon said *Jonathan Bourne, Jr.*

Dated *September 24*, 1891.

E. D. Shattuck, Judge.

3. Attachment.

a. Order that Attachment Issue.[1]

1. For Contemptuous Publication. — In *In re* Millington, 24 Kan. 214, the order for attachment for contemptuous publication, omitting the formal parts, was as follows, to wit:

"Now, on this *seventeenth* day of *May*, A. D. 18*80*, there being reasonable grounds for believing that *Daniel A. Millington* and *Edwin P. Greer* are the editors, publishers and proprietors of a weekly newspaper called the *Winfield Courier*, published and of general circulation in the county of *Cowley*; and that heretofore, to wit, on the *twelfth* day of *May*, *inst.*, the said *Millington* and *Greer* caused to be published in said paper several articles of and concerning a certain case then pending and undetermined in this court in which *the State of Kansas* was plaintiff and *Charles H. Payson* was defendant, and among other things then and there published the following language, viz.: (*Here were set out three contemptuous paragraphs.*) The court being of the opinion that the publications, such as above set forth, concerning a case pending in court, are calculated to obstruct and embarrass the administration of justice, have a tendency to prejudice the public concerning the merits of the case, and to weaken the influence and authority of, and destroy public confidence in, the tribunal trying the cause, and as such are a contempt of court, therefore ordered that an attachment issue forthwith against the said *Millington* and *Greer*, and that they be brought before the bar of this court, and be required to answer in writing and under oath the matters herein set forth and charged."

Conditional Order, unless Witness Attend and Testify. — For the form of a conditional order for an attachment, unless a witness attend and testify, see Briggs *v.* Mackellar, 2 Abb. Pr. (N. Y. C. Pl.) 68.

Failure to Obey Mandamus. — In Delgado *v.* Chavez, 5 N. Mex. 661, the following order for an attachment for contempt was entered, to wit:

"It being shown to the court by the petition and affidavit of *William H. Nesbitt*, filed this *19th* day of *January*, 189*1*, in the cause lately pending in said *district* court, in which *Abraham Staab*, *Juan Garcia* and *William H. Nesbitt* were relators, and *Pedro Delgado* was respondent, that the said defendant, *Pedro Delgado*, has refused, and still does refuse, to obey the peremptory writ of mandamus issued out of this court in said mandamus proceeding on the *15th* day of *January*, 189*1*, it is ordered by the court that an attachment for contempt, returnable at *five* o'clock this *after*noon, issue for the arrest of said defendant, *Pedro Delgado*.

Edward P. Seeds,
Associate Justice, etc.

Santa Fe, New Mexico,
January 19, 189*1*."

Against sheriff for failure to bring in defendant's body. People *v.* Marsh, 2 Cow. (N. Y.) 494

For violation of injunction held void because the court issuing the restraining order had no jurisdiction so to do. *In re* Ayers, 123 U. S. 445.

See also forms in Gorham *v.* Luckett, 6 B. Mon. (Ky.) 639; Young *v.* Cannon, 2 Utah 576.

Form No. 6193.[1]

At a *Special* Term of the *Supreme* Court, held at the *Kings County Court-house* in the City of *Brooklyn* on the *third* day of *January*, 1882.

Present: Hon. *Jasper V. Gilbert*, Justice.

John D. Negus
against
The City of Brooklyn, The Brooklyn Elevated Railway Company and others.
} Order for Attachment.

On reading and filing the affidavits of *David Barnett* and *Edward J. Bergen*, and the injunction order therein referred to and annexed thereto, showing the violation of the injunction heretofore made in this action by the members of the common council of said city of *Brooklyn* and aldermen of said city, to wit, *William Dwyer*, *John McCarty*, *James Kane*, *James Weir*, *Jr.*, *Daniel O'Connell*, *Philip Casey*, *James Donovan*, *William J. LePine*, *Felix W. Doyle*, *William Allison*, *Philip Schmitt*, *William H. Waters*, *Thomas Bowers*, *Richard S. Roberts*, *Benjamin B. Seaman*, *Patrick J. Kelly* and *Thomas R. Armitage*, which injunction was made herein on the *twenty-sixth* day of *December last past*, and which injunction was duly served on the persons above named; now, on motion of *Herbert G. Hull*, attorney for the plaintiff, it is hereby ordered and directed, that an attachment as for a contempt for disobedience of the said injunction order, be issued to the sheriff of the county of *Kings* against each and every of the following named members of the common council of the city of *Brooklyn*, and aldermen of said city, to wit, *William Dwyer*, *John McCarty*, *James Kane*, *James Weir*, *Jr.*, *Daniel O'Connell*, *Philip Casey*, *James Donovan*, *William J. Le Pine*, *Felix W. Doyle*, *William Allison*, *Philip Schmitt*, *William H. Waters*, *Thomas Bowers*, *Richard S. Roberts*, *Benjamin B. Seaman*, *Patrick J. Kelly* and *Thomas R. Armitage*; and that the said attachment be returnable at a *special* term of this court to be held at the *court-house* in the city of *Brooklyn* on the *third* day of *January*, 1882, at *ten* o'clock in the *fore*noon of that day.

And it is further ordered, that each and every of the said persons, to wit, *William Dwyer*, *John McCarty*, *James Kane*, *James Weir*, *Jr.*, *Daniel O'Connell*, *Philip Casey*, *James Donovan*, *William J. Le Pine*, *Felix W. Doyle*, *William Allison*, *Philip Schmitt*, *William H. Waters*, *Thomas Bowers*, *Richard S. Roberts*, *Benjamin B. Seaman*, *Patrick J. Kelly* and *Thomas R. Armitage*, be held to bail on said attachment in the sum of *two thousand* dollars each.

Enter: *J. W. G.*

b. Attachment Writ.

(1) In General.

Form No. 6194.

The State of *Delaware*.

Kent County, ss.

To the Sheriff of *Kent* County, Greeting:

(SEAL) We command you that you attach *Richard Roe*, late of

1. This form is copied from the record in People *v.* Dwyer, 90 N. Y. 402. See Birds. Rev. Stat. N. Y. (1896), p. 631, § 5, and statutes cited *supra*, note 1, p. 228.

Kent county, if he shall be found in your bailiwick, so that you have his body before our judges, at *Dover*, at our *Superior* Court forthwith, to answer unto our judges of a certain contempt by him committed, and further to abide and perform such order as our said court shall then and there consider of him in this behalf, etc., and therefore fail not. And have you then there this writ with your doings thereon indorsed, etc.

Witness, the Honorable *Edward W. Gilpin*, Esquire, chief justice of our said court, at *Dover*, the *twenty-fourth* day of *February*, in the year of our Lord one thousand eight hundred and *ninety-eight*.

John Hancock, Prothonotary.

Form No. 6195.

(82 Me. 606.)[1]

(SEAL) State of *Maine*.

To the Sheriffs of our Counties and their Deputies:

We command you to attach the body of *John Doe*, of *Paris*, in our county of *Oxford*, so that you have him before our *Supreme Judicial* Court, at *Paris*, within and for our county of *Oxford*, on the *fourth Tuesday* of *April next*, to answer for an alleged contempt in not (*Here insert the cause*), and you may take a [bond with sufficient sureties to *Richard Roe*, the party injured, in the sum of *one thousand* dollars, conditioned that he then and there appear and abide the order of court.][2] Hereof fail not and make due return thereof and of your proceedings, at the time and place aforesaid.

Witness, *James Smith*, justice of our said court, the *eighteenth* day of *March*, in the year of our Lord 1896.

George Jones, Clerk.

Form No. 6196.

(Precedent in *In re* Wood, 82 Mich. 76.)[3]

State of *Michigan*, } ss.
County of *Wayne*. }

(SEAL) In the *Circuit* Court for said County.

To the Sheriff or any Deputy Sheriff of *Wayne* County, Greeting:

Whereas, it has been made to appear to said *circuit* court, by return of the officer duly made, that *E. T. Wood* was duly served with an order of said court citing him to appear before said court on *Wednesday*, the *4th* day of *June*, 1890, at *9:30* o'clock A. M., to show cause why he should not be punished for contempt of court, and the hearing of said matter being continued until 2 P. M. of said *June 4*, at which time said respondent was ordered to appear in court, and *E. T. Wood* has made default in obeying the command of said order:

Now, therefore, you, and each of you, are hereby commanded, in the name of the people of the State of *Michigan*, forthwith to appre-

1. Form is also set out in 37 Me. 595.
2. Where the party is not bailable, that part of the writ enclosed by [ ] should be omitted.
3. In this case the petitioner was discharged on habeas corpus, as the contempt was not committed within the view of the court and the proceedings were not commenced by affidavit. The form of the writ, however, is good.

hend said *E. T. Wood*, and bring him before the said court to be dealt with according to law; and you are further commanded to detain, in the manner prescribed by law, the said *E. T. Wood*, until he shall be discharged by said *circuit* court, and of this writ make due return.

Witness, the Honorable *H. N. Brevoort*, Presiding Judge, on the *4th* day of *June*, A. D. 1890.

Wm. P. Lane,
Clerk of the *Circuit* Court for the County of *Wayne*.
By *Wm. May*, Dp. Clk.

Form No. 6197.

(Minn. Stat. (1894), § 5092.)

State of *Minnesota*, } ss.
County of *Ramsey*. }

The State of *Minnesota*.

To the sheriff or constable of said county:

You are hereby commanded to apprehend *John Doe*, and bring him before *Abraham Kent*, one of the justices of the peace of said county, at his office in said county, to show cause why he, the said *John Doe*, should not be convicted of a criminal contempt alleged to have been committed on the *eighteenth* day of *January*, A. D. 1898, before the said justice, while engaged as a justice of the peace in judicial proceedings.

Dated this *twentieth* day of *January*, A. D. 1898.

Abraham Kent, justice of the peace.

Form No. 6198.

(Precedent in Matter of Sloan, 5 N. Mex. 637.)

The Territory of *New Mexico* to the sheriff of *Santa Fe* county, greeting:

You are hereby commanded to arrest and take the body of *John H. Sloan*, and him safely keep, so that you have his body before the *district* court within and for the county of *Santa Fe*, sitting at chambers at the *federal building* in said county, on *Monday*, *January 19*, 1891, at *nine* o'clock *A.* M., then and there to answer for a charge of contempt.

Witness, the Honorable *Edward P. Seeds*, associate justice of the *supreme* court of the territory of *New Mexico*, and judge of the *First* judicial *district* court thereof, and the seal of said *district* court, this *17th* day of *January*, 1891.

A. E. Walker, Clerk. (SEAL)

Form No. 6199.

(Hill's Anno. Stat. Wash. (1891), § 1605.)[1]

The State of *Washington*, } ss.
King County. }

To the Sheriff or any constable of said County:

In the name of the state of *Washington*, you are hereby commanded to apprehend *John Doe*, and bring him before *Abraham Kent*, one of

1. The same form is set out in Sanb. & B. Anno. Stat. Wis. (1889), § 3578.

the justices of the peace of said county, at his office in said county, to show cause why he should not be convicted of a contempt alleged to have been committed on the *sixth* day of *January*, A. D. 1898, before the said justice, while engaged as a justice of the peace in a judicial proceeding.

Dated this *tenth* day of *January*, A. D. 1898.

Abraham Kent, Justice of the Peace.

(2) For Contempt before Arbitrators.

Form No. 6200.

(Pepp. & L. Dig. Pa. (1895), p. 180, § 53.)

Cumberland County, ss.

The *Commonwealth* of *Pennsylvania*.

To the constable of *Carlisle*. We command you, that you take *Richard Roe*, late of your county, aforesaid, and have him forthwith before *Samuel Short*, *William West* and *Leonard A. Ford*, arbitrators (or *referees*) appointed to hear and determine all matters in variance in a certain action, wherein *John Doe* is plaintiff and *Joseph Hunt* defendant, at the house of *Samuel Short*, in *Carlisle*, then and there to answer to such matters and things as shall be objected against him, and not depart without leave.

Witness my hand, this *twenty-fifth* day of *February*, A. D. 1898.

Samuel Short.
William West.
Leonard A. Ford. } Arbitrators.

(3) For Contemptuous Affidavit for Change of Venue.

Form No. 6201.

(Precedent in Hughes *v.* People, 5 Colo. 437.)

State of *Colorado*, }
Clear Creek County. } ss.

The People of the State of *Colorado* to the Sheriff of *Clear Creek* County, Greeting:

We command you to take *William T. Hughes*, and him safely keep, so that you have his body forthwith before our *county* court of *Clear Creek* County at a term now being held at the court in *Georgetown* for probate matters, to answer us for and concerning a contempt of our said court, in this, to wit: on the *24th* day of *June*, 1879, in the *district* court in and for said county, at the regular *June* term thereof, A. D. 1879, in a case then and therein pending, wherein *Daniel Ernst*, *administrator of the estate of Jenny Akin*, against *William T. Hughes*, *William J. Hurd* and *Frank X. Aicher*; after the trial of said case by said *district* court, the following order was therein entered by said *district* court, to wit: (*Here was set out a copy of the order.*)[1]

1. **The order** was as follows:
"Now, at this day comes the plaintiff, by his attorney, *G. G. White*, and the said defendants, by their attorney, *John A. Coulter*, and this cause came on to be heard, and is submitted to the court without a jury, and after hearing all the testimony, and the court being

That afterwards, to wit, on the *15th* day of *July*, 1879, a copy of the said order was filed in the said *county* court.

That afterwards, on the *5th* day of *August*, A. D. 1879, by order of the attorney of the estate of said *Jenny Akin*, a citation, under the hand and seal of said *county* court, was duly issued, requiring the said defendants, *Wm. T. Hughes*, *Wm. J. Hurd*, *Frank X. Aicher* and *Charles H. Martin*, to be and appear before said *county* court on the *6th* day of *August*, 1879, then and there to show cause, if any they may have, why they, and each of them, should not comply with the judgment and order of said *district* court; and that said *William T. Hughes* show what amount, if any, he has paid out on account of said estate. Which said citation was duly served upon said *Wm. T. Hughes*, by the sheriff of *Clear Creek* county, on the day of the date hereof; and on said *Frank X. Aicher*, on the *6th* day of *August*, 1879, and on said last day duly returned in court.

That upon last said date the said *Wm. T. Hughes* failed to appear in said *county* court in person, but did appear by *John A. Coulter*, Esq., his attorney; and upon information received by this court from the said *John A. Coulter*, as such attorney, the court, of its own motion, continued the time for the appearance of the said *Wm. T. Hughes* to answer concerning said citation until *Thursday*, the *7th* day of *August*, A. D. 1879, at *2* o'clock *P.* M. of said day. And on the said *7th* day of *August*, A. D. 1879, at *2* o'clock *P.* M., and for more than one hour thereafter, the said *Wm. T. Hughes* still failed to personally appear before said court in obedience to said citation, and the order extending the time of appearance of said *Hughes* in respect thereto; but the said *John A. Coulter*, attorney, did appear for the said *William T. Hughes*, and presented to the court to be filed, the pretended answer of the said *William T. Hughes*, in words and figures following: (*Here was set out the answer in full.*)[1]

sufficiently advised in the matter, it is ordered by the court that the defendants, *W. T. Hughes*, *Wm. J. Hurd* and *Frank X. Aicher*, deliver to the said administrator all and singular the goods and chattels belonging to the said estate, viz: one bedstead, one bureau, one commode, one rocking chair, one heating stove, one dining table, one meat safe, one wash bowl, one bed spring, one mattress, one bolster, two pillows, two bed spreads, three comforts, and all other articles of personal property that they and each of them have in their possession, or under their control; and it appearing that *Charles H. Martin* has in his possession certain property belonging to said estate: one trunk and contents, one wash bowl and other articles, it is ordered that he deliver the same to said administrator, and that the said defendants and the said *Martin* are hereby required to account to the *county* court of this county for all personal property they, or any of them, have had, or may have, in their possession or under their control, belonging to said estate. It is further ordered that the said *William T. Hughes* pay into said *county* court the sum of *nineteen* dollars, received by him from the sale of personal property belonging to said estate, and had and received by him from said estate, except as to such amount as he may have paid out on account of said estate, and for which he will account to said *county* court, and that the said defendants pay the costs of this appeal and all other proceedings had herein; and that the order be certified by the clerk of this court to the said *county* court, and the same be there enforced as the law directs."

1. The answer was as follows:

"The defendant, in response to the citation issued by the judge of the *county* court, within and for the county of *Clear Creek*, *Colorado*, on the *5th* day of *August*, A. D. 1879:

That during the same session of said court, the said *Hughes* still being absent therefrom, the said *John A. Coulter*, his attorney, pre-

I.

That on the *26th* day of *June*, 1879, an order was made and entered of record in the *district* court, within and for the county of *Clear Creek*, *Colorado*, against *William T. Hughes*, *William J. Hurd*, *Frank X. Aicher* and *Charles H. Martin*, and in favor of *Daniel Ernst*, administrator of the estate of *Jenny Akin*, deceased, ordering these defendants to turn over certain goods and to pay over certain moneys in said order specified; and it was further ordered by the *district* court, that these defendants have *thirty* days to file their bill of exceptions in said cause.

That the defendants, to wit: on the *30th* day of *June*, A. D. 1879, the said *Daniel Ernst*, administrator of the estate of *Jenny Akin*, deceased, compromised, released and discharged, and received in accord and satisfaction the goods in the possession of *William J. Hurd*, one of the above named defendants, which said compromise, release and discharge is in words and figures as follows, to wit:

'*Daniel Ernst*, *admin.*,
v. } No. *2,138*.
W. T. Hughes et al.

Plaintiff and defendants hereby compromise all matters in dispute in this cause, and defendants agree to turn over to plaintiff all goods of the estate of *Jenny Akin*, now in the possession of *William J. Hurd*, and law the same no farther, for which plaintiff agrees to absolve them from all existing and further liabilities of whatsoever kind and nature, and the defendants be fully acquitted of the same.

June 30, 1879.

Daniel Ernst.
W. T. Hughes,
For Defendants.'

That defendants did, on the *30th* day of *June*. 1879, fully perform their agreements and undertakings, in accordance with the above agreement, and did then and there deliver the goods mentioned in the said release and discharge to the said *Daniel Ernst*, administrator aforesaid, and that said release and discharge was made a part and parcel of the records of the *district* court of *Clear Creek* County, *Colorado*.

That the defendants, relying and believing that said release and discharge, after their compliance with the same, would wholly absolve them from any further or other liability in the premises, and that the same were made in good faith, allowed the time for filing bill of exceptions and making up the record in the said *district* court within and for the county of *Clear Creek*, *Colorado*, to pass without filing the same.

These defendants further state that said *Daniel Ernst*, administrator aforesaid, had full notice of the above release and discharge, and the performance thereof on the part of these defendants, and did duly accept the terms and conditions of the same.

And these defendants further state, that the judge of the *county* court within and for the county of *Clear Creek*, *Colorado*, had notice of the release and discharge as aforesaid, at or about the time that the same was executed by the said *Daniel Ernst*, administrator as aforesaid, and further charge, upon information and belief, that *G. G. White*, attorney of the estate of *Jenny Akin*, had notice of the release and discharge of these defendants, on or about the time that said *Daniel Ernst*, administrator as aforesaid, executed and performed the conditions of said agreement; and further charged, upon information and belief, that the said county judge and *G. G. White*, the attorney for said estate, and *Daniel Ernst*, administrator aforesaid, purpose and intentionally acquiesced in the release and discharge given by *Daniel Ernst*, administrator aforesaid, until the time for perfecting the record of the case in the *district* court had expired, and thus gained an unjust and undue advantage by these further proceedings in said cause.

John A. Coulter,
Attorney for Defendants.

State of *Colorado*, } ss.
Clear Creek County. }

W. T. Hughes, of lawful age, being first duly sworn, on oath states that he has read the foregoing answer and knows the contents of the same, and that the same are true of his own knowledge, excepting those matters stated on information and belief, and as to those matters, he believes the same to be true. *W. T. Hughes.*

Subscribed and sworn to before me this *August 6*, 1879.

Arthur D. Bullis, Notary Public."

sented to the court the affidavit of said *W. T. Hughes*, stating causes for a change of venue of said case, which affidavit of said *William T. Hughes* is in words and figures following, to wit: (*Here was set out the affidavit in full.*)[1]

Whereupon, upon information imparted to said court, the time for appearance of said *Hughes*, under the said citation, was extended to *August 11*, 1879, at *10* o'clock *A.* M.

Such contempt consisting in —

First. The failure of said *Hughes* to personally appear as required by said citation.

Second. The allegations in said answer, sworn to by said *Hughes*, contained in the eight last lines of said answer, are disrespectful to the judge of said *county* court, untrue, scandalous and impertinent.

Third. The affidavit of said *Hughes*, stating causes for a change of venue of said case, contained grossly scandalous, untrue and impertinent allegations and outrageously insulting imputations against the said *county* court and the judge thereof.

And have you then and there this writ, with an indorsement showing how you have executed the same.

Witness, *J. C. McCoy*, Judge of said court, and the seal thereof, at *Georgetown*, this *12th* day of *August*, A. D. 1879.

(SEAL) *J. C. McCoy*, County Judge.

(4) For Contemptuous Publication.[2]

1. The affidavit was as follows:

"State of *Colorado*, } ss. In *County*
Clear Creek County. } Court.

Daniel Ernst, administrator, etc.,
v.
William T. Hughes, William J. Hurd, Charles H. Martin and Frank X. Aicher.

William T. Hughes, being duly sworn according to law, on oath states that he is one of the above named defendants in the above entitled cause. That he fears that he cannot have a fair and impartial hearing or trial before *John C. McCoy*, county judge within and for the county of *Clear Creek*, *Colorado*, where the above entitled action is pending, because —

As affiant is informed and believes, and therefore charges the fact to be, that the said *John C. McCoy*, county judge of said county, and before whom said action is now pending, has prejudged the merits of this action against these defendants; and further, as affiant is informed, and verily believes, that the said *John C. McCoy* is interested in the result of these proceedings; and further, that the said *John C. McCoy*, county judge as aforesaid, is so prejudiced against this affiant, as to incapacitate him from doing this affiant justice in any cause in which this affiant is a party or has any interest whatever.

That this bitter and disqualifying enmity has existed over a year last past, and was greatly increased after the sitting of the grand jury at the *June* term of the *district* court, before whom, as is said, certain charges were preferred against *John C. McCoy*, accusing him of taking and securing a bribe from one *G. G. White*, in a cause pending in said *county* court, the preferring of which charges the said *John C. McCoy* charges affiant of being chief and instrumental in bringing about.

For these and other reasons, affiant says that a fair and impartial trial cannot be had in said cause, nor of any issue arising out of the same.

W. T. Hughes.

Subscribed and sworn to before me, this *August 6*, 1879.

J. P. Post, Justice of the Peace."

2. See also a form in Neel *v.* State, 9 Ark. 259.

Form No. 6202.

(Precedent in People *v.* Wilson. 64 Ill. 236.)

State of *Illinois*, } *Northern Grand Division.*
In the *Supreme* Court. } *September* Term, A. D. 1872.
The People of the State of *Illinois*, to the Sheriff of *La Salle* County—Greeting:

Whereas, it has been made to appear that *Charles L. Wilson* and *Andrew Shuman* have printed and published an article, which has been adjudged by the said court, now in session at *Ottawa*, in the aforesaid county and State, to have been printed and published in contempt of said court while so in session as aforesaid.

We, therefore, command you, that you attach the said *Charles L. Wilson* and *Andrew Shuman*, so as to have their bodies forthwith before our said *supreme* court at *Ottawa*, in the county aforesaid, to answer the said court of the said contempt, by them lately committed against it, as it is said, and further to do and receive what our said court shall in that behalf consider. Hereof fail not, and have you then and there this writ.

Witness, *Charles B. Lawrence*, Chief Justice of said Court, and the seal thereof, at *Ottawa*, this *6th* day of *November* in the year of our Lord one thousand eight hundred and *seventy-two*.

(SEAL) *W. M. Taylor*, Clerk of the *Supreme* Court.

Form No. 6203.

(Precedent in State *v.* Frew, 24 W. Va. 491.)

State of *West Virginia*.
In the *Supreme* Court *of Appeals*. *June* Term, 1884.
The State of *West Virginia* to the Sheriff of *Ohio* county, greeting:

Whereas it has been made to appear, that *John Frew* and *C. B. Hart* have printed and published an article, which has been adjudged by the said court, now in session at *Wheeling*, in the aforesaid county and State, to have been printed and published in contempt of said court while so in session, as aforesaid. We therefore command you that you attach the said *John Frew* and *C. B. Hart*, so as to have their bodies forthwith before our said *Supreme* Court *of Appeals* here now in session at *Wheeling* in the county aforesaid, to answer the said Court of the said contempt, by them lately committed against it, as it is said, and further to do and receive what our said Court shall in that behalf consider. Hereof fail not and have you then and there this writ.

Witness the judges of said Court, and the seal thereof, this *7th* day of *July*, 1884.

O. S. Long,
(SEAL) Clerk *Supreme* Court *of Appeals*.

(5) For Failure to Obey.[1]

1. **Failure to Obey Order.** — In Conover's Case, 5 Abb. Pr. (N. Y. Supreme Ct.) 194, note, the warrant drawn by David Dudley Field, Esq., was, omitting the signature of the judge, in the words following, to wit:

(*a*) *Injunction.*[1]

Form No. 6204.[2]

The People of the State of *New York*, to the Sheriff of *Kings* County, Greeting:

We command you that you attach *William Dwyer*, *John McCarty*, *James Kane*, *James Weir*, *Jr.*, *Daniel O'Connell*, *Philip Casey*, *James Donovan*, *William J. LePine*, *Felix W. Doyle*, *William Allison*, *Philip Schmitt*, *William H. Waters*, *Thomas Bowers*, *Richard S. Roberts*, *Benjamin B. Seaman*, *Patrick J. Kelly* and *Thomas R. Armitage*, and each and every of them, so as to have their and each and every their several bodies before our *Supreme* Court, at a *special* term thereof to be held at the *court-house* in the city of *Brooklyn* on the *third* day of

"The People of the State of *New York* to the Sheriff of the *City and* County of *New York*:

Whereas, at the *City Hall* of the city of *New York*, on the *18th* day of *June*, 1857, complaint was made to the undersigned, one of the justices of the *Supreme* Court of the State of *New York*, by *Daniel D. Conover*, setting forth, among other things, that *Joseph S. Taylor*, who was, in *November*, 1855, elected to the office of street commissioner of the city of *New York*, to serve for *three* years from *January*, 1856, went into his office in said *January*, and continued in office until the *9th* day of *June*, 1857, when he died; that the said *Conover* was, on the *12th* day of said *June*, duly appointed and commissioned to fill the vacancy in said office occasioned by the death of the said *Taylor*, and had duly qualified himself, and was then the successor to said office; that books, maps, papers and documents belonging and appertaining to the said office had come to the hands of *Charles Devlin*; that the said *Conover* had demanded the said books, maps, papers and documents from the said *Charles Devlin*, and that the said *Devlin* had withheld them, and refused to deliver them to the said *Conover*, and asking that the said *Devlin* might be ordered to show cause before the undersigned why he should not be compelled to deliver the said books, maps, papers and documents to the said *Conover*. And whereas, being satisfied by the oath of the said *Conover* that the said books, maps, papers and documents were withheld, the undersigned granted an order directing the said *Devlin* to show cause before the undersigned, on the *23d* day of said *June*, at the chambers of the justices of said court, in the *City Hall* of the city of *New York*, why he should not be thus compelled; and whereas, at the time and place so appointed the said *Conover* and the said *Devlin* appeared before the undersigned, and due proof having been made of the service of the said order, the undersigned proceeded to inquire into the circumstances, which inquiry was continued before the undersigned from day to day until this day, the matter having been regularly thus adjourned, and the said *Devlin*, not having made oath that he has truly delivered to the said *Conover* the said books, maps, papers and documents, and it appearing to the undersigned that the said books, maps, papers and documents are still withheld, and that the said *Devlin* omits and refuses to deliver up the same, —these presents are therefore to command you, the sheriff of the *city and* county of *New York*, and you are hereby commanded, to take the body of the said *Charles Devlin*, and commit him to the jail of the *city and* county of *New York*, there to remain until he shall deliver such books, maps, papers and documents, or be otherwise discharged according to law.

In witness whereof, I have hereto set my hand and seal, at the *City Hall* of the city of *New York*, this *ninth* day of *July*, in the year of our Lord one thousand eight hundred and *fifty-seven*."

1. See also forms in Stimpson *v.* Putnam, 41 Vt. 238.

2. This form is copied from the record in People *v.* Dwyer, 90 N. Y. 402. See Birds. Rev. Stat. N. Y. (1896), p. 631, § 5, and list of statutes cited *supra*, note 1, p. 228.

January, 1882, at *ten* o'clock in the *fore*noon of said day, there to answer us as well touching the contempt which they and each of them as alleged have committed against us, as also such other matters as shall be laid to their and each of their charge, and further to perform and abide such order as our said court shall make in this behalf.

And have you then and there this writ and make and return a certificate under your hand of the manner in which you shall have executed the same.

Witness, Hon. *Jasper W. Gilbert*, one of the justices of our court, at the *court-house* in the city of *Brooklyn*, on the *third* day of *January*, 1882.

(SEAL) *Chas. B. Elliott*, Clerk.

H. G. Hull, Attorney for Relator, *John D. Negus*.

(*b*) *Mandamus.*

Form No. 6205.

(Precedent in People *v.* Pearson, 4 Ill. 272.)

State of *Illinois*, *Supreme* Court:

The People of the State of *Illinois*, to any and all Sheriffs of all Counties of the State of *Illinois*, Greeting:[1]

We command you, and each of you, that you take the body of *John Pearson*, and that you have him before the *Supreme* Court of the State of *Illinois*, at *Springfield*, forthwith, to answer for a contempt of said court, in refusing to obey a peremptory mandamus issued out of the said court, and to him directed and delivered, and have you then and there this writ.

Witness, *William Wilson*, chief justice of our said *Supreme* Court at *Springfield*, this *tenth* day of *June*, A. D. 1840.

(SEAL) *J. M. Duncan*, Clerk *S.* C.
Per *Jas. H. Matheny*, D. C.

(*c*) *Order.*

Form No. 6206.

(1 N. Car. Code (1883), p. 352, No. 13.)

John Doe
against
Richard Roe. } *Justice's* Court.

State of *North Carolina*, to any constable or other lawful officer of *Nash* county, Greeting:

Whereas, it appears that *Samuel Short* was duly served on the *sixteenth* day of *February*, 1898, with an order issued by *Abraham Kent*, Esq., one of our justices of the peace for said county, requiring said *Samuel Short* to attend before said justice at his office, in said county, on the *twenty-third* day of *February*, 1898, and be examined on oath

1. **Address.** — It was held in this case that an attachment from the supreme court for contempt may be directed "To any and all sheriffs of all counties of the state of Illinois."

concerning a certain debt owing to the defendant named in the above action, by the said *Samuel Short* (or *property held by the said Samuel Short for the benefit of the defendant*).

And whereas, the said *Samuel Short*, in contempt of said order, has refused or neglected, and doth still refuse or neglect, to appear and be examined on oath as in said order he is required to do;

Now, therefore, we command you that you forthwith attach the said *Samuel Short*, so as to have his body before *Abraham Kent*, Esq., one of our justices of the peace for your county, on the *twenty-sixth* day of *February*, 18*98*, at his office in said county, then and there to answer, touching the contempt which he, as is alleged, hath committed against our authority; and further, to perform and abide by such order as our said justice shall make in his behalf. And have you then and there this writ, with a return, under your hand, of your proceedings thereon.

Hereof fail not at your peril.

Witness, our said justice, this *twenty-third* day of *February*, 18*98*.

Abraham Kent, Justice of the Peace.

(*a*) *Subpœna.*

aa. In Civil Case.

(*aa*) *Before Court of Record.*

Form No. 6207.[1]

The State of *Alabama*. } *Circuit* Court,
Jefferson County. } *April* Term, 18*96*.

To any Sheriff of the State of *Alabama* — Greeting:

It having been made known to the court by competent evidence that heretofore, viz: on the *tenth* day of *April*, 18*96*, a subpœna issued out of this court directed to *John Livingston* commanding him to appear at the present term of this court to give evidence in behalf of the plaintiff in a case now pending in this court wherein *John Doe* is the plaintiff and *Richard Roe* is the defendant. And it appearing to the court by the return of the sheriff on said subpœna indorsed, that the said *John Livingston* was duly served with a copy of said subpœna; and it further appearing that said *John Livingston* has wilfully refused to appear and testify, as by said subpœna he was required; and wilfully and without good excuse refuses to appear in obedience to said subpœna. You are, therefore, hereby commanded to arrest the said *John Livingston* and him safely keep, unless he give bond in the sum of *five hundred* dollars, so that you have him before this court on the *twentieth* day of *April*, 18*96*.

Herein fail not, and show by your return how you have executed this process.

Witness my hand, this the *eleventh* day of *April*, 18*96*.

Richard Fleming, Clerk.

1. *Alabama*. — Civ. Code (1886), § 756, subs. 4. See also statutes cited *supra*, note 1, p. 228.

Form No. 6208.

(Sand. & H. Dig. Ark. (1894), p. 1630, No. 49.)[1]

The State of *Arkansas* to the Sheriff of *Pulaski* County:

You are commanded to arrest *George Morgan* and have him before the *Pulaski Circuit* Court on the *fourth* day of its *next* (*March*) term, which will be on *Thursday*, the *third* day of *March*, 1898, as well to testify in behalf of the plaintiff in an action in said court between *Richard Roe*, plaintiff, and *John Doe*, defendant, as to answer for contempt of said court; and you will admit him to give bail for his appearance in the sum of *one hundred* dollars.

(SEAL) Witness my hand and the seal of said court this *tenth* day of *January*, 1898.

John Hancock, Clerk.

Form No. 6209.[2]

In the *District* Court of the *First* Judicial District of the State of *Idaho*, in and for the County of *Shoshone*.

The People of the State of *Idaho*, to the Sheriff of the County of *Shoshone*, Greeting:

You are hereby commanded, forthwith, to attach the body of *Richard Roe* and bring him before the *District* Court of said county, to show cause, if any he has, why he should not be adjudged in contempt for failing to attend and serve as witness in said court, after being personally served with a subpœna to attend.

Witness, Hon. *John Marshall*, judge of the *District* Court, this *twenty-fourth* day of *February*, 1898.

(SEAL) *John Hancock*, Clerk.

Form No. 6210.[3]

In the name of the People of the State of *Michigan*.

(SEAL) To the Sheriff of the County of *Wayne*:

We command you to attach *Leonard A. Ford* and bring him forthwith personally before the *Circuit* Court for the county of *Wayne* to answer to said court for a certain contempt in not obeying a certain writ of subpœna, issued out of the said court, and to him directed, and on him duly served, commanding him to appear on *Monday*, the *eighth* day of *September*, 1896, at the city of *Detroit*, before the said court, to testify and give evidence in a certain cause then to be tried between *John Doe*, plaintiff, and *Richard Roe*, defendant, on the part of the *defendant*. And you are further commanded to detain the said *Leonard A. Ford* in your custody until he shall be discharged by the said *Circuit* Court. And have you there then this writ.

Witness, the Honorable *R. E. Frazer*, *circuit* judge, at the city of *Detroit*, this *eighth* day of *September*, in the year of our Lord one thousand eight hundred and *ninety-six*.

John Hancock, Clerk.

1. *Arkansas*. — Sand. & H. Dig. (1894), § 2944. See also statutes cited *supra*, note 1, p. 228.

2. *Idaho*. — Rev. Stat. (1887), § 5158. See statutes cited *supra*, note 1, p. 228.

3. *Michigan*. — How. Anno. Stat. (1882), § 7257, subs. 5, § 7483. See also statutes cited *supra*, note 1, p. 228.

Form No. 6211.[1]

The State of *Mississippi* to the Sheriff of *De Soto* County in said State:

You are hereby commanded to take the body of *John Livingston*, if to be found in said county, and have him before the *Chancery* Court of the county of *De Soto* in the state aforesaid, at the *court-house* in the town of *Hernando* in said *De Soto* county, on the *tenth* day of *May*, A. D. 1895, at *eleven* o'clock *A.* M., to testify for the *plaintiff* in the case of *John Doe* against *Richard Roe*, No. *183*. But if said *John Livingston* shall furnish bail, with sureties, to be approved by you, in the sum of *five hundred* dollars, for his appearance as above required, you will discharge him.[2]

And have there then this writ.

Given under my hand and seal of said court, and issued this the *second* day of *May*, A. D. 1895.

(SEAL) *Charles Fleming*,
Chancery Clerk, *De Soto* County, Miss.

Form No. 6212.[3]

In the *District* Court of the *Fourth* Judicial District of the State of *Montana*, County of *Missoula*, ss:

The People of the State of *Montana* to the Sheriff of said *Missoula* County, Greeting:[4]

You are hereby commanded forthwith to attach the body of *Leonard A. Ford*, defaulting witness, and have him before our said court on *Monday*, the *twenty-first* day of *February*, A. D. 1898, then and there to show cause why he should not be punished for contempt in disobeying the mandate of said court.

Witness, the Hon. *John Marshall*, judge, and the seal of said court, this *fourteenth* day of *February*, A. D. 1898.

(SEAL) Attest: *John Hancock*, Clerk.

Form No. 6213.[5]

State of *Rhode Island and Providence Plantations.*

Providence, sc.

Court *of Common Pleas*, *May* Term, A. D. 1898.

To the Sheriff of said County or to his Deputy, Greeting:

Whereas, at our said court, now holden at *Providence*, within and for said county, at its present term, *John Livingston* has been duly summoned to appear before our said court, to give evidence of what

1. *Mississippi.* — Anno. Code (1892), § 506. See also statutes cited *supra*, note 1, p. 228.

2. **Bond for Appearance.** — The court shall, on ordering the attachment, direct whether the witness shall enter into bond for his appearance, and in what sum, and whether with or without sureties, which bond the sheriff or other officer by whom the attachment is executed is authorized to take, payable to the state. Miss. Anno. Code (1892), § 3454.

3. *Montana.* — Code Civ. Proc. (1895), §§ 2173, 3306, 1650, subs. 4.

4. **Address.** — The warrant must be directed to the sheriff of the county where the witness may be. Mont. Code Civ. Proc. (1895), § 3309.

5. *Rhode Island.* — Gen. Laws (1896), c. 221, § 6. See also statutes cited *supra*, note 1, p. 228.

he knows relative to a certain cause now pending between *John Doe*, plaintiff, and *Richard Roe*, defendant, and has, in contempt of our said court, and to its great hindrance and delay, neglected and refused to appear to testify in said case:—

We therefore command you to attach the body of the said *John Livingston* and have him forthwith before our said court to testify in relation to said case, and likewise to abide the order and determination of our said court for his contempt of its process.

Witness, Hon. *Thomas Durfee*, chief justice of our *Supreme* Court, at *Providence*, this *third* day of *May*, A. D. *1893*.

Charles Edwards, Clerk.

Form No. 6214.[1]

The State of *Tennessee* to the Sheriff of *Maury* County, Greeting:

Whereas, in our *Circuit* Court for *Maury* county, an action is pending wherein *John Doe* is plaintiff and *Richard Roe* is defendant, and whereas, it appears to the court from the affidavit of the said *John Doe*, and from an inspection of the subpœna, that *John Livingston* has been regularly summoned to appear at the *January* term of our said court, to testify on behalf of the said *John Doe* in said action; and it further appearing to the court that said *John Livingston* has failed to obey said summons, in contempt of court: It is therefore ordered, that an attachment issue for the body of the said *John Livingston*.

You are hereby commanded to have the body of the said *John Livingston* before the judge of our said court to give evidence as heretofore commanded, and answer for contempt. Herein fail not.

Witness, *George Smith*, clerk of said court, at office in *Columbia*, this *second Monday* in *January*, *1893*, and of American independence the one hundred and *seventeenth* year.

Charles Jones, Clerk.
Edward Smith, D. C.

(*bb*) *Before Justice of Peace.*

Form No. 6215.

(Sand. & H. Dig. Ark. (1894), p. 1630, No. 50.)[2]

The State of *Arkansas* to any Constable of *Pulaski* County:

You are commanded to arrest *George Morgan* and have him before me at my office in *Little Rock*, on the *tenth* day of *January*, 1894, as well to testify in behalf of the plaintiff in an action pending before me between *Richard Roe*, plaintiff, and *John Doe*, defendant, as to answer for contempt; and you will admit him to give bail for his appearance in the sum of *one hundred* dollars.

Given under my hand this *first* day of *January*, 1894.

Thomas Mason, J. P.

1. *Tennessee.* — Code (1896), § 5918, subs. 4. See also statutes cited *supra*, note 1, p. 228.

2. *Arkansas.* — Sand. & H. Dig. (1894), § 2944. See also list of statutes cited *supra*, note 1, p. 228.

Form No. 6216.[1]

State of *Indiana*, } ss.
St. Joseph County. }

The State of *Indiana*, to *John Smith*, constable of *Portage* Township:

Whereas, it appears to the satisfaction of the undersigned, a justice of the peace of said township, that *John Doe* was, on the *eighteenth* day of *May*, 1895, duly served with a subpœna to appear at my office at *eleven* o'clock *fore*noon of the *twenty-seventh* day of *May*, 1895, and testify in a certain complaint then pending before me, between *Edward Rice* and *Richard Roe*, and that he neglected to attend as such witness in conformity to said subpœna; you are therefore hereby commanded to attach the body of said *John Doe* and him forthwith bring before me, to answer to his alleged contempt in so disobeying said writ as aforesaid. And of this attachment make due return.

Given under my hand and seal, this *twenty-eighth* day of *May*, 1895.

Charles Fleming. (SEAL)

bb. In Criminal Case.

(*aa*) *Before Court.*

Form No. 6217.[2]

State of *Florida*, } In *Circuit* Court, *Second* Judicial Circuit.
County of *Leon*. }

The State of Florida }
against }
John Doe. }

To the Sheriff of *Leon* County, Greeting:

We command you that you attach *John Livingston* so that you have his body before the honorable the judge of the *Circuit* Court for said county, *instanter*, to answer us as well of a certain contempt by him to us offered in failing to attend the said court at the *spring* term, 1896, as a witness in behalf of the state in the above entitled cause (as in the last summons), as upon those things to do and receive what our said court shall consider just and proper in the premises. And have you then and there this writ.

Witness the Honorable *George Reynolds*, judge, as also *Edward Rice*, clerk, and the seal of said court, at the *court-house* at *Tallahassee*, *Florida*, this *tenth* day of *April*, A. D. 1896.

(SEAL) *Edward Rice*, Clerk.

(*bb*) *Before Grand Jury.*

Form No. 6218.[3]

The State of *Mississippi* to the Sheriff of *De Soto* County, in said State:

You are hereby commanded to take the body of *Edward Rice*, if to

1. *Indiana*. — Horner's Stat (1896), § 1436. See also statutes cited *supra*, note 1, p. 228.
2. *Florida*. — Rev. Stat. (1892), §§ 975, 976. See *supra*, note 1, p. 228.
3. *Mississippi*. — Anno. Code (1892), § 3457. See also statutes cited *supra*, note 1, p. 228.

be found in your county, and have him before the grand jurors of the state of *Mississippi*, impaneled for the *May* term, A. D. 1897, of the *Circuit* Court of the county of *De Soto*, in the state aforesaid, at the *court-house*, in the town of *Hernando* in said *De Soto* county, on the *fifth* day of *June*, 1897, at *eleven* o'clock *A.* M., to testify concerning any matters upon which he may be legally examined. But if the said *Edward Rice* shall furnish bail, with sureties, to be approved by you, in the sum of *five hundred* dollars, for his appearance at said time and place, you will discharge him.[1]

And have there then this writ.

Given under my hand and the seal of said court, and issued this the *twenty-eighth* day of *May*, 1897.

Daniel Webster,
Circuit Clerk, *De Soto* County, *Miss.*

(*cc*) *Before County Attorney in Liquor Case.*

Form No. 6219.[2]

The State of *Kansas* to *Charles Johnson*, Sheriff of *Linn* County, in said State, Greeting:

Whereas, on the *tenth* day of *April*, A. D. 1896, it having become my duty as county attorney of said *Linn* county, in the state of *Kansas*, because of due notification to me theretofore duly given of a certain violation of the act of the legislature of the state of *Kansas* entitled "An Act amendatory and supplemental to chapter 128 of the Session Laws of 1881, being an act entitled 'An Act to prohibit the manufacture and sale of intoxicating liquors, except for medical, scientific and mechanical purposes, and to regulate the manufacture and sale thereof for such excepted purposes,'" approved March 7, 1885, to diligently inquire into the facts of such alleged violation of said act, and having reason to believe that one *Richard Roe* of said county had information and knowledge of said alleged violation of said act, I did, as such county attorney, duly sign and issue my certain subpœna as by said act in such cases provided, directed to the sheriff of said *Linn* county, thereby requiring and commanding the said *Richard Roe* to appear before me at the *county court-house* in said county on the *twenty-second* day of *April*, A. D. 1896, at *eleven* o'clock *A.* M. of said day, then and there to testify before me concerning said violation of said act, which said subpœna was delivered by me forthwith to said sheriff, and was by him duly served upon said *Richard Roe*, at said *Linn* county, on the said *tenth* day of *April*, A. D. 1896, as by return thereof to me by said sheriff fully appears; and the time so fixed for his said appearance having fully passed, and said *Richard Roe* having wholly failed to attend before me as he was as aforesaid required and commanded, and no excuse for said disobedience to said subpœna appearing:

These are therefore to command you that you do forthwith arrest the said *Richard Roe* and bring him before me at the *county court-*

1. See *supra*, note 2, p. 268.

2. *Kansas*. — Gen. Stat. (1889), § 2435.

house in said *Linn* county, on the *twenty-ninth* day of *April*, A. D. 1896, at *eleven* o'clock *A.* M., to give his testimony and be examined as aforesaid, and to answer for his said contempt in disobeying my said subpœna. And have you then and there this writ, with your due and proper return thereof.

Witness my hand at *Mound City*, *Potose* township in said *Linn* county, in the state of *Kansas*, this *twenty-second* day of *April*, A. D. 1896.

Ralph Anderson,
County Attorney of *Linn* County, *Kansas*.

cc. BEFORE UNITED STATES SENATE.

Form No. 6220.

(Precedent in Sanborn *v.* Carleton, 15 Gray (Mass.) 399.)[1]

By authority of the *Senate* of the *United States*, in the *Senate* of the *United States*.

To *Dunning R. McNair*, sergeant at arms of the *senate* of the *United States*:

Whereas *F. B. Sanborn*, of *Concord* in the State of *Massachusetts*, was on the *sixteenth* day of *January*, A. D. 1860, duly summoned to appear and testify before the select committee of the *senate* "to inquire into the facts attending the late invasion and seizure of the armory and arsenal of the *United States* at *Harper's Ferry* in *Virginia* by a band of armed men," and has failed and refused to appear before said committee pursuant to said summons. And whereas the *senate* did on the *fifteenth* day of *February*, A. D. 1860, by a resolution direct the president of the *senate* to issue his warrant to the sergeant at arms, commanding him to take into his custody the body of the said *F. B. Sanborn*, wherever to be found, and to have the same forthwith before the bar of the *senate* to answer for contempt of the authority of the *senate* in thus failing and refusing to appear before said committee:

You are therefore commanded to take the body of the said *F. B. Sanborn*, wherever found, and forthwith have the same before the bar of the *senate* to answer for contempt of the authority of the *senate* in thus failing to appear before its committee.

In testimony whereof I have set my hand and seal of the *Senate* of the *United States* this *16th* day of *February*, 1860.

(SEAL) *John C. Breckenridge*,
Vice President of the United States and
President of the *Senate*.

Attest: *Asbury Dickins*,
Secretary of the *Senate* of the *United States*.

1. It was held in this case, in habeas corpus proceedings, that a warrant issued by order of the senate of the United States for the arrest of a witness for contempt in refusing to appear before a committee of the senate, and addressed only to the sergeant-at-arms of the senate, cannot be served by deputy in *Massachusetts*.

(*e*) *Venire.*

Form No. 6221.[1]

In the *Superior* Court, in and for the County of *Marin*, State of *California*.

The People of the State of *California*, to the Sheriff of the County of *Marin*, Greeting:

You are hereby commanded forthwith to attach the body of *John Livingston*, defaulting juror, and have him before our said court, on *Friday*, the *tenth* day of *April*, 1894, at the hour of *eleven* A. M., and there to show cause why he should not be punished for contempt, in (*Here describe the contemptuous act*).

Witness, Hon. *George Randolph*, *superior* judge, and the seal of the said court, this *seventh* day of *April*, 1896.

Attest: *Richard Fleming*, Clerk,

(SEAL) By *George Jones*, Deputy Clerk.

(*Indorsement.*)[2]

Form No. 6222.[3]

State of *Illinois*, } ss.
La Salle County. }

The People of the State of *Illinois*, to any Constable of said County, Greeting:

Whereas, *John Smith* has been duly summoned to appear before me, at my office in said county, on the *tenth* day of *May*, A. D. 1894, to serve as a juror in a certain case then and there pending before me, wherein *John Doe* was the plaintiff and *Richard Roe* was the defendant, and hath failed to appear according to the command of the summons:

We, therefore, command you to attach the body of the said *John Smith*, and him forthwith bring before me, at my office in *Ottawa*, in said county, then and there to answer for contempt in not obeying said summons, and to show cause, if any he have, why he should not be fined for such contempt, according to the statute in such case made and provided. Hereof fail not, but of this writ make legal service and due return.

Given under my hand and seal, this *eleventh* day of *May*, A. D. 1894.

Richard Fleming, (SEAL)
Justice of the Peace.

4. Interrogatories to Contemnor.

a. Order Directing Filing.

Form No. 6223.[4]

At a *Special* Term of the *Supreme* Court, held at the *Court-house*,

1. *California*. — Code Civ. Proc. (1897), § 1209, subs. 11. See also statutes cited *supra*, note 1, p. 228.

2. **Indorsement.** — The judge must indorse on the warrant a direction that bail may be taken specifying the amount. Cal. Code Civ. Proc. (1897), § 1213.

3. *Illinois*. — Starr & C. Anno. Stat. (1896), p. 2462, par. 161. See also statutes cited *supra*, note 1, p 228.

4. This form is copied from the record in the case of People *v.* Dwyer, 90 N. Y. 402. See Birds. Rev. Stat. N. Y. (1896), p. 633, § 16, and statutes cited *supra*, note 1, p. 228.

in the City of *Brooklyn*, in the County of *Kings*, on the *9th* day of *January*, 1882.

Present: Hon. *Jasper W. Gilbert*, Justice.

The People of the State of New York, on the relation of John D. Negus,
against
Richard S. Roberts, William Dwyer, John McCarty, James Kane, James Weir, Jr., Daniel O'Connell, Philip Casey, James Donovan, William J. LePine, Felix W. Doyle, William Allison, Philip Schmitt, William H. Waters, Thomas Bowers, Benjamin B. Seaman, Patrick J. Kelly and Thomas R. Armitage.

Each of the said seventeen last above named persons being charged with a contempt of court in wilfully violating an order of injunction granted by Hon. *Henry A. Moore*, *County* Judge of *Kings* County, on the *26th* day of *December*, 1881, in a certain action pending in the *Supreme* Court of the State of *New York*, County of *Kings*, wherein *John D. Negus* is plaintiff and *The City of Brooklyn, The Brooklyn Elevated Railway Company and others* are defendants, and a writ of attachment having been issued against each of the above named seventeen persons for such contempt, directed to the Sheriff of the County of *Kings*, and returnable this day, and the said Sheriff having made return to the said attachment, that he had attached the said above named seventeen persons and each of them, and has taken bonds for the due appearance of them and each of them according to the exigency of the said attachment, now on filing said attachment and return and the several bonds accompanying same, and the said seventeen above named persons and each of them now being by virtue of such attachment personally before the Court, and each severally denying that he is guilty of the misconduct alleged against him as aforesaid, and said *Richard S. Roberts*, appearing by *Ward & Jenks*, his counsel, and the other persons appearing by *Winchester Britton*, their counsel, and reading and filing the said attachment and the papers on which the same was granted. Now on motion of *Herbert G. Hull*, the attorney for the relator above named, and after hearing *Ward & Jenks*, of counsel for *Richard S. Roberts*, and *Winchester Britton*, counsel for the other persons, in opposition, and *David Barnett* and *Erastus Cooke*, of counsel for the relator, in support, Ordered that the relator above named forthwith file in the office of the Clerk of this Court, interrogatories specifying the facts and circumstances alleged against the aforesaid seventeen persons and each of them, and requiring their and each of their answers thereto.

And it is further ordered that the said seventeen above named persons and each and every of them make written answers to said interrogatories, on oath, within *twenty-four* hours after the service of said interrogatories on them or their counsel.

It is further ordered that further proceedings herein stand adjourned until the *11th* day of *January*, 1882, at *10* o'clock in the

*fore*noon, at a *Special* Term of this Court, to be held at the *Court-house*, in the City of *Brooklyn*, County of *Kings*, at which time and place it is hereby ordered and directed by this Court that the said seventeen above named persons and each of them attend this Court and abide the further order of this Court.

Granted *January 9*, 1882.

Chas. B. Elliott, Clerk.

Enter: *J. W. G.*

b. Interrogatories.

(1) For Violating Injunction.

Form No. 6224.[1]

Supreme Court, County of *Kings*.

(*Title of cause as in Form No. 6223.*)

Interrogatories to be administered to *Richard S. Roberts*, *William Dwyer*, *John McCarty*, *James Kane*, *James Weir, Jr.*, *Daniel O'Connell*, *Philip Casey*, *James Donovan*, *William J. LePine*, *Felix W. Doyle*, *William Allison*, *Philip Schmitt*, *William H. Waters*, *Thomas Bowers*, *Benjamin B. Seaman*, *Patrick Kelly* and *Thomas R. Armitage*, and each of them, touching a contempt alleged against them and each of them for wilfully violating an injunction order granted by Hon. *Henry A. Moore*, *County* Judge of *Kings* County, on the *26th* day of *December*, 1881, in a certain action then pending in the *Supreme* Court, State of *New York*, County of *Kings*, wherein *John D. Negus* was plaintiff and *The City of Brooklyn*, *The Brooklyn Elevated Railway Company and others* were defendants, which interrogatories are hereby exhibited pursuant to an order of this Court, dated *January 9th*, 1882.

First interrogatory. Were you from the *1st* day of *January*, 1881, to and including the *31st* day of *December*, 1881, one of the Aldermen of the City of *Brooklyn*? If yea, in what ward in said City were you elected as such?

Were you, during the time above mentioned, a member of the Common Council of the City of *Brooklyn*?

Second interrogatory. Were you served on the *27th* day of *December*, 1881, at the *City Hall*, in the City of *Brooklyn*, and previous to the meeting of the Common Council on that day, with a copy of the summons and complaint, affidavits, undertaking and injunction order and order to show cause in an action in the *Supreme* Court of the State of *New York*, County of *Kings*, wherein *John D. Negus* was plaintiff and *The City of Brooklyn*, *The Brooklyn Elevated Railway Company and others* were defendants, a copy of which is hereto annexed marked "*A*, *January 9*, 1882"?

Was not such injunction and order to show cause served upon you by showing you the original injunction and order to show cause in said action, bearing the signature or purporting to bear the signature thereto of *Henry A. Moore*, *County* Judge of *Kings* County, and at the same time and place was there not delivered to and left with you per-

1. This form is copied from the record in the case of People *v.* Dwyer, 90 N. Y. 402. See Birds. Rev. Stat. N. Y. (1896), p. 633, § 16, and statutes cited *supra*, note 1, p. 228.

sonally a copy or what purported to be a copy thereof, together with a printed copy of the summons and complaint in said action?

When was such service made?

Answer fully.

Third interrogatory. Was not the object of the adjournment of said meeting held *December 27th*, 1881, and after the service of the injunction order made by Hon. *Henry A. Moore*, *County* Judge of *Kings* County, to *December 28th*, 1881, for the purpose of passing or adopting the resolution which was the subject of the injunction order served on you?

Fourth interrogatory. Were any of the adjournments had after the service of the injunction for the purpose of adopting the aforesaid resolutions?

Fifth interrogatory. Did you attend a meeting or session of the Common Council of the City of *Brooklyn* on the *31st* day of *December*, 1881? If yea, at what time was said meeting or session held?

Sixth interrogatory. Was a motion then made (if yea, by whom?) to take from the table a communication from his Honor the Mayor, presented *December 19th*, 1881, disapproving of resolutions adopted in Common Council *December 6th*, 1881?

Was or was not such communication the veto or disapproval by the Mayor of the resolutions mentioned in the plaintiff's complaint in the action hereinbefore mentioned? If you answer nay, or say you do not know or do not remember, then produce and annex to your answer to this interrogatory a copy of the resolutions adopted *December 6th*, 1881, to which such communications referred.

Seventh interrogatory. Was a motion then made to adopt the said resolutions notwithstanding the objections of his Honor the Mayor? Who made such motion?

Were the resolutions mentioned in the plaintiff's complaint and injunction order adopted by a two-thirds vote? Did you not vote in the affirmative on such motion? Who else voted in the affirmative on said motion? How many members so voted?

Eighth interrogatory. Was or was not a motion then made to reconsider the vote then just taken, or was or was not said motion lost? Did you not vote in the negative on said motion to reconsider the vote taken on the adoption of the resolutions? Who else voted in the negative?

Herbert G. Hull, Attorney for the Relator.

(2) For Disobeying Mandamus.

Form No. 6225.

(Precedent in People v. Pearson, 4 Ill. 274.)

Supreme Court of the State of *Illinois*, *June* Term, 1840.

The People of the State of Illinois on the relation of Robt. C. Bristol v. *John Pearson.* } Attachment for Contempt.

Interrogatories propounded by said relator to be answered by the said *John Pearson.*

Interrogatory 1. Did *J. Y. Scammon*, on or about the *twenty-fifth* day of *April*, A. D. eighteen hundred and *forty*, at the *Circuit* Court in and for the county of *Cook*, at the last term of said court, deliver to you a certain writ of mandamus, issued by the said *Supreme* Court, and bearing date *February fourteenth*, eighteen hundred and *forty*, commanding you to sign a certain bill of exceptions in the case of *Robert C. Bristol* against *John F. Phillips* — and was the same delivered in open court, to you?

Interrogatory 2. Have you, *John Pearson*, made a return to said writ of mandamus? If so, when, how, and where? And where is said writ of mandamus? And when was it last in your possession? And if not in your possession, what have you done with it?

Interrogatory 3. Did you, as judge of said *Circuit* Court, at the time the said *J. Y. Scammon* delivered to you the said writ of mandamus, direct the clerk of said *Circuit* Court to enter a rule against the said *J. Y. Scammon*, to show cause why he (said *Scammon*) should not be fined or imprisoned, or both, for a contempt of court?

Interrogatory 4. At the time the said *Scammon* answered said rule, did you not state in open court that you would not obey said writ of mandamus, or sign the bill of exceptions recited in said writ, or words to that effect?

G. Spring, Counsel for Relator.

5. Proceedings Connected with Reference.

a. Order of Reference.

Form No. 6226.[1]

At a *Special* Term of the *Supreme* Court of the State of *New York*, in and for the *Fifth* Judicial District, at the *Court-house* in the city of *Utica*, in the county of *Oneida*, on the *8th* day of *January*, 1889.

Present: Hon. *M. H. Merwin*, Justice Presiding.

Rozellen Aldinger }
against }
Emery S. Pugh. }

This action having been commenced by the personal service of the summons and complaint on defendant on the *7th* day of *December*, 1888, and an injunction order having been duly granted in said action by Hon. *H. C. Sholes*, *Special Surrogate* of *Oneida* County, restraining and enjoining the defendant and his servants, agents, assistants and assigns from doing certain acts therein specified, and said injunction order having been duly served on the defendant on said *7th* day of *December*, 1888, and an order having been granted by Hon. *M. H. Merwin*, a Justice of the *Supreme* Court, on the *31st* day of *December*, 1888, requiring the defendant *Emery S. Pugh* and *Stephen J. Pugh*, *Michael Leary* and the *Utica and Mohawk Railroad Co.* and each of them to show cause at this term of court why they and each of them should not be punished for their alleged contempt, offense and mis-

1. This form is copied from the record in the case of Aldinger *v.* Pugh, 132 N. Y. 403.

conduct for violating or disobeying said injunction order as alleged and charged in said order to show cause and the papers upon which it was granted, which are hereby referred to.

Now on reading and filing said order to show cause, granted *December 31*, 1888, the petition of the plaintiff, verified *December 31*, 1888, the affidavit of *Henry F. Coupe*, verified *December 31*, 1888, the affidavit of *Geo. E. Philo*, verified *December 29*, 1888, copies of the summons, complaint and injunction, with proof of personal service, the affidavit of the defendant *Emery S. Pugh*, verified *January 5*, 1889 (*and the affidavits of nine others similarly described*), and after hearing *Henry F. Coupe*, one of plaintiff's attorneys, in favor of the relief asked in said order to show cause and *W. E. Lewis*, Esq., attorney for *Michael Leary* and the said *Utica and Mohawk Railroad Co.*, and *Edward Lewis*, Esq., attorney for the defendant in opposition thereto.

Ordered, That said matter be and the same hereby is referred to *Charles G. Irish*, Esq., an attorney and counsellor at law residing at *Utica*, *New York*, to take the examination or testimony of the parties to this proceeding and their witnesses of the facts, charged as to whether such violated said injunction order, and if violated, whether such violation was wilful, and whether *Stephen J. Pugh*, *Michael Leary* and the *Utica & Mohawk Railroad Co.* or either of them knowingly or wilfully violated said injunction order, or whether they or either of them aided or abetted the defendant in violating the same in removing from the farm of the plaintiff, situated in the town of *Frankfort*, *Herkimer* county, *New York*, on the *22d* and *25th* days of *December*, 1888, a quantity of hay in violation of said injunction order, and the value of the hay drawn away from said farm, if any, on said *22d* and *24th* days of *December*, 1888, and also if said injunction order was so violated by said parties or either of them did the same defeat, impede, impair or prejudice the rights of the plaintiff in this action and to what extent and the damages sustained by the plaintiff, and that he report said facts and return the testimony taken by him, together with his opinion, to the *Supreme* Court, and also ordered that either party may bring said matter to trial or hearing on serving the other with *ten* days notice.

Enter: *M. H. M.*, J. *S.* C.

b. Referee's Report.

Form No. 6227.[1]

Supreme Court.

Rozellen Aldinger against *Emery S. Pugh.*

Reference as to whether *Michael Leary*, the *U. & M. R. R. Co.*, *Emery Pugh* and *Stephen J. Pugh* are or either of them is guilty of contempt of court in disobeying an injunction order served on defendant on *Dec. 7th*, 1888.

1. This form is copied from the record in the case of Aldinger *v.* Pugh, 132 N. Y. 403.

To the *Supreme* Court: —

The undersigned, to whom it was referred by an order of this court granted at a *Special* Term thereof at *Utica*, *N. Y.*, on *Jan. 8th*, 1889, to take the examination or testimony of the parties to this proceeding and their witnesses of the facts charged as to whether the defendant violated said injunction order, and if violated whether such violation was wilful and whether *Stephen J. Pugh*, *Michael Leary*, and the *U. & M. R. R. Co.*, or either of them knowingly or wilfully violated said injunction order or whether they or either of them aided or abetted the defendant in violating the same in removing from the farm of the plaintiff in *Frankfort*, *N. Y.*, on *Dec. 22d* and *24th*, 1888, a quantity of hay in violation of said injunction order, and the value of the hay drawn away on said *22d* and *24th* days of *Dec.*, 1888, and also if said injunction order was violated by said parties or either of them did the same defeat, impair, impede or prejudice the rights of the plaintiff in this action and to what extent are the damages sustained by the plaintiff, and that I report said facts and return the testimony taken by me together with my opinion, would report as follows:

That I have been detained by the parties and their attorneys, the testimony taken by me is hereto annexed and the facts as I believe them to be from the testimony are as follows:

1st. That on *Feb. 13th*, 1888, by a written instrument dated that day, the plaintiff leased to defendant her farm in the town of *Frankfort*, *N. Y.*, for the term of *one* year from *Apr. 1st*, 1888, to end on *Apr. 1st*, 1889, at a yearly rent of $*250*.

2d. That in and by said lease the defendant agreed to keep at least *ten* cows on said premises and to draw back on said farm *one* load of manure for every ton of hay or straw that he should sell from said premises.

3d. That defendant took possession of said farm on or about *Apr. 1*, 1889, and remained in possession during said term and before the expiration thereof fully complied with all its provisions except as stated in the next finding.

4th. That in *Nov.*, 1888, it was agreed between the parties that plaintiff would waive the requirements for defendant to keep *ten* cows if he would give security to draw back on the place a two-horse load of manure for every ton of hay or straw he might take away and give a note with defendant's father's (*S. J. Pugh*) on it for the installment of rent due *Jan. 1*, 1889.

5th. That defendant did not give such security or note and up to the time of the commencement of this action had drawn away about *three* tons of straw worth $*20* and about *thirteen* tons of hay worth $*152*.

6th. That this action was commenced *Dec. 7th*, 1888, by the service of summons, complaint and injunction order on the defendant, at the house on leased premises, between *six* and *seven* P. M., that he went to *S. J. Pugh's* the same evening immediately after such service and there saw his father.

That that evening or the next day *Stephen J. Pugh* was fully cognizant of the service of said order and its contents.

7th. That on *Dec. 22d* and *24th*, 1888, the said *Stephen J. Pugh* drew away from said leased premises *eleven* tons of hay of the value of $*132*

and that defendant was aware of such removal and did nothing to prevent it.

8th. That by such removal on *Dec. 22d* and *24th*, 1888, defendant and *S. J. Pugh* and each of them knowingly and wilfully violated said injunction order, the defendant in permitting the said *Stephen J. Pugh* to remove said hay and the said *S. J. Pugh* in aiding, abetting and assisting the defendant to remove, draw away and dispose of the hay referred to in and restrained by said injunction order, and further in refusing to return the *two* tons of said hay removed by him on *Dec. 24th*, 1888.

9th. That on the *22d* and *24th* days of *December*, 1888, and prior thereto, *Michael Leary* was employed by the *Utica & Mohawk Railroad Company* as superintendent, and as such had charge of said *Utica & Mohawk Railroad Company's* street railroad in the city of *Utica*, *N. Y.*

10th. That the injunction order herein granted by *H. C. Sholes*, *Special Surrogate* of *Oneida* County, was served upon *Michael Leary* by *Henry F. Coupe* on *Bleecker* St., in the city of *Utica*, on *Dec. 24*, 1888, about *10 A.* M. of that day, by exhibiting to said *Leary* the injunction order and the signature of the *Special Surrogate* granting the same, but that no copy of said order was served upon said *Leary* or left with him at any time.

11th. That said *Michael Leary* had no notice of the existence of said injunction order prior to said *Dec. 24*, and no knowledge that the hay referred to in the petition and moving papers herein or the title to the same was effected by any order or injunction.

12th. That said *Michael Leary* did not wilfully or knowingly violate said injunction order and that he did not knowingly aid or abet the defendant, *Emery S. Pugh*, or any other person, in violating the same by receiving from the farm of the plaintiff in the town of *Frankfort*, *Herkimer* County, *N. Y.*, on the *22d* and *24th* days of *December*, 1888, a quantity of hay in violation of said injunction order.

13th. That the *Utica and Mohawk Railroad Company* is a corporation owning and operating a street railroad in the city of *Utica*, *N. Y.*, and that on the said *22d* and *24th* days of *December*, 1888, and prior thereto, *James F. Mann* was the president, *George D. Dimon* was the treasurer, *R. W. Sherman*, vice president, and *W. E. Lewis*, secretary thereof.

14th. That the injunction order herein granted by *H. C. Sholes*, *Special Surrogate* of *Oneida* County, *Dec. 7*, 1888, was not served upon said corporation or its officers before the delivery of the hay referred to in the petition herein.

15th. That the *Utica and Mohawk Railroad Company* did not wilfully or knowingly violate said injunction order and that said corporation and its officers did not aid or abet the defendant, *Emery S. Pugh*, or any other person in violating the same by receiving from the farm of the plaintiff, in the town of *Frankfort*, *Herkimer* County, *N. Y.*, on the *22d* and *24th* days of *December*, 1888, a quantity of hay in violation of said injunction order.

16th. That no notice was given to the *Utica and Mohawk Railroad*

Company or its officers by the plaintiff or her attorneys of the injunction order in question until about *10 A.* M. on the *24th* day of *December*, *1888*.

I find as conclusions of law:

1st. That as to said *Michael Leary* the order to show cause granted by Hon. *M. H. Merwin*, J. *S.* C., dated *Dec. 31*, *1888*, why said *Michael Leary* should not be punished for contempt, offenses and misconduct should be dismissed.

2d. That as to the *Utica and Mohawk Railroad Company*, the order to show cause granted by Hon. *M. H. Merwin*, J. *S.* C., dated *Dec. 31*, *1888*, why said corporation the *Utica and Mohawk Railroad Company* should not be punished for contempt, offenses and misconduct should be dismissed.

3d. That the defendant *Emery S. Pugh* and his father, *Stephen J. Pugh*, are guilty of contempt by entering into a plan to evade said injunction order when cognizant of its provisions by removing the hay referred to in said injunction order, and they and each of them should be punished for his misconduct in violating said injunction order.

4th. At the time of the service of the injunction order and also on *Dec. 22d* and *24th*, *1888*, the plaintiff was damaged by the fracture of defendant's part to draw back manure equivalent in amount to the hay and straw then drawn away, this damage had since been remedied by defendant drawing manure on the place from *Dec. 15th*, *1888*, and through *Feb.* and *Mar.* *1889*, and inasmuch as the defendant before the expiration of such lease fully complied with all its provisions except keeping the *ten* cows, and drew back upon said premises an amount of manure equivalent to the hay and straw drawn away by him the object of this action is substantially defeated and the plaintiff cannot be said to have suffered any damages from the breach of any covenant in the lease or by removal of the hay.

Charles G. Irish, Referee.

Fees, $*100*, Paid by Plff.
Utica, *N. Y.*, *May 10*, *1889*.

6. Order of Conviction.[1]

1. For other orders of conviction see as follows:

For refusal to pay money to receiver. Wilson *v.* Roach, 4 Cal. 362; Cartwright's Case, 114 Mass. 230.

Failure to obey order in supplementary proceedings. Sickels *v.* Hanley, 4 Abb. N. Cas. (N. Y. Supreme Ct.) 231.

For interference with and attempt to bribe witnesses. Savin, Petitioner, 131 U. S. 267.

For putting fictitious sureties in undertaking to discharge mechanic's lien. McAveney *v.* Brush, 3 N. Y. Ann. Cas. 148.

For failure to surrender note under order of court. Thompson *v.* Onley, 96 N. Car. 9.

For failure to obey judgment. *Ex p.* Henshaw, 73 Cal. 494.

For failure to pay money to assignee. *In re* Burt, 56 Minn. 399.

Of officer for failure to return papers. *Ex p.* Summers, 5 Ired. L. (27 N. Car.) 150.

Order of conviction of contempt in disobeying an injunction. Carroll *v.* New York, etc., R. Co., 1 Duer (N. Y.) 571.

Requisites of Order. — It has been held that the judgment in a proceeding against a party for contempt need only express on its face that it was a contempt generally, and that the specific nature of the contempt need not be set out. *Ex p.* Summers, 5 Ired. L. (27 N.

a. For Contempt in Facie Curiæ.[1]

Form No. 6228.

(Precedent in Harrison *v.* State, 35 Ark. 459.)[2]

State of Arkansas
against
Joseph G. Harrison, William N. May, J. P. Byers, H. W. Walker. } Contempt.

Now, on this day the court doth assess a fine of *fifty* dollars each against *Joseph G. Harrison, William N. May, J. P. Byers* and *H. W. Walker*, for a contempt, committed as follows, viz.: The said *Joseph G. Harrison, William N. May, J. P. Byers* and *H. W. Walker*, being attorneys at law, employed on the side of the defense in a cause pending in this court, wherein the *State of Arkansas* is plaintiff and *S. L. Tucker*, indicted by the name of *Clint. Tucker*, is defendant, and the said attorneys, on filing a motion for a new trial in said cause, stated as one of the grounds of said motion as follows, to wit: "No. 23. Because the judge of this court, in which the prosecution was had herein, was so prejudiced against this defendant that he did not give him a fair and impartial trial;" and afterwards subscribed to an affidavit reaffirming said statement, which the court doth consider a contempt, and doth assess the fines above stated.

It is, therefore, considered and adjudged by the court, that the *State of Arkansas* have and recover of and from the said *Joseph G. Harrison, William N. May, J. P. Byers* and *H. W. Walker* the sum of *fifty* dollars each, as for fine, and all her costs in this behalf laid out and expended, and have execution therefor.

Form No. 6229.

(Precedent in Pickett *v.* Wallace, 57 Cal. 555.)[3]

In the *Supreme* Court of the State of *California*.

Thursday, August 6th, 1874.

Court met at *eleven* o'clock pursuant to adjournment. Present, Hon. *W. T. Wallace*, C. J., *J. B. Crockett*, J., *A. C. Niles*, J., *E. W. McKinstry*, J. *Grant I. Taggart*, Clerk. *Thos. F. O'Connor*, Bailiff.

Car.) 149; State *v.* Miller, 23 W. Va. 801. But in other cases the contrary view has been held. People *v.* Turner 1 Cal. 152; Albany City Bank *v.* Schermerhorn, 9 Paige (N. Y.) 372.

1. See forms in *Ex p.* Stice, 70 Cal. 57; People *v.* Kelly, 24 N. Y. 75; State *v.* Sachs, 2 Wash. 373.

2. In this case plaintiffs sued out a writ of certiorari to the circuit court of Yell county, to bring up the record of proceedings and quash a judgment rendered against them for contempt, but they were held to be plainly in contempt of court, and the judgment was affirmed.

3. A complaint claiming damages for the imprisonment in accordance with the order given in the text was held bad on demurrer, and this judgment was affirmed on appeal.

Precedent.—In *Ex p.* Stice, 70 Cal. 52, it was held that refusal to be sworn as a witness in a cause on trial is a contempt of court both under the provisions of Cal. Code Civ. Proc., § 1209, subs. 10, and also at common law, and that the court had full power to adjudge the contempt and to fix the penalty therefor. The order was as follows:

"In the *Superior* Court of *San Benito County*.

State of California
v.
J. F. Prewett. }

On this *first* day of *March*, 1886, at

The Court having met pursuant to adjournment, the Judges proceeded to their respective seats upon the Bench. *Charles E. Pickett*, being then present in the court-room, suddenly obtruded himself upon the Bench, and into the chair of *Crockett*, J., and announced that he had as good a right to occupy a seat upon the Bench of said Court as the said *Crockett* had, and the said *Pickett* thereupon, being commanded by the Chief Justice to leave the said chair, peremptorily refused to do so, and was subsequently removed therefrom by actual force.

Whereupon it is now here by the Court adjudged that the said *Charles E. Pickett* is guilty of a contempt of this Court, committed in its immediate presence, by unlawfully interfering with its proceedings in manner as aforesaid, and by disorderly, contemptuous, and insolent behavior towards the Court and the Judges thereof then present as aforesaid, it is now here ordered and adjudged by the Court, that for such, his contempt aforesaid, he, the said *Charles E. Pickett*, shall suffer imprisonment by close confinement in the common jail of the *city and* county of *San Francisco* for the period of *five* days, and further, that he pay a fine of *five hundred* dollars, and that if the said fine be not paid at the expiration of *five* days' imprisonment, then it is further ordered, adjudged, and decreed, that the said *Charles E. Pickett* be imprisoned and kept in close confinement in said common jail until the said fine be paid, provided that such imprisonment for the nonpayment of said fine may extend to, but shall not exceed, one day for every *two* dollars of the fine due from him, the said *Charles E. Pickett*, and that a warrant and writ of execution do forthwith issue, directed to the sheriff of the *city and* county of *San Francisco*, commanding him to carry the aforesaid judgment into effect.

And the said *Charles E. Pickett* being still present, and having been adjudged guilty of the contempt of the Court aforesaid, in manner and form aforesaid, and the judgment of the Court in that behalf having been then and there announced in open Court, he, the said *Charles E. Pickett*, then and there insolently and contemptuously used and addressed to the Court then and there, being in open session, the following language in reference to the said judgment, to wit, "I defy your authority."

Whereupon and before committing the said *Charles E. Pickett* into the custody of the sheriff, it is now here adjudged that the said

the hour of *two* o'clock *p.* m., the above named cause was upon trial in the above entitled court, and *Richmond Stice* was called as a witness for the people, and was ordered by the said court to be sworn as a witness, and thereupon, in the immediate view and presence of the said court, he did refuse to be so sworn as a witness.

Whereupon it is adjudged that the said *Richmond Stice* is guilty of a contempt of court in refusing to be so sworn as a witness, and as a penalty thereof it is ordered, adjudged and decreed that *Richmond Stice* pay a fine of *five hundred* dollars ($500), and that in default of the payment thereof he be imprisoned in the county jail of *San Benito* county until said fine be fully satisfied, in the proportion of *one* day's imprisonment for every dollar of the fine; and on the payment of such portion of said fine as shall not have been satisfied by imprisonment at the rate above prescribed, that the defendant be discharged from custody.

James F. Breen, Superior Judge."

Charles E. Pickett is guilty of a further contempt of this Court committed in its immediate presence, by reason of the disorderly, contemptuous, and insolent behavior and language towards the Court and the judges thereof, as last aforesaid, and that for such, his contempt last aforesaid, he shall suffer imprisonment by close confinement in the said common jail for the further period of *five* days, and that he pay a fine in the further sum of *five hundred* dollars.

It is therefore ordered that the said *Charles E. Pickett* be committed into the custody of the sheriff of the *city and* county of *San Francisco*, to be by him imprisoned and kept in close confinement in the common jail of said *city and* county of *San Francisco* for the last-mentioned space of *five* days, and until he pay the said last-mentioned sum of *five hundred* dollars, and that if said last-mentioned fine be not paid at the expiration of said last-named *five* days' imprisonment, then and in that case it is ordered that the said *Charles E. Pickett* be further imprisoned until said last-mentioned fine be paid, provided such imprisonment shall not exceed *one* day for each *two* dollars of said fine last aforesaid adjudged.

The imprisonment for the contempt last aforesaid to commence at the expiration of the imprisonment for the contempt adjudged firstly aforesaid.

Form No. 6230.

(Precedent in *In re* Wood, 82 Mich. 78.)

At a session of the *Circuit* Court for the county of *Wayne*, convened and held at the *Circuit* Court room, in the city of *Detroit*, on the *twenty-ninth* day of May, in the year one thousand eight hundred and *ninety*.

In the Matter of *Emery T. Wood*, for Contempt of Court.

Present: Hons. *H. N. Brevoort*, *Geo. Gartner*, *Geo. S. Hosmer*, *C. J. Reilly*, Circuit Judges.

Before Judge *Brevoort*.

It appearing to the court now here, from its own immediate view thereof, that *Emery T. Wood* hath been and is guilty of disorderly behavior in using language disrespectful to the court during its sitting, and in the immediate view and presence of the said court, and directly tending to interrupt its proceedings, that is to say, in using the following language:

"With all due respect to your honor, I must say that when your honor chastises me from the bench, as your honor does now, and when you chastise me as you did when the pleadings came up, and when the public press sends out a report, and sets your honor upon the pedestal, and says I do not know how to draw a declaration, your honor has overstepped the mark, and not accorded me the justice I am entitled to in this court. It seems to me, while I cannot refrain from the feeling which takes possession of me while I am to be chastised, I must say that I have not been treated fairly in this case, and I have not been treated fairly in one or two other cases before your honor. Why it is, I cannot say. I am not aware that I have ever had any difficulty that your honor should carry into a case I am trying, and affect my client as well as myself. I say there are things

that are discretionary with the court; but if the court abuses his discretion, I have my remedy."

Wherefore, it is adjudged by the said court now here that the said *E. T. Wood* is guilty of a criminal contempt of the said court; and it is further ordered and adjudged that the said *Emery T. Wood* do pay to the people of the State a fine of *twenty-five* dollars within *twenty-four* hours, or that in default thereof, he be committed to the county jail for the period of *five* days.

[*H. N. Brevoort*, Circuit Judge.][1]

Form No. 6231.

(Minn. Stat. (1894), § 5092.)[2]

State of *Minnesota*, } ss.
County of *Ramsey*. }

The State of *Minnesota*.

Whereas, on the *sixth* day of *January*, A. D. 1*898*, while we, the undersigned, one of the justices of the peace of the said county, was engaged in the trial of a cause between *John Doe*, plaintiff, and *Richard Roe*, defendant, in said county, according to the statute in such case made and provided, *Samuel Short*, of the said county, did interrupt the said proceedings, and impair the respect due to the authority of the undersigned, by (*Here describe the cause particularly*), and whereas the said *Samuel Short* was thereupon required by the undersigned to answer for the said contempt, and show cause why he should not be convicted thereof; and whereas the said *Samuel Short* did not show any cause against the said charge: Be it therefore remembered, that the said *Samuel Short* is adjudged to be guilty; and is convicted, of a criminal contempt aforesaid, before the undersigned, and is adjudged by the undersigned to pay a fine of *ten* dollars, or to be imprisoned in the common jail of said county for the term of *two* days, or until he is discharged from imprisonment according to law.

Dated this *sixth* day of *January*, A.D. 1*898*.

Abraham Kent, Justice of the Peace.

Form No. 6232.

(1 N. Car. Code (1883), p. 365, No. 48.)

Whereas, on the *sixth* day of *January*, 1*898*, while engaged in the trial of an action (*or other judicial act*) in which *John Doe* was plaintiff and *Richard Roe* was defendant, at my office in *Nash* county, *Samuel Short* did wilfully and contemptuously interrupt me, and did then and there conduct himself so disorderly and insolently towards me, and by making a loud noise did disturb the proceedings on said trial (*or other judicial act*) and impair the respect due to the authority of the law; and on being ordered by me to cease making such noise and disturbance, the said *Samuel Short* refused so to do, but on the contrary, did publicly declare and with loud voice (*State whatever*

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. The same form is set out in Hill's Anno. Stat. Wash. (1891), § 1606.

offensive words were used); and whereas when immediately called upon by me to answer for the said contempt, said *Samuel Short* did not make any defense thereto, nor excuse himself therefrom; the said *Samuel Short* is therefore convicted of the contempt aforesaid, and is adjudged to pay a fine of *five* dollars and be imprisoned in the county jail for the term of *two* days, and until he pays such fine or is duly discharged from imprisonment according to law.

Abraham Kent, Justice of the Peace.

Form No. 6233.

(Precedent in Com. v. Bell, 145 Pa. St. 381.)

Commonwealth v. *W. D. Wallace.* } In the Court *of Quarter Sessions* of *Lawrence* County, *Pennsylvania.* No. *8 September* Sessions 1890.

And now, *December 17*, 1890, the witnesses *Edwin Shaffer*, alias *Edward Shaffer*, *Thomas J. Downing* and *John R. Tate*, are each sentenced to pay a fine of *two hundred* dollars to the *commonwealth*, and each to undergo an imprisonment in the common jail in and for the county of *Lawrence*, until the *tenth* day of *March next*; and stand committed to the custody of the sheriff for the purpose of carrying into effect this sentence.

By the Court.

Form No. 6234.

(Precedent in *Ex p.* Terry, 128 U. S. 297.)[1]

In the *Circuit* Court of the *United States of America* for the *Northern* District of *California.*

In the Matter of Contempt of *David S. Terry.* In open court.

Whereas on this *3d* day of *September*, 1888, in open court, and in the presence of the judges thereof, to wit, Hon. *Stephen J. Field*, *Circuit* Justice, presiding; Hon. *Lorenzo Sawyer*, *Circuit* Judge, and Hon. *George M. Sabin*, *District* Judge, during the session of said court, and while said court was engaged in its regular business, hearing and

1. In this case the petition for discharge on habeas corpus was dismissed, the court saying in part:

"It is a settled doctrine in the jurisprudence both of England and of this country, never supposed to be in conflict with the liberty of the citizen, that for direct contempts committed in the face of the court, at least one of superior jurisdiction, the offender may, in its discretion, be instantly apprehended and immediately imprisoned, without trial or issue, and without other proof than its actual knowledge of what occurred, and according to an unbroken chain of authorities, reaching back to the earliest times, such power, although arbitrary in its nature and liable to abuse, is absolutely essential to the protection of the courts in the discharge of their functions. Without it, judicial tribunals would be at the mercy of the disorderly and violent, who respect neither the laws enacted for the vindication of public and private rights, nor the officers charged with the duty of adminstering them. To say, in case of a contempt such as is recited in the order below, that the offender was accused, tried, adjudged to be guilty and imprisoned without previous notice of the accusation against him and without an opportunity to be heard, is nothing more than an argument or protest against investing any court, however exalted, or however extensive its general jurisdiction, with the power of proceeding summarily, without further proof or trial, for direct contempts committed in its presence."

determining causes pending before it, one *Sarah Althea Terry* was guilty of misbehaving in the presence and hearing of said court,

And whereas, said court thereupon duly and lawfully ordered the United States marshal, *J. C. Franks*, who was then present, to remove the said *Sarah Althea Terry* from the court-room;

And whereas the said United States marshal then and there attempted to enforce said order, and then and there was resisted by one *David S. Terry*, an attorney of this court, who, while the marshal was attempting to execute said order in the presence of the court, assaulted the said United States marshal, and then and there beat him, the said marshal, and then and there wrongfully and unlawfully assaulted said marshal with a deadly weapon, with intent to obstruct the administration of justice, and to resist such United States marshal and the execution of the said order;

And whereas the said *David S. Terry* was guilty of a contempt of this court by misbehavior in its presence and by a forcible resistance in the presence of the court to a lawful order thereof, in the manner aforesaid;

Now, therefore, be it ordered and adjudged by this court, That the said *David S. Terry*, by reason of said acts, was, and is, guilty of contempt of the authority of this court, committed in its presence on this *3d* day of *September*, 1*888*;

And it is further ordered, That the said *David S. Terry* be punished for said contempt by imprisonment for the term of *six* months;

And it is further ordered, That this judgment be executed by imprisonment of the said *David S. Terry* in the county jail of the county of *Alameda*, in the State of *California*, until the further order of this court, but not to exceed said term of *six* months.

And it is further ordered, That a certified copy of this order, under the seal of the court, be process and warrant for executing this order.

b. For Contemptuous Publication.

Form No. 6235.

(Precedent in State *v.* Judge, 45 La. Ann. 1255.)

Civil District Court for the Parish of *Orleans*.

Tuesday, the *21st* day of *March*, 1*893*. Present, the Hon. *Francis A. Monroe*, Judge.

Peter Fabacher, vs. *Bryant & Mathers*. } No. *35,549*.

In the matter of the rule herein taken upon the *Times-Democrat Publishing Company*, through its manager, *Page M. Baker*, and its president, *Ashton Phelps*, to show cause why said manager and president should not disclose to the court the party at whose instance a certain article which appeared in said *Times-Democrat* newspaper on *Sunday, March 19*, 1*893*, concerning the case in which said rule is taken and which is now on trial before a jury in this court, was published and from whom the information contained in said article was obtained, and whether said article was paid for, and if so by whom,

or in default thereof why they, the defendants in rule, should not stand committed for contempt of this court; said defendants having appeared in person and through their counsel, and having made the disclosures asked for in said rule.

And the court having heard evidence and argument and being satisfied therefrom that said publication was the voluntary act of said *Times-Democrat Publishing Company*, for which said company and its officers are alone responsible, and the question being then submitted to the court by the counsel for the plaintiff and for the defendants respectively whether said company was guilty of contempt of court in publishing said article, and the court finding the law and the evidence to sustain the affirmative of this proposition and for the reasons orally assigned in open court, it is ordered that the *Times-Democrat Publishing Company* and *Page M. Baker*, manager of said company, be adjudged guilty of contempt of the authority of this court in authorizing, publishing and circulating in a newspaper published and circulated within the jurisdiction of this court an article the tendency and effect of which is necessarily to influence and forestall public opinion and the verdict of the jury on the case now being tried.

And the court reserves its decision as to the penalty to be imposed for said contempt.

c. For Failure to Obey.

(1) Decree for Payment of Alimony.

Form No. 6236.[1]

At a *Special* Term of the *Supreme* Court of the State of *New York*, held at the *Supreme* Court chambers in the *City Hall*, in the city of *Albany*, and county of *Albany*, on the *twenty-seventh* day of *August*, 1878.

Present: Hon. *Theodore R. Westbrook*, Justice.

Cornelia Park
agt.
Richard H. Park.

A writ of attachment having heretofore issued out of this court against the defendant *Richard H. Park*, for alleged contempt in disobeying the mandate of the court, contained in the decree herein, granted *April 24th*, 1868, requiring the said defendant to give security for the payment of the allowance therein granted to the plaintiff, which writ was directed to the Sheriff of the *City and* County of *New York* and returnable on the *thirtieth* day of *April*, 1878, and the said Sheriff having returned that he had attached the body of the said

1. This order is copied from the records in Park *v.* Park, 80 N. Y. 156. The defendant claimed that the attachment should be vacated because it was based on his refusal to pay the costs of the suit. This claim was untenable, as the attachment was issued for a disobedience of the order of the court, and the statutory provision (Laws (1847), c. 390, § 2), prohibiting imprisonment for contempt in not paying costs, had no application to this case.

For conditional order that defendant be committed unless money is paid see Hurd *v.* Hurd, 63 Minn. 443.

Richard H. Park, and let him to bail in the sum of *three thousand* dollars, as directed in said writ and by the indorsement of the clerk thereon; and the said *Richard H. Park* having appeared before the court on said *thirtieth* day of *April*, accompanied by counsel, and interrogatories having been filed, specifying the facts and circumstances alleged against the defendant, and a copy of the same having been served on the said defendant, and the said defendant having interposed answers thereto on oath, and also made and presented his affidavit for the purpose of purging himself of contempt; and it having been referred to *A. J. Taylor*, Esquire, to take such proofs as might be offered by either party touching the said defendant's ability to pay said allowance or to give security therefor, and the said defendant having on the *thirtieth* day of *July*, 1878, made a motion to vacate said attachment, and the court having refused to entertain said motion until the coming in of the referee's report, and the hearing of the parties on the attachment proceedings, which was set down for *August 27*, 1878; and testimony having been taken before said referee on the part of both plaintiff and defendant, and the referee having duly reported the same to the court, and the said hearing of the contempt proceedings, under the attachment and the motion to vacate the attachment, having been brought on before the court on said *twenty-seventh* day of *August*, 1878, on the following papers, viz:

The affidavits of *Cornelia Brainard*, dated *November 22*, 1877; of *Samuel T. Smith*, dated *November 26*, 1877, and *July 27*, 1878; the interrogatories on file and the decree in this action on the part of the plaintiff; and the affidavits of *R. H. Park*, dated *April 30*, 1878; and *E. C. Ripley*, dated *April 27*, 1878, and *April 24*, 1878; also of *R. H. Park*, dated *July 8*, 1878, and of *E. C. Ripley* of same date, and the sworn answers to the interrogatories filed herein, on the part of the defendant, together with the report of the referee, *A. J. Taylor*, Esq., and testimony taken before him, and all other papers on file herein; and *Samuel Tro. Smith*, Esq., of counsel for plaintiff, having been heard in favor of the attachment and in opposition to the motion to vacate, and *Edward C. Ripley*, Esquire, of counsel for defendant, in favor of said motion and in opposition to said attachment, and after due deliberation, it appearing to the court from such affidavits, report, answers and proofs, that *Richard H. Park*, the said defendant, is guilty of the contempt alleged against him, and that such misconduct was calculated to and did defeat, impair, impede or prejudice the rights of the above named plaintiff, *Cornelia Park*.

Now, on motion of *Sam. Tro. Smith*, attorney for plaintiff, it is ordered:

I. That the motion to vacate the attachment be, and the same is hereby, denied, with *ten* dollars costs of opposing said motion to the plaintiff.

II. That said *Richard H. Park* pay to the said plaintiff her costs and expenses in these proceedings, amounting to the sum of *seventy dollars* and *forty-four* cents, which amount has been found and taxed by the court on proper proof thereof presented by the plaintiff, and which is hereby imposed as a fine for his misconduct.

III. That said *R. H. Park* give security to be approved by one of the justices of this court, in the sum of *three thousand* dollars, to the clerk of the city and county of *Albany* for the payment to the plaintiff of the sum of *three hundred* dollars per annum, in semiannual payments, for the support and maintenance of the plaintiff, to be paid: *one hundred and fifty* dollars on the *twenty-fourth* day of *April*, and *one hundred and fifty* dollars on the *twenty-fourth* day of *October*, in each and every year, during the natural life of the said plaintiff, or till she shall again marry.

IV. That the said defendant, *Richard H. Park*, be and he is hereby directed to stand committed to the common jail of the county of *Albany*, there to remain charged upon said contempt until such security shall be given and approved, and such costs and expenses shall be fully paid, unless he shall sooner be discharged by the court; and that a warrant issue to carry this order into effect.

V. That the bail bond given in these proceedings remain in force until the defendant *Richard H. Park* shall surrender himself under the warrant to be issued hereunder.

VI. That all proceedings herein on the part of the plaintiff be stayed for *thirty* days from the service of a certified copy of this order on defendant's attorney, on the defendant's executing and filing with the clerk of *Albany* county, a proper and sufficient undertaking in the sum of *one thousand* dollars, that the appellant will pay all costs and expenses awarded against him in this order, in case the same shall be affirmed or the appeal dismissed; together with all costs and damages which may be awarded against him on said appeal.

Enter: *T. R. W.*, J. *S.* C.

(2) Injunction.[1]

Form No. 6237.[2]

At a *Special* Term of the *Supreme* Court, held at the *Court-house* in the City of *Brooklyn*, in the County of *Kings*, on the *fourteenth* day of *January*, 1882.

Present: Hon. *Jasper W. Gilbert*, Justice.

The People of the State of New York, on the relation of John D. Negus,
against
William Dwyer and others, respondents.

A writ of attachment having heretofore issued out of this court against the said above named person and others, charging him and them and each of them with a contempt of court, in wilfully violating an order of injunction granted by Hon. *Henry A. Moore*, *County* Judge of *Kings* County, on the *twenty-sixth* day of *December*, 1881, in a cer-

1. See also other orders of convictions for failure to obey injunctions in Koester *v.* State, 36 Kan. 27; Latimer *v.* Barmore, 81 Mich. 592; Howe *v.* Willard, 40 Vt. 654; Poertner *v.* Russel. 33 Wis. 193; *In re* Tyler, 149 U. S. 164.

2. This order is copied from the record in the case of People *v.* Dwyer, 90 N. Y. 402.

tain action then pending in the *Supreme* Court of the State of *New York*, County of *Kings*, wherein *John D. Negus* is plaintiff, and *The City of Brooklyn, The Brooklyn Elevated Railway Company and others* are defendants, which attachment was directed to the Sheriff of the County of *Kings* and returnable on the *ninth* day of *January*, 1882, and the said Sheriff having made return to the said attachment that he had attached the body of the said above named *William Dwyer*, and has taken a bond for the due appearance of him according to the exigency of said attachment, and the said above named *William Dwyer*, having appeared personally before said court. And interrogatories specifying the facts and circumstances alleged against him having by order of the court been filed, and a copy of the same having been served on his counsel pursuant to said order, and he having been required to answer said interrogatories, and having answered the same, and the respondent *Richard S. Roberts*, being examined in open court, and after reading the affidavits of *Theodore D. Dimon*, *Robert Black* and *Harry O. Jones*, and a copy of the minutes of the meeting of the *Common Council* held on *December 31*, 1881, and after the examination of *Robert Black* in open court, and filing the testimony so taken of said *Roberts* and *Black*, and proceedings having been duly adjourned to this day. And after hearing *Erastus Cooke*, *David Barnett* and *Hubert G. Hull*, Esqs., in support of said motion, and *Winchester Britton*, Esq., and *Ward & Jencks*, counsel for the respondents.

Now, on motion of *Herbert G. Hull*, the attorney for the relator,

It is now here considered and adjudged that the said *William Dwyer* has been and is guilty of the misconduct and contempt alleged against him, and has been and is guilty of a wilful disobedience to a lawful mandate of this Court, to wit, in wilfully violating the injunction order granted by Hon. *Henry A. Moore*, *County* Judge of *Kings* County, on the *twenty-sixth* day of *December*, 1881, in the aforesaid action.

And it is further ordered and adjudged, that the said *William Dwyer* for his said misconduct be imprisoned in the common jail of the County of *Kings*, for the period of *thirty* days; and it is further

Ordered and adjudged that a fine of *two hundred and fifty* (250) dollars be and the same is hereby imposed upon him for his said misconduct, and that he stand committed to the common jail of the County of *Kings*, there to remain charged upon said contempt, until his fine imposed as aforesaid shall be fully paid, not exceeding *thirty* days, unless he shall be sooner discharged by the further order of the court, and that a warrant issue to carry this order into effect, and that such fine be paid to the Clerk of this Court and to be disposed of according to law.

A copy. *Chas. B. Elliott*, Clerk.

Form No. 6238.

(Precedent in Stimpson *v.* Putnam, 41 Vt. 243.)

J. C. Stimpson et al. v. *A. W. Putnam et al.* } Court *of Chancery*, *Orleans* County. *December* Term, 1867.

This cause having been fully heard, so far as the complaint for the contempt is concerned, upon the proofs, allegations of the parties, and the argument of their respective solicitors, and having been duly considered by the court, it is adjudged that said *Alfred W. Putnam* has been guilty of a contempt in manner and form as alleged in the complaint in that he did wilfully violate said order of injunction in said complaint referred to by selling and removing, or causing to be removed, into the province or dominion of Canada and beyond the reach of the process of this court, a certain steam-engine and elevator and other machinery attached and connected therewith, included within the terms of said injunction, and did commit other waste upon the masonry of said limekiln, as the orators have complained against him; and it is considered that the damage to the orators, by the defendant's said unlawful act, is the sum of *eleven hundred and seventy* dollars ($*1170*), and said *Alfred W. Putnam* is hereby ordered and decreed to pay forthwith to the clerk of the court of chancery in the county of *Orleans*, for the orators, said sum of *eleven hundred and seventy* dollars, with the costs of this proceeding, to be taxed by the clerk, and also to pay to said clerk, for the treasury of the state of *Vermont*, the sum of *fifty* dollars, as a further fine on this behalf; and it is further ordered and decreed that said *Alfred W. Putnam*, in default of immediate and full payment of said several sums of money, be committed to prison in the common jail at *Irasburgh* in said *Orleans* county, and be therein confined until said several sums, with interest thereon from this day, together with cost of commitment and confinement in jail, shall be fully paid.

Done in court this *7th* day of *April*, A. D. 1*868*.

Benj. H. Steele, Chancellor.

(3) MANDAMUS.[1]

Form No. 6239.[2]

At a *Special* Term of the *Supreme* Court of the State of *New York*, held in the county *Court-house* of *Columbia* county, in the city of *Hudson*, on the *fourth* day of *April*, 1*894*:

Present — Hon. *Samuel Edwards*, Justice.

The People of the State of New York, on the relation of John I. Platt and another,
against
Frank Rice, Edward Wemple, Charles F. Tabor, Elliot F. Danforth and John Bogart.

Upon the order of this court, entered herein on the *seventh* day of *December*, 1*891*, wherein it was ordered that a writ of peremptory mandamus issue out of and under the seal of this court, commanding and requiring the defendants herein, the state board of canvassers, to issue a certificate of election to the office of senator in the *fifteenth*

1. See also a form in *Ex p.* Rust, 38 Tex. 344.

2. This form is copied from the records in People *v.* Rice, 144 N. Y. 249.

senatorial district of this state, disregarding the so-called return of the board of county canvassers of the county of *Dutchess*, which was signed by *John Mylod*, as secretary of said board *pro tempore*, and was not signed by the county clerk of *Dutchess* county, or certified under the seal of said county clerk, but that, instead thereof, they consider only such return from the county of *Dutchess* as should thereafter be filed, containing the signatures of the clerk of the county of *Dutchess* and the chairman of said board of county canvassers, and issued under the seal of the said county clerk, and that in such certificate of election the said defendants, as such state board of canvassers, should certify and declare that the person who appeared upon the certified returns and statements made by the board of canvassers of the counties of *Columbia*, *Putnam* and *Dutchess*, in pursuance of the statute and the order of the court, to have received the greatest number of votes, was duly elected from the *fifteenth* senatorial district.

And upon the order entered in the Court *of Appeals* herein, on *December 29*, 1891, as embodied in the remittitur sent from that court to this court, wherein it was ordered and adjudged, and the said order of this court of *December 7*, 1891, and the order of the *General* Term, affirming the same, and the said writ itself be modified by striking out the provision requiring a return to be certified by, and to come from, the county clerk of *Dutchess* county, and issued under the seal, and that the said order so appealed from, as so modified, be affirmed without costs.

And upon the affidavits of *John I. Platt*, *Robert F. Wilkinson*, *J. Rider Cady*, *Charles F. Cussum*, *F. E. Smith*, *C. H. Winslow*, and *Alfred R. Conklin*, filed in the office of the clerk of *Albany* county, *June 9*, 1893, and the order entered herein at the *General* Term of this court, *December 6*, 1893, reserving the order entered herein at a *Special* Term of this court, denying the motion then made upon the said affidavits by the relator, for an order requiring the defendants herein to show cause why they should not be punished as for a contempt of court, and granting such motion, and requiring said defendants to show such cause before this court at a *Special* Term thereof, to be held in the city of *Hudson*, on *January 13*, 1894.

And on reading and filing a copy of the appeal book on said appeal, and a certified copy of such order of the *General* Term, and notice of filing of the original, and of the application so to be made on *January 13*, 1894, before this court at a *Special* Term, in said county of *Columbia*, with due proof of service thereof upon the said defendants herein.

And on reading and filing the answer of the said defendants, duly verified by each of them, and accepted as affidavits by them respectively, and the affidavits of *J. Newton Fiero* and *John J. Hughes*, in opposition to the motion.

And after hearing Mr. *John Brooks Leavitt*, of counsel for the relator, for the motion, and Mr. *J. Newton Fiero*, of counsel for the respondents, opposed, and due deliberation had thereon.

And it appearing that, after said order of *December 7*, 1891, had been filed, and pending the said appeal, by the defendants, to the

Court *of Appeals*, from the order of the *General* Term affirming said order of *December* 7, 1891, another return of the board of county canvassers of *Dutchess* county was filed pursuant to the statute and an order of the court in the office of the clerk of said *Dutchess* county, and certified copies thereof were forwarded by him to the Governor, the Secretary of State and the State Comptroller, pursuant to the statute and said order, and the said certified copies of such return were taken from their possession, and other certified copies of the same return were delivered to each one of the defendants respectively by a private citizen, and the said defendants had the same in their possession on the *twenty-ninth* day of *December*, 1891, at the meeting held by them as the said board of canvassers, hereinafter referred to.

And it appearing that upon the said returns made by the board of canvassers of the counties of *Columbia*, *Putnam* and *Dutchess*, regarding the aforesaid return signed by said *Mylod* as one of them, that one *Edward B. Osborne* had received the greatest number of votes for the office of senator from said district; and that upon the returns made by the said boards of county canvassers of the said counties, considering the other return from the board of county canvassers of *Dutchess* county so filed as aforesaid after the said order of *December* 7, 1891, as one of such returns, that one *Gilbert A. Deane* had received the greatest number of votes for said office.

And it further appearing that on the *twenty-ninth* day of *December*, 1891, after the rendition by the Court *of Appeals* of its decision, upon the appeal to it, by the defendants herein, from the order of the *General* Term affirming said order of the *Special* Term of *December* 7, 1891, and before the judgment of said Court *of Appeals* herein was made the judgment of this court by filing the remittitur and entering thereon the usual order upon the remittitur, making the said judgment of the Court *of Appeals* the judgment of this court, and before any writ of mandamus, in pursuance thereof, was issued out of and under the seal of this court, pursuant to the said order of *December* 7, 1891, as so modified, they, the said defendants, held a meeting for the purpose of canvassing the returns made by the boards of canvassers of the counties of *Columbia*, *Putnam* and *Dutchess*, for the office of senator in the *fifteenth* senatorial district, and thereupon that they, the said defendants, did regard the return, hereinbefore called the *Mylod* return, and did not consider the other return, hereinbefore mentioned, which had thereafter been filed pursuant to the statute and the order of the court, as aforesaid, and which was in the possession of them, the said defendants, at the time of such meeting, and did issue their certificate of election, whereby they certified and declared that said *Edward B. Osborne* had received the greatest number of votes in the counties of *Columbia*, *Putnam* and *Dutchess* for the position of senator for the *fifteenth* senatorial district.

And it appearing that defendants, in canvassing the said returns from said counties aforesaid, and in issuing their certificate of election aforesaid, were guilty of the offense of contempt of this court, and that such contempt was calculated to and actually did defeat, impair and prejudice the rights and remedies of the relators herein; and that such disobedience was not wilful.

And it not having been shown that any actual loss or injury has been produced to the said relators by reason thereof, and due proof having been given to the complainant's costs and expenses in prosecuting these proceedings to punish these defendants, for such contempt aforesaid, including a reasonable counsel fee, and the amount of such costs, including such reasonable counsel fee, being the sum of $550, and the amount of such expense being the sum of $281.28, making a total sum of $831.28, as the amount of the complainant's costs and expenses herein.

Now, on motion of Messrs. *Leavitt, Wood & Keith*, attorneys for the relators, it is ordered and adjudged as follows:

That in canvassing, as aforesaid, the said election returns from the *fifteenth* senatorial district for the office of senator for that district, on *December 29*, 1891, and in issuing their certificate of election, in which they declared that *Edward B. Osborne* had received the greatest number of votes in the counties of *Columbia*, *Putnam* and *Dutchess*, for the office of senator from said district, they, the said defendants, were guilty of contempt of this court, and that such contempt was calculated to and actually did defeat, impair, impede and prejudice the rights and remedies of the relators herein.

And it is further ordered and adjudged that the said defendants, *Frank Rice*, *Edward Wemple*, *Charles F. Tabor*, *Elliot F. Danforth* and *John Bogart* be and they are hereby fined in the sum of $831.28, the amount of the complainant's costs and expenses, as aforesaid, and that they pay the said sum of $831.28 to Messrs. *Leavitt, Wood & Keith*, the attorneys for the relators herein.

Enter in *Albany* county.

Samuel Edwards, Justice *Supreme* Court.

d. Upon Report of Referee.

Form No. 6240.[1]

At a *Special* Term of the *Supreme* Court held at the *Court-house* in the City of *Utica*, in and for the County of *Oneida* and State of *New York*, on the *15th* day of *June*, 1889.

Present: Hon. *Milton H. Merwin*, Justice Presiding.

Rozellen Aldinger
vs.
Emery S. Pugh.

The People, ex rel. Rozellen Aldinger,
vs.
Stephen J. Pugh.

An action having been commenced in this court by *Rozellen Aldinger*, the above named plaintiff, against *Emery S. Pugh*, the above named defendant, for the purpose, among other things, of restraining the defendant from selling and disposing of a quantity of hay then situate on the farm of the plaintiff in the town of *Frankfort*, *Herkimer* county, *New York*, and the said plaintiff having on the *seventh* day of

1. This form is copied from the records in Aldinger *v.* Pugh, 132 N. Y. 403.

December, 1888, duly obtained an injunction order in said action in and by which the said defendant, *Emery S. Pugh*, and his servants, agents, assistants and assigns, and each of them were ordered and enjoined during the pendency of the action or until the further order of this court absolutely to desist and refrain from selling, disposing of or drawing away any of the hay on the farm mentioned in the complaint in said action which the defendant had leased of the plaintiff and was then occupied by the defendant, situate as aforesaid in the town of *Frankfort*, *Herkimer* county and state of *New York*, and the summons and complaint and said injunction order, together with the papers upon which it was granted, having been duly served on the defendant on the *seventh* day of *December*, 1888, and an order to show cause having been duly granted in said action on the *thirty-first* day of *December*, 1888, directing *Emery S. Pugh*, the said defendant, *Stephen J. Pugh*, *Michael Leary* and the *Utica and Mohawk Railroad Company*, and each of them, to show cause at the *Special* Term of this court, held at the *court-house*, city of *Utica*, *New York*, on the *eighth* day of *January*, 1889, why they and each of them should not be punished for their alleged contempt, offenses and misconduct for having knowingly and wilfully violated said injunction order, and having, on the *twenty-second* and the *twenty-fourth* day of *December*, 1888, drawn away from said farm and disposed of a quantity of the hay mentioned and referred to in said injunction order, and the said order to show cause and the papers upon which it was granted having been duly served on each of said parties, and upon the return of said order to show cause, *Edward Lewis*, Esq., an attorney and counsellor at law of *Utica*, *New York*, having duly appeared for said *Emery S. Pugh* and *Stephen J. Pugh*, and *William E. Lewis*, Esq., an attorney and counsellor of law, of said city, having duly appeared for said *Michael Leary* and *Utica and Mohawk Railroad Company*, and after hearing *Henry F. & James Coupe* for the plaintiff in said action in favor of the relief asked for in said order to show cause, and said Messrs. *Lewis*, attorneys for the said parties, to whom the order was directed, in opposition hereto, and said matter was by an order of the court granted that day, duly referred to *Charles G. Irish*, Esq., a counsellor at law in the city of *Utica*, *New York*, as referee to take the examination or testimony of the parties to this proceeding and their witnesses of the facts charged as to whether defendant violated said injunction order, and if violated, whether such violation was wilful, and whether *Stephen J. Pugh*, *Michael Leary*, and the *Utica and Mohawk Railroad Company*, or either of them, knowingly or wilfully violated said injunction order, or whether they, or either of them, aided or abetted the defendant in violating the same in the removing from the farm of the plaintiff, situated in the town of *Frankfort*, *Herkimer* county, *New York*, on the *twenty-second* and *twenty-fourth* days of *December*, 1888, a quantity of hay, in violation of said injunction order, and the value of the hay drawn away from said farm, if any, and if said injunction order was so violated by said parties, or either of them, did the same defeat, impede, impair or prejudice the rights of the plaintiff in the action, and to what extent, and the damages sustained by the plaintiff, and that he report said facts and return the testi-

mony taken by him, together with his opinion, to the *Supreme* Court, and the said referee, having been duly attested by said parties and their witnesses, and having duly made his report thereon to this court, in which he states that in his opinion the said *Stephen J. Pugh* on the *twenty-second* and *twenty-fourth* days of *December*, 1888, drew from said premises *eleven* tons of hay of the value of $*132*, and that by said removal the defendant, *Emery S. Pugh*, and said *Stephen J. Pugh*, and each of them knowingly and wilfully violated said injunction order; the defendant in permitting the said *Stephen J. Pugh* to so remove said hay, and the said *Stephen J. Pugh* in aiding and abetting and assisting the defendant to remove, and draw away and dispose of the said hay, the same being a part of the hay referred to in and restrained by said injunction order, and that they and each of them should be punished therefor.

And the said referee having further reported that in his opinion the order to show cause should be dismissed as to *Michael Leary* and the *Utica and Mohawk Railroad Company*, and a motion having been made at a *Special* Term of this court, held at the *court-house* in the city of *Syracuse*, *New York*, on the *twenty-fifth* day of *May*, 1889, for an order confirming said report of the referee and adjudging the defendants *Emery S. Pugh* and *Stephen J. Pugh* guilty of contempt for having wilfully violated said injunction order as above charged and alleged and punishing them therefor by fine or imprisonment or both, and that a commitment issued against them accordingly; and the court having ordered said matter to Mr. Justice *Merwin* at this term of court, and the matter having been duly brought to a hearing, and after reading and filing the report of said referee, dated *May 10th*, 1889, and the testimony taken by them, the affidavit of *Henry F. Coupe*, verified *May 17th*, 1889, the written opinion of the Court, *Merwin*, Justice; *Special* Term, *January 8th*, 1889, disposing of the matter which came up on the order to show cause, the affidavits of *William E. Lewis*, verified *May 16th*, 1889, and after hearing *Wm. E. Lewis* in favor of confirming said referee's report as to the *Utica and Mohawk Railroad Company* and *Michael Leary*, and *Henry F. & James Coupe*, plaintiff's attorneys, in favor of the motion above mentioned, and *Edward Lewis* in opposition hereto —

It is hereby considered and adjudged that the defendants *Emery S. Pugh* and *Stephen J. Pugh* are guilty of a contempt in having knowingly and wilfully disobeyed the said injunction order granted in said action. The said *Emery S. Pugh* in causing and permitting *eleven* of the tons of the hay mentioned in and restrained by said injunction, of the value of $*132*, to be removed, drawn away and disposed of while said injunction order was in force, to wit, on the *twenty-second* and *twenty-fourth* days of *December*, 1888. The said *Stephen J. Pugh*, in having with full knowledge of said injunction order, of its contents, and of the service of it on the said defendant, while acting as the agents, servant and assistant of the said defendant, aided and abetted the said defendant, *Emery S. Pugh*, in said removing, drawing away and disposing of said *eleven* tons of hay on the said *twenty-second* and *twenty-fourth* days of *December*, 1888, and that said violation of said injunction order was calculated to and

actually did defeat, impede, impair and prejudice the rights and remedies of the plaintiff in said action.

It is further considered and adjudged and ordered that the said *Emery S. Pugh* and *Stephen J. Pugh* pay a fine of $100 referee's fees, $17 witness fees, $50 counsel fees and $10 costs of this motion, in all the sum of *one hundred and seventy-seven* dollars ($177), to be paid to the plaintiff herein, *Rozellen Aldinger*, to satisfy her costs and expenses in the premises, and that they stand committed to the common jail of *Oneida* county until said fine be paid.

It is further ordered and adjudged that the said order to show cause, and these proceedings against *Michael Leary* and *Utica and Mohawk Railroad Company* be and they are hereby dismissed, and that the plaintiff in said action, said *Rozellen Aldinger*, pay to them or their attorney, *William E. Lewis*, Esq., $10 costs on said order to show cause, and $10 costs of reference, and $10 costs of this motion; and in all, *thirty* dollars ($30)

Enter: *M. H. M.*

7. Commitment.[1]

a. For Contempt in Facie Curiæ.

Form No. 6241.

(Precedent in Hill *v.* Crandall, 52 Ill. 71.)[2]

State of *Illinois*, } ss.
Will County. }

The People of the State of *Illinois* to the Sheriff of said County:

Whereas, on the *19th* day of *August*, A. D. 18*68*, while *Edward W. Crandall*, one of the justices of the peace in and for said county, was engaged listening to a motion made before him for a continuance of a cause then pending at his office in *Joliet*, wherein *Jacob Powles* was the plaintiff, and *Isaac Noabes* the defendant, *Charles A. Hill*, attorney for the said plaintiff, did wilfully and contemptuously resist said motion after the court had given him, the said *Charles A. Hill*, notice that the said motion had been granted, and being ordered by the said justice to cease, refused to do so, and said that the said justice could "fine and be damned." And whereas, the said *Charles A. Hill* was forthwith called upon by the said justice and required to answer for said contempt, and to show cause why he should not be convicted thereof, but did not make any defense except to deny the jurisdiction of the said justice, and did not make any apology for his said conduct, and whereas the said justice did thereupon convict the said *Charles A. Hill* of said contempt, and adjudge and determine that he pay a fine of *five* dollars, and that he be committed to the common jail of said county until he pay the said fine, or until he be discharged

1. See also forms in Clyma *v.* Kennedy, 64 Conn. 313; *In re* Clayton, 59 Conn. 510; *Ex p.* O'Brien, 127 Mo. 486; People *v.* Cassels, 5 Hill (N. Y.) 165; Fitler *v.* Probasco, 2 Browne (Pa.) 138.

2. It was held in this case that a proceeding for contempt is in the nature of a criminal proceeding, and when a person is guilty of contempt in open court, before a justice of the peace, the justice may direct his warrant for the arrest of the offender to the sheriff of the county. Hill *v.* Crandall, 52 Ill. 70.

by due course of law. We therefore command you, the said sheriff, to take the said *Charles A. Hill*, and deliver him to the keeper of the common jail of said county, together with this warrant; and you, the said keeper, are hereby required to receive him into your custody in the said jail, and him there safely keep until he pay the said fine, or until he shall be discharged by due course of law. Hereof fail not at your peril.

Given under my hand and seal this *21st* day of *August*, A. D. 1868.

E. W. Crandall, J. P. (SEAL)

Form No. 6242.

(Precedent in Morrison *v.* McDonald, 21 Me. 551.)

State of *Maine*. *Penobscot*, ss. Whereas at a *municipal* court for the city of *Bangor*, in the county of *Penobscot*, holden at said *Bangor*, on the *twenty-first* day of *January*, A. D. 1839.

Reuben S. Prescott appeared with a commission from the Governor, and having been duly qualified as recorder of said Court, and also with a notice from the Secretary of State directed to *Samuel Morrison*, notifying him that *Reuben S. Prescott* of *Bangor* had by the Governor, with the advice and consent of Council, been duly appointed recorder in his stead, and had been commissioned accordingly, which said notice was read by said *Prescott* in the hearing of said *Morrison*, and delivered to him in hand by said *Prescott*. Whereupon the Court directs said *Prescott* to take charge of the papers and records of said Court, and said *Prescott* attempting to take charge of the same is resisted by said *Morrison*, and the said *Samuel Morrison* claiming to be Recorder of said Court, and not recognizing the authority of the Governor and Council to remove him in the manner they have exercised said authority; therefore the Court order and direct, that the said *Morrison* be committed to the common jail in *Bangor* in said county for contempt of Court by indecent behavior in thus withholding the records and resisting the Recorder of said Court, and thus insulting said Court and obstructing it in the due and lawful exercise of its duties, against the peace of said State.

Wherefore in the name of said State, you are commanded to convey the said *Samuel Morrison* to the common jail in said *Bangor* and there deliver him to the keeper thereof with this precept; and the said keeper is alike commanded to receive the said *Morrison* into his custody in said jail, and him there keep for want of sureties, or until he be otherwise discharged by due course of law.

Witness, *John McDonald*, our said Judge, at *Bangor* aforesaid, this *twenty-first* day of *January*, A. D. 1839.

R. S. Prescott, Recorder.

Form No. 6243.

(Precedent in People *v.* Sheriff, 7 Abb. Pr. (N. Y. Supreme Ct.) 97.)[1]

The People of the State of *New York*, to the Sheriff of the *City and* County of *New York*, greeting:

1. This commitment is regular and sufficient in form, and contains the cause of the alleged contempt plainly charged therein.

Whereas, in a certain action pending in the Court *of Common Pleas*, for the *city and* county of *New York*, between *John H. McCunn* and *James Moncrief*, plaintiffs, and *John McKechnie*, defendant, for the recovery of a certain lot of land in the said city of *New York*, one *John F. Bettz* had been examined upon the trial thereof as a witness for the defendant, and upon such examination had sworn that he claimed the title to the said land; that the said defendant was his tenant, and that he, the said *Bettz*, was defending the said action as the landlord of the said defendant, and being asked whether he had in his possession any old deeds, leases or assignments relating to the said land, and having answered that he had received from his grantors a certain lease and other papers which he had kept in his possession until a few days before the said trial, when he had delivered them to *John W. Mitchell*, his attorney, and the attorney of the said defendant in the said action; and being asked to produce the said old lease and other papers, answered that he was unable to do so because they were in the possession of the said *Mitchell*, who was then in court, acting as the attorney and counsel of the defendant in the said trial. And whereas the said *John W. Mitchell*, who is a counsellor of the *Supreme* Court of the State of *New York*, and of the Court *of Common Pleas* of the *city and* county of *New York*, and counsel for the defendant in the said action, pending in the said Court *of Common Pleas*, between *John H. McCunn* and *James Moncrief*, plaintiffs, and *John McKechnie*, defendant, being then placed under examination, as a witness for the plaintiff in the said action, upon the trial thereof before the said Court *of Common Pleas*, at a *special* term thereof, held at the *City Hall* of *New York*, on the *22d* day of *May*, 1858, was asked a question material and pertinent to the issue, wherein, that is to say, whether he had in his possession any deed, lease, or other papers delivered to him by one *John F. Bettz*. And whereas the said *John W. Mitchell* said he could not state whether there was any such deed, lease or other papers, without looking at a bundle of papers then being in court and in his possession, and thereto brought by him. And whereas the said *John W. Mitchell* was thereupon, during the sitting, and in the presence of the court, and by the direction of the said court, directed to look at said bundle of papers, for the purpose of answering the said question, which he refused to do; and whereas, after having so declined to make such examination, and pending the consideration, by the court, of a motion for his commitment, then to the said court made, upon the ground of such refusal, he, the said *John W. Mitchell*, gave the said lease and other papers to his client, with instructions to take them from the said court to the office of his counsel; and whereas the examination of the said *Mitchell* being by regular adjournment of the said trial, continued on the *27th May*, aforesaid, he was then examined, and admitted that he had in his possession the paper thus received from the said *Bettz*, and he was then asked whether he would state what said papers were, and he answered that he could not, without examining them; and he was then asked whether he would look at the papers, and state what they were, so far as to identify them, and he answered that he would not; and he was then asked to look at the papers, and state what they

were, and he refused to do so, though thereto required by the court; and he was further asked to produce the said papers, and though required by the court to do so, refused, and gave as his reasons for refusing, that to answer would be a breach of his privilege as attorney for the defendant; and whereas all the said questions were material and pertinent to the issue in the said action; and whereas it appears that the said *John W. Mitchell*, before his said examination, was duly served with a subpœna duces tecum requiring him to appear on the days and at the times and places aforesaid, and produce the said papers, and has been paid his fees thereon; and whereas the said *John W. Mitchell* has thus been guilty of contemptuous behavior in the immediate view and presence of the said Court *of Common Pleas*, during its sitting, tending directly to interrupt its proceedings, and impair the respect due to its authority; and whereas the aforesaid misconduct of the said *Mitchell* was calculated to impair or defeat the rights of the plaintiff in the said action; and whereas the said *John W. Mitchell*, for the cause aforesaid, was adjudged to be guilty of contempt of the said court. Now, therefore, you are hereby ordered to take the body of said *John W. Mitchell*, and commit him to the common jail of the *city and* county of *New York*, and there keep him in prison for the space of *ten* days, or until he be sooner discharged according to law.

Witness, *John R. Brady*, Judge of the said Court *of Common Pleas*, of the *City Hall*, in the city of *New York*, the *27th* day of *May*, 1858.

Nathaniel Jarvis, Clerk.

Form No. 6244.

(Precedent in *In re* Stokes, 5 S. Car. 71.)[1]

State of *South Carolina*, *Greenville* County. } In *Circuit* Court.

R. H. Earle, plaintiff, against *Edward F. Stokes*, defendant.

A notice having been made by the Court on the *25th* day of *July*, A. D. 1872, that the defendant herein should appear before this Court and answer such questions as may be propounded to him, touching his property, and the said defendant refusing to be so sworn and answer, it is ordered that he be held by the Sheriff in close confinement until such time as he shall make such answer.

T. H. Cooke.

September 12, 1873.

b. For Failure to Obey.

(1) Decree in Chancery.

Form No. 6245.

(Precedent in Stimpson *v.* Putnam, 41 Vt. 244.)

State of *Vermont*, *Orleans* County, ss. } To any sheriff or constable in the state, greeting:

1. The petitioner's motion for discharge from detention under and by virtue of this warrant was denied.

By the authority of the state of *Vermont* you are hereby commanded to attach the body of *Alfred W. Putnam*, of *Newport* in said county, and, unless he shall forthwith pay, or cause to be paid, the several sums of money in the foregoing decree of the court of chancery ordered to be paid, the said *Alfred W. Putnam* having been adjudged guilty of a contempt as is therein set forth, you will proceed and commit the said *Putnam* to prison in the common jail in *Irasburgh* in said *Orleans* county, and you will lodge with the keeper of said prison a true and attested copy of this precept and of the foregoing decree; and the keeper of said prison is commanded to receive the said *Putnam* within said prison, and to keep and hold him as a prisoner within said prison until he shall pay said several sums, interest and cost, as in said decree required.

Given under my hand, at *Newport* in the county of *Orleans*, this *7th* day of *April*, A. D. 1868.

Benj. H. Steele, Chancellor.

(2) Injunction.

Form No. 6246.

(Precedent in Matter of Sloan, 5 N. Mex. 638.)

The Territory of *New Mexico* to *Francisco Chavez*, sheriff of the county of *Santa Fe*, greeting:

Whereas on the *12th* day of *November*, 1890, an injunction was issued out of the *district* court of *Santa Fe* county enjoining and restraining *John H. Sloan*, *George L. Wyllys* and *Teodoro Martinez*, both individually and as members of the board of county commissioners of said *Santa Fe* county, their agents, servants, or ordering or causing to be made or delivered, any certificate of election to the offices of members of the house of representatives of the legislative assembly of the territory of *New Mexico*, and of member of the council of said legislative assembly, to any person or persons other than *Benjamin M. Read*, *Joseph B. Mayo*, and *Thomas B. Catron*, and from making, or causing to be made, any record of the result of their canvass of the election returns of the election held in said county of *Santa Fe* on the *4th* day of *November*, 1890, until the further order of said *district* court in the premises. And whereas, on the *17th* day of *January*, 1891, there was filed in the office of the clerk of said court the petition of the said *Thomas B. Catron*, setting forth that the said *John H. Sloan* and *Teodoro Martinez*, two of the defendants in said injunction proceedings, wholly disregarding the injunction so issued as aforesaid, did, on the *5th* day of *December*, 1890, sitting as a board of canvassers of said county, canvass the returns of the general election held in said county on the *4th* day of *November*, 1890, and did on said *5th* day of *December*, 1890, make, order, and deliver a certificate of election to the offices of members of the house of representatives of the legislative assembly to persons other than the said *Benjamin M. Read*, the said *Joseph B. Mayo* and the said *Thomas B. Catron*, to wit, to one *Charles F. Easley*, to one *Thomas P. Gable*, and to one *Romulo Martinez*; the said *Easley* and the said *Gable* receiving certificates of election to the office of member of the house of repre-

sentatives of the legislative assembly, and the said *Romulo Martinez* receiving a certificate to the office of member of the council of said legislative assembly; and praying that that court cause attachments to issue for the arrest of the said *John H. Sloan* and *Teodoro Martinez* for contempt. Whereupon such proceedings were had by the said court that on *January 20*, 1891, after attachments had been issued by said court against the said *John H. Sloan* and *Teodoro Martinez*, and after the bodies of the said *Sloan* and the said *Martinez* had been presented before the said court by you, the said sheriff, they being accompanied by counsel, and after a full hearing of counsel, the said *John H. Sloan* and *Teodoro Martinez* were adjudged guilty of contempt of this court in issuing and delivering a certificate of election to *Romulo Martinez*, and in making, or causing to be made, a record of the result of their canvass of the returns of the election held in said county of *Santa Fe* on the *4th* day of *November*, 1890, and the punishment of each of said defendants was assessed to a fine of *fifty* dollars for each of the said several contempts, making a total of *two hundred* dollars against each of said defendants: Now, therefore, you, the said sheriff of *Santa Fe* county, are hereby commanded that of the lands and tenements, goods and chattels, of *John H. Sloan*, in your county, you cause to be made the sum of *two hundred* dollars fine, and *seventeen* dollars and *forty-five* cents costs of suit, which, by the said judgment of the said *district* court on the *20th* day of *January*, 1891, the territory recovered against the said *John H. Sloan* and in default of the prompt payment of the said sum by the said *John H. Sloan* that you confine the body of the said *John H. Sloan* in the common jail of said county until said fine and costs are fully paid and satisfied, and due return made of this writ, with your proceedings thereon.

Witness the Honorable *Edward P. Seeds*, associate justice of the *supreme* court of the territory of *New Mexico*, and judge of the *first* judicial *district* court thereof, and the seal of said *district* court, this *20th* day of *January*, 1891.

A. E. Walker, Clerk. (SEAL)

(3) Order to Pay Money to Receiver.

Form No. 6247.

(Precedent in Cartwright's Case, 114 Mass. 237.)

To the sheriff of our county of *Suffolk*, his deputies, and the keeper of our common jail in *Boston* in said county, Greeting.

(SEAL) Whereas, by the consideration of our *Supreme Judicial* Court, holden at *Boston*, within and for our said county of *Suffolk*, on the *second Tuesday* of *September*, eighteen hundred and *seventy-three*, *John W. Cartwright*, of said *Boston*, was adjudged to be guilty of contempt of our said court, for having disobeyed an order made in a cause pending in our said court by one of the justices thereof, and for having unlawfully appropriated to his own use a portion of the assets of the *Hide & Leather Insurance Company*, one of the parties to said cause, in the hands of the receivers appointed in said cause by our said court, the said *John W. Cartwright* being one of the said re-

ceivers; and on the *fifty-ninth* day of the session of our said court, being the *third* day of *January* in the year eighteen hundred and *seventy-four*, was sentenced for his said misconduct to suffer imprisonment in our said jail for the term of *six* months, unless he shall be sooner discharged by the further order of our said court:

We therefore command you, the said sheriff and deputies, forthwith to convey and deliver into the custody of the keeper of our said jail the body of the said *John W. Cartwright*. And you, the keeper of our said jail, are hereby required to receive the body of the said *John W. Cartwright*, and cause him to be confined in our said jail for the full term of *six* months, unless he shall be thence sooner discharged by the further order of our said court.

And for so doing, this shall be your warrant. And you are to make a return of this warrant, with your doings thereon, to the officer of the clerk of the said *Supreme Judicial* Court at *Boston* aforesaid.

Witness, *Horace Gray*, Esquire, chief justice of said court. Dated at *Boston* aforesaid the *third* day of *January* in the year of our Lord eighteen hundred and *seventy-four*, and sealed with the seal of the said court.

George C. Wilde, Clerk.

c. By Canal Commissioners.

Form No. 6248.

(Precedent in People *v.* Learned, 5 Hun (N. Y.) 627.)[1]

The People of the State of *New York* to the Sheriff of the County of *Albany*, greeting:

Whereas, in a certain investigation of the affairs of the canals of the State of *New York* pending before a commission appointed to investigate the affairs of the canals of the State, duly appointed under and by virtue of the authority of the legislature of the State of *New York*, one *Henry D. Denison* had two certain contracts with the people of the State of *New York* for the performance of work upon the canals of the State, one of said contracts being for the performance of work, between *Port Schuyler* and the lower *Mohawk* aqueduct, and the other of said contracts being for the performance of work at *Utica*, from the eastern limits of the city of *Utica* to the junction of the *Chenango* canal. And, whereas, the said commission was investigating the subject of the said contracts of the said *Henry D. Denison*. And, whereas, the said *Henry D. Denison* had been duly subpœnaed to attend before such commission, to give such information touching the subject of the inquiry of said commission as might be in his possession, and had been further ordered, by said subpœna, to bring with him before said commission all his books and papers relative to his contracts with the State to be performed between *Port Schuyler* and the lower *Mohawk* aqueduct, and at *Utica*, from the eastern limits of the city of *Utica* to the junction of the *Chenango* canal, and had been paid his fees upon said subpœna.

1. This commitment was authorized by N. Y. Laws (1875), c. 91, which act was held to be constitutional.

And, whereas, the said *Henry D. Denison* did appear before said commission, said commission being then duly organized and holding a regular meeting to investigate the affairs of the canals of the State, on the *14th* day of *July*, 1875, and did then and there admit and declare that he had in his possession books and papers relative to his said contracts with the State for work to be performed between *Port Schuyler* and the lower *Mohawk* aqueduct, and at *Utica*, from the eastern limits of the city to the junction of the *Chenango* canal, and did then and there, in the immediate presence of said commission, wilfully refuse to produce said books before said commission, and to obey such subpœna.

And, whereas, the said *Henry D. Denison* has thus been guilty of wilful disobedience of process lawfully issued by said commission to investigate the affairs of the canals of the State, and of contemptuous behavior in the immediate view and presence of said commission during its sitting, tending directly to interrupt its proceedings and impair the respect due to its authority.

And, whereas, the aforesaid misconduct of the said *Henry D. Denison* is calculated to impair or defeat the rights of the State in said investigation.

And, whereas, the said *Henry D. Denison*, being now here before this commission, has, for the causes aforesaid, been adjudged guilty of contempt of the said commission, now, therefore, you are hereby ordered to take the body of the said *Henry D. Denison* and commit him to the common jail of the county of *Albany*, and there keep him imprisoned until he shall have consented to produce and shall produce to and before this commission all his books and papers relative to contracts with the State for work to be performed between *Port Schuyler* and the lower *Mohawk* aqueduct, and at *Utica*, from the eastern limits of the city to the junction of the *Chenango* canal, not exceeding *thirty* days.

Witness the hands of this commission, affixed hereto at the present sitting of this commission appointed to investigate the affairs of the canals of the State, at the capital, in the city of *Albany*, the *14th* day of *July*, 1875.

John Bigelow.
D. Magone.
A. E. Orr.
John D. VanBuren, Jr.
Commissioners.

8. Criminal Prosecution.[1]

1. For statutes relating to the punishment of contempts as misdemeanors see as follows:

Arizona. — Pen. Code (1887), §§ 250, 1035.

California. — Pen. Code (1897), §§ 166, 657, 658, 1331.

Idaho. — Rev. Stat. (1889), § 6529.

Michigan. — How. Anno. Stat. (1882), § 7239.

Minnesota. — Stat. (1894), §§ 6407, 6819.

Montana. — Pen. Code (1895), §§ 293, 1223.

New York. — Birds. Rev. Stat. (1896), p. 635, § 23.

North Dakota. — Rev. Codes (1895), §§ 7015, 7687.

Oklahoma. — Stat. (1893), §§ 2039, 2556.

Form No. 6249.[1]

In the Court *of Sessions* of the county of *Albany*.

Of *June* Term in the year of our Lord one thousand eight hundred and *seventy-four*.

City and County of *Albany*, ss:

The jurors for the people of the State of *New York*, in and for the body of the *City and* County of *Albany*, being then and there sworn and charged upon their oath,

Present, That on the *twenty-fifth* day of *April*, in the year of our Lord one thousand eight hundred and *seventy-four*, at the *city and* county aforesaid, a certain writ of the people of the State of *New York*, called a subpœna, was duly and lawfully issued and tested by and in the name of *T. R. Westbrook*, one of the justices of the *Supreme* Court of said state, on the day and at the city aforesaid, which said writ was directed to *Frank R. Sherwin*, by the name of *F. R. Sherwin*, and by which said writ he was, in the name of said people, commanded that laying aside all pretenses and excuses whatsoever, he appear in his proper person before the Court *of Oyer and Terminer*, to be held at the *City Hall* in the City of *Albany*, in and for said County of *Albany*, on the *eighteenth* day of *May*, eighteen hundred and *seventy-four*, at *three* o'clock in the *after*noon of that day, then and there to testify and give evidence on behalf of said people concerning a certain indictment to be tried in said court against *Charles H. Phelps* for *grand larceny No. 2*; that the said writ of subpœna was on the *first* day of *May*, in the year of our Lord one thousand eight hundred and *seventy-four*, at the City of *New York*, in the said State of *New York*, exhibited to the said *Frank R. Sherwin* and duly served upon him the said *Frank Sherwin*, and a copy of the said writ was then and there delivered to the said *Frank R. Sherwin* and left with him, who then and there had notice to appear and give evidence according to the exigency of said writ. Yet the said *Frank R. Sherwin*, continuing and intending to impede and obstruct the due course of justice, unlawfully and wilfully disobeyed the said writ

Utah. — Rev. Stat. (1898), §§ 4491, 4492.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), 4503.

1. This form is copied from the records in People *v.* Mead, 92 N. Y. 415, wherein it was held that it was not necessary to the validity of the indictment that the accused should first have been duly adjudged in contempt by the court whose process he disobeyed. The two proceedings are wholly independent of each other. One who disobeys the lawful order of a court not only offends against the dignity of the particular tribunal, but also against the public law. The particular court may pass over the contempt and suffer its order to be spurned, but the offense against the people remains. Their authority has been contemned, the administration of public justice assailed, and its power despised. For such an offense the guilty party may be punished by indictment, although the court whose order has been disobeyed may take the indignity in silence. The statute has made such disobedience, when wilful in its character, an offense against the people, and not left it dependent upon the action or nonaction of the specific judge or court. The statute contemplates that both remedies, or either, may be pursued. If the court has first moved and proceeded against the offender by attachment and inflicted punishment, he may nevertheless be indicted for the same wrong, but in that event the sentence is to be affected by the previous punishment.

of subpœna, and did not appear before the said Court *of Oyer and Terminer*, holden at the time and place specified in the said writ of subpœna, to testify to the truth and give evidence before the said court on the trial of said bill of indictment so preferred against the said *Charles H. Phelps*, to the great hindrance and delay of public justice, in contempt of the court aforesaid, against the form of the statute in such case made and provided, and against the peace of the people of the State of *New York* and their dignity.

Second count. And the jurors aforesaid, upon their oath aforesaid, do further present:

That on the *twenty-fifth* day of *April* in the year of our Lord one thousand eight hundred and *seventy-four*, at the city and county aforesaid, a certain process, commonly called a subpœna, was duly and lawfully issued by *Nathaniel C. Moak*, the District Attorney of the County of *Albany*, in support of the foreclosure of a certain indictment then pending in the Court *of Oyer and Terminer* in and for said county against *Charles H. Phelps* for *grand larceny No. 2*, and subscribed by the said district attorney, and tested by and in the name of *T. R. Westbrook*, one of the justices of the *Supreme* Court of said State, on the day and at the city aforesaid, which said process of subpœna was directed to *Frank R. Sherwin*, by the name of *F. R. Sherwin*, and by which said process of subpœna he was, in the name of the people of the State of *New York*, commanded that, laying aside all pretenses and excuses whatsoever, he appear in his proper person before the Court *of Oyer and Terminer* to be held at the *City Hall* in the City of *Albany*, in and for said County of *Albany*, on the *eighteenth* day of *May*, eighteen hundred and *seventy-four*, at *three* o'clock in the *afternoon* of that day, then and there to testify and give evidence on behalf of said people concerning a certain indictment to be tried in said court against *Charles H. Phelps* for *grand larceny No. 2*; that the said process of subpœna was, on the *first* day of *May*, in the year of our Lord one thousand eight hundred and *seventy-four*, at the City of *New York*, in the said State of *New York*, exhibited to the said *Frank R. Sherwin*, and duly served upon him, the said *Frank R. Sherwin*, and a copy of the said subpœna was then and there delivered to the said *Frank R. Sherwin*, and left with him, who then and there had notice to appear and give evidence according to the exigency of said process of subpœna. Yet the said *Frank R. Sherwin*, contriving and intending to impede and obstruct the due course of justice, unlawfully and wilfully disobeyed the said process of subpœna, and did not appear before the said Court *of Oyer and Terminer* holden at the time and place specified in the said process of subpœna, to testify to the truth and give evidence before the said court on the trial of said bill of indictment so preferred against the said *Charles H. Phelps*, to the great hindrance and delay of public justice in contempt of the court aforesaid, against the form of the statute in such case made and provided, and against the peace of the people of the State of *New York* and their dignity.

Nathaniel C. Moak, District Attorney.

II. CONTEMNOR'S DEFENSES AND REMEDIES.

1. Answers.

a. To Rule to Show Cause or Attachment.[1]

Form No. 6250.

(Precedent in *In re* Ayers, 123 U. S. 456.)[2]

Answer of Defendant, *R. A. Ayers.*

The answer of *R. A. Ayers*, Attorney-General of the State of *Virginia*, to a rule awarded against him by this honorable court.

To the Honorable Judge of the *Circuit* Court *of the United States* for the *Eastern* District of *Virginia*:

By an order entered in the chancery cause of *James P. Cooper et als.* against *Morton Marye and others*, summoning him to show cause why he should not be fined and imprisoned for disobeying the injunction heretofore awarded in said suit, restraining him and others from instituting the suits required by an act of the General Assembly of *Virginia*, entitled "An act to provide for the recovery by motion of taxes and certain debts due the Commonwealth, for the payment of which papers purporting to be genuine coupons of the Commonwealth have been tendered," approved May 12, 1887, by instituting a suit against the *Baltimore and Ohio Railroad Co.*, respondent, answering, says that he admits that he instituted the suit against the *Baltimore and Ohio Railroad Company* to recover taxes due by it to the State of *Virginia* after he had been served with the injunction order in this case; that he instituted the said suit because he was thereunto required by the act of the General Assembly of *Virginia* aforesaid, and because he believed this court had no jurisdiction whatever to awarded the injunction violated. Respondent disclaims any intention to treat the court with disrespect, and states that he has been actuated alone with the desire to have the law properly administered.

R. A. Ayers, Att'y-Gen'l of *Virginia.*

Subscribed and sworn to before me this *8th* day of *October*, 1887.

M. F. Pleasants, Clerk.

b. To Interrogatories.

Form No. 6251.[3]

(*Title of court and cause as in Form No. 6224.*)

The defendants herein, except defendant *Richard S. Roberts*, sever-

1. See also various forms of answers in the following cases: Martin *v.* Burgwyn, 88 Ga. 78; Shirk *v.* Cox, 141 Ind. 301; Haskett *v.* State, 51 Ind. 176; Whittem *v.* State, 36 Ind. 196; Winslow *v.* Nayson, 113 Mass. 411; *In re* Robinson, 117 N. Car. 535; Boyett *v.* Vaughan, 89 N. Car. 27; Young *v.* Cannon, 2 Utah 577.

2. It was held in this case that as the circuit court had no power to make the orders forbidding the suits, for bringing which defendants are charged with contempt, they were not guilty of contempt. See also, in regard to want of jurisdiction as a defense, People *v.* O'Neil, 47 Cal. 109; Brown *v.* Moore, 61 Cal. 432; State *v.* Smithers, 14 Kan. 629; Matter of Morton, 10 Mich. 208; Forrest *v.* Price, 52 N. J. Eq. 16; Holman *v.* Austin, 34 Tex. 668.

3. This form is copied from the record

ally claiming and protesting that the facts hereby declared by the answer to the interrogatories propounded to them under the order of this court, made and entered on the *ninth* day of *January*, 1882, constitute no contempt of court, each for himself answers said interrogatories as follows:

To the First Interrogatory. I was, on the *first* day of *January*, 1881, to and including the *thirty-first* day of *December*, 1881, one of the aldermen of the city of *Brooklyn*; and I, said *William Dwyer*, was elected as such in the *second* ward; and I, the said *John McCarthy*, was elected as such in the *fifth* ward; and I, the said *James Kane*, was elected as such in the *sixth* ward; and I, the said *James Weir*, Jr., was elected as such in the *eighth* ward; and I, the said *Daniel O'Connell*, was elected as such in the *ninth* ward; and I, the said *Philip Casey*, was elected as such in the *tenth* ward; and I, the said *James Donovan*, was elected as such in the *twelfth* ward; and I, the said *William J. LePine*, was elected as such in the *thirteenth* ward; and I, the said *Felix W. Doyle*, was elected as such in the *fourteenth* ward; and I, the said *William Allison*, was elected as such in the *fifteenth* ward; and I, the said *Philip Schmitt*, was elected as such in the *sixteenth* ward; and I, the said *William H. Waters*, was elected as such in the *seventeenth* ward; and I, the said *Thomas Bowers*, was elected as such in the *eighteenth* ward; and I, the said *Benjamin B. Seaman*, was elected as such in the *twenty-third* ward; and I, the said *Patrick Kelly*, was elected as such in the *twenty-fourth* ward; and I, the said *Thomas Armitage*, was elected as such in the *twenty-fifth* ward.

I was, during the time mentioned in said interrogatory, a member of the common council of the city of *Brooklyn*.

To the Second Interrogatory. I was so served, and in the manner specified in said second interrogatory.

To the Third Interrogatory. It was not. When such adjournment was made on *December 27th*, 1881, I had formed no purpose upon the subject. I had not then determined how I should vote if said resolution should be at said adjourned meeting put upon its passage. Nor did I know that it would be then put upon its passage.

To the Fourth Interrogatory. Not to my knowledge.

To the Fifth Interrogatory. I did attend said meeting, and it was held at *ten* o'clock in the *fore*noon of said *thirty-first* day of *December*, 1881.

To the first paragraph of the Sixth Interrogatory. There was a motion made to take from the table a communication from the mayor, disapproving such a resolution, by *William Dwyer*.

To the second paragraph of the said Sixth Interrogatory. Such communication was the disapproval by the mayor of such a resolution.

To the paragraph of the Seventh Interrogatory. There was a motion made to adopt said resolution by *William Dwyer*.

To the paragraph of said Seventh Interrogatory. Said resolution received a two-thirds vote, and I voted in the affirmative on its adop-

in the case of People *v.* Dwyer, 90 N. Y. 402. For the interrogatories to which this is the answer see *supra*, Form No. 6224. For other answers to interrogatories see Stuart *v.* People, 4 Ill. 395; People *v.* Pearson, 4 Ill. 270.

tion, and each of the persons named as defendant herein voted in the affirmative, *seventeen* in all.

To the Eighth Interrogatory. Such motion was made and was lost. I voted in the negative on said motion, and each of the persons named as defendant herein so voted.

James Kane (*and signature of fourteen others.*)

State of *New York*,)
County of *Kings*, } ss.
City of *Brooklyn.*)

William Dwyer, *John McCarty*, *James Kane*, *James Weir*, *Jr.*, *Daniel O'Connell*, *Philip Casey*, *James Donovan*, *William J. LePine*, *Felix W. Doyle*, *William Allison*, *Philip Schmitt*, *William H. Waters*, *Thomas Bowers*, *Benjamin B. Seaman*, *Patrick J. Kelly* and *Thomas R. Armitage*, being duly severally sworn, each for himself respectively deposes and says, that he is one of the defendants in the above entitled proceedings, and that the foregoing answers (by him signed) to the several interrogatories propounded to him in said proceedings are true to the best of his knowledge and belief.

James Kane (*and signature of fourteen others.*)

Severally sworn to before me, *January 10th*, 1882.

William M. Summers,
Notary Public, *Kings* Co., *N. Y.*

2. Petition for Revocation of Order of Commitment.[1]

Form No. 6252.

(Precedent in *Exp.* Terry, 128 U. S. 299.)[2]

In the *Circuit* Court *of the United States*, *Ninth* Circuit, *Northern* District of *California.*

In the Matter of Contempt of *David S. Terry.*

To the Honorable *Circuit* Court aforesaid:

The petition of *David S. Terry* respectfully represents:

That all the matters and transactions occurring in the said court on the *3d* day of *September*, *inst.*, upon which the order in this matter was based, your petitioner did not intend to say or do anything disrespectful to said court or the judges thereof, or to any one of them; that when petitioner's wife, the said *Sarah Althea Terry*, first arose from her seat, and before she uttered a word, your petitioner used every effort in his power to cause her to resume her seat and remain quiet; and he did nothing to encourage her in her acts of indiscretion; when this court made the order that petitioner's wife be removed from the court-room, your petitioner arose from his seat with the purpose and intention of himself removing her from the court-room, quietly and peaceably, and had no intention or design of obstructing or preventing the execution of the said order of the court; that he never struck or offered to strike the United States marshal until the said marshal had assaulted himself, and had in his

1. See also a form in Tolleson *v.* People's Sav. Bank, 85 Ga. 176.

2. The circuit court declined and refused to grant the relief prayed for in this petition, or any other relief, and an application for a writ of habeas corpus was denied by the supreme court.

presence violently, and, as he believed, unnecessarily, assaulted petitioner's wife.

Your petitioner most solemnly avers that he neither drew or attempted to draw any deadly weapon of any kind whatever in said court-room, and that he did not assault or attempt to assault the United States marshal with any deadly weapon in said court-room or elsewhere.

And in this connection he respectfully represents that after he had left said court-room he heard loud talking in one of the rooms of the United States marshal, and among the voices proceeding therefrom he recognized that of his wife, and he thereupon attempted to force his way into said room through the main office of the United States marshal; the door of this room was blocked with such a crowd of men that the door could not be closed; that your petitioner then for the first time drew from inside his vest a small sheath knife, at the same time saying to those standing in his way in said door, that he did not want to hurt any one; that all he wanted was to get in the room where his wife was; the crowd then parted, and your petitioner entered the doorway, and there saw a United States marshal with a revolver in his hand pointed to the ceiling of the room; some one then said, "Let him in, if he will give up his knife," and your petitioner immediately released hold of the knife to some one standing by.

In none of these transactions did your petitioner have the slightest idea of showing any disrespect to this honorable court or any of the judges thereof.

That he lost his temper he respectfully submits, was a natural consequence of himself being assaulted when he was making an honest effort to peacefully and quietly enforce the order of the court so as to avoid a scandalous scene, and of seeing his wife so unnecessarily assaulted in his presence.

Wherefore your petitioner respectfully requests that this honorable court may, in the light of the facts herein stated, revoke the order made herein committing him to prison for *six* months.

And your petitioner will ever pray, etc.

Dated *September 12*, 1888.

[*David S. Terry.*][1]

[(*Verification.*)][2]

3. Order Discharging from Imprisonment.

Form No. 6253.

(Precedent in *Ex p.* Ireland, 38 Tex. 350.)

The State of *Texas.*

To the *District* Court of *Guadalupe* County, and *John F. Gordon*, Sheriff of said County, greeting:

1. The signature of the petitioner does not appear in the reported case, but has been added to render the form complete.
2. This petition was duly verified, but the verification is omitted from the reported case. For the form of a verification in a particular jurisdiction consult the title VERIFICATIONS.

Before our *Supreme* Court on the *ninth* day of *May*, 1872, the applicants, upon petition for habeas corpus, in the case of *Ex parte John Ireland, W. P. H. Douglass, John P. White, W. M. Rust, W. E. Goodrich, W. H. Burgess and Alex. Henderson*, to revise or reverse your judgment in relation to said parties was determined, and therein our *Supreme* Court made its order in these words:

"No. *1085*. This day came the sheriff of *Guadalupe* county, in obedience to the writ awarded in this cause, and brought with him the prisoners, *John Ireland, W. P. H. Douglass, John P. White, W. M. Rust, W. E. Goodrich, W. H. Burgess*, and *Alex. Henderson*, and having made his return writ, *George F. Moore* and *W. M. Walton*, Esquires, appeared in behalf of the applicants, and *B. Trigg*, Esquire, District Attorney *Twenty-seventh* Judicial District, appeared in behalf of the State; and the petition of the appellants, the writ and return, with the evidence introduced, having been submitted to the court, because it appears to this court that said applicants are illegally restrained of their liberty; it is ordered by the court, that they be discharged from the custody of the sheriff of *Guadalupe* county, and that they be restored to their liberty; and this decision be certified below for observance."

Wherefore we command you to observe the order of our said *Supreme* Court in this behalf, and in all things to have it duly recognized, obeyed and executed.

Witness the Hon. *Lemuel D. Evans*, Presiding Judge of our said *Supreme* Court, with the seal thereof annexed, at *Austin*, this *ninth* day of *May*, A. D. 1872.

(SEAL) *W. P. De Normandie*, Clerk.

4. Pardon.

Form No. 6254.

(Precedent in *Ex p.* Hickey, 4 Smed. & M. (Miss.) 753.)

Albert G. Brown, Governor of the State of *Mississippi*.

To the Sheriff of *Warren* County, Greeting:

Whereas it appears from a certified copy of certain proceedings had in the *circuit* court of the county of *Warren* in this state, to wit, on the *30th October*, 1844, that *Walter Hickey* was by the order and sentence of the presiding judge of said court, committed to jail for *five* months, and fined in the sum of *five hundred* dollars, and directed to be detained in prison until said fine and costs be paid, for an alleged contempt of court; and whereas it appears from the proceedings aforesaid, that said contempt consisted in certain newspaper publications made by said *Walter Hickey*, on the *10th* of *June*, 1844, and not alleged to have been in any wise done or committed in the presence of said court, or in its hearing, and whereas, by the 26th

1. It was held in this case that under the constitution of the state of *Mississippi* conferring upon the governor "power to grant reprieves and pardons, and to remit fines in all criminal and penal cases, except in those of treason and impeachment," he had power to pardon a contempt committed against a circuit court, and to release and remit the sentence of fine and imprisonment inflicted upon the offender.

section of the circuit-court law of this state, page 486, (How. & Hutch. Digest,) "the said court shall have power to fine and imprison any person who may be guilty of a contempt of the court, while sitting either in the presence or hearing of such court, provided that such fine shall not exceed one hundred dollars, and no person for such contempt shall be imprisoned for a longer period than the term of the court at which the contempt shall have been committed." And whereas it now appears that the said *Walter Hickey* has been committed for a longer period than the term of the court, fined in a greater sum than *one hundred* dollars for an offense not alleged to have been committed in the presence or hearing of said court, nor during the sitting of said court, and this at a term subsequent to that at which the offense was said to have been committed; and whereas there is, in this proceeding an exercise of judicial power over the liberty and property of the citizen, not, as I conceive, warranted by the constitution and laws of the land; and whereas a large number of citizens have appealed to me to interpose the executive clemency in this case; now, therefore, I, *Albert G. Brown*, Governor of the State of *Mississippi*, by virtue of the power in me vested, by the 10th section of the fifth article of the constitution, do grant to the said *Walter Hickey*, a full and free pardon, and do moreover direct the sheriff of *Warren* county forthwith to set him at liberty.

Given under my hand, and attested by the great seal of the state, at the city of *Jackson*, *November* the *13th*, 1844.

A. G. Brown.

(SEAL) By the Governor,
William Hemingway, Secretary of State.

5. Writ of Prohibition Forbidding Commitment.

Form No. 6255.

(Precedent in People *v.* Mayer, 71 Hun (N. Y.) 183.)[1]

In the name of the People of the State of *New York*.

To *Alexander U. Mayer*, Esq., a commissioner appointed by the *Superior* Court of the city of *Baltimore*:

Whereas, It doth appear to our *Supreme* Court of the State of *New York* that you, as commissioner appointed by the *Superior* Court of the city of *Baltimore*, are about to issue a process for contempt against one of the citizens of our said State of *New York*, by name *Daniel S. Toy*, for refusal to answer certain interrogatories proposed by you, as such commissioner, to the said *Daniel S. Toy*; and whereas, it further appears that said *Daniel S. Toy* is a minister of the gospel and clergyman of the *Baptist* church; and whereas, it

1. It was held in this case that when a hearing upon the merits has been had upon the return of an order to show cause why a writ of prohibition should not issue to prevent a commissioner appointed by a court of another state from oppressively and illegally committing the relator to prison for refusing to answer interrogatories calling for the disclosure of a privileged communication, and it appears that only a question of law is involved, it is proper to issue a peremptory writ instead of an alternative writ.

further appears to our *Supreme* Court of the State of *New York* that the declarations, if any, were made in the nature of a confession to the said *Daniel S. Toy*, as such minister of the gospel under a course of discipline prescribed by the *Baptist* church, to which religious body the said Rev. *Daniel S. Toy* belongs.

Now, therefore, we command you, *Alexander U. Mayer*, as such commissioner, appointed by the *Superior* Court of the city of *Baltimore*, that you do refrain from issuing any commitment for contempt or from doing any act to compel the said *Daniel S. Toy* to answer such interrogatory, or, in any way, interfere with the liberty of said *Daniel S. Toy*.

In witness whereof we have hereunto affixed the seal of our *Supreme* Court this *11th* day of *February*, 1893.

(SEAL) *J. O. Dykman*, J. S. C.

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CROSS-REFERENCES.

See the GENERAL INDEX to this work.

For matters of Procedure and Practice relating to CONTINUANCES, generally, see 4 ENCYCLOPÆDIA OF PLEADING AND PRACTICE, p. 822 *et seq.*

I. NOTICE OF MOTION FOR CONTINUANCE.[1]

Form No. 6256.

To *Jeremiah Mason*, Esq., Attorney for Defendant:

Take notice, that upon an affidavit, of which the within is a copy, a motion will be made on the first day of the next term of said court, to be held at the *Court-house*, in *Charlottesville*, in said county, on the *twelfth* day of *April*, 1898, for a continuance of said cause.

Dated *April 1st*, 1898.

Oliver Ellsworth, Attorney for Plaintiff.

II. MOTION FOR CONTINUANCE.[2]

Form No. 6257.[3]

In the *District* Court in and for *Harrison* county, *Iowa*.

John Doe, plaintiff,
against
Richard Roe, defendant.

Comes now the plaintiff (or *defendant*) in the above entitled cause and moves the court to postpone and continue the trial of said cause until the next term of this court (or *until Thursday, the first day of March, A. D. 1888*), upon affidavits filed herewith (or *attached hereto*) and made a part hereof.

Oliver Ellsworth,
Attorney for Plaintiff (or *Defendant*).

Form No. 6258.

(Precedent in State *v.* Maddox, 117 Mo. 670.)

[*The State of Missouri* against *Morgan Maddox.*] In the *Circuit* Court of *Shelby* County, *Missouri*. *April* Term, 1892.

The defendant, *Morgan Maddox*, comes and moves the court to

1. **Notices of motions**, for forms of, generally, consult the title MOTIONS. Motions for continuance are usually made without notice. Estee's Pl. and F. (2d ed.), p. 240.

2. **Necessity for Motion.** — Unless a cause is continued by consent or by operation of law, a party is not entitled to a continuance without making a motion therefor. 4 Encycl. of Pl. and Pr., p. 870.

Oral or in Writing. — It is said to be the better practice to file a written motion. Puterb. Pl. and Pr. at Com. Law (6th ed.), p. 755. But the application is almost invariably made by oral motion, except in the rare instances where a rule of court requires it to be in writing. The motion is sometimes incorporated in the affidavit. See for illustration Forms Nos. 6258, 6283, 6302, and precedent in note 4, p. 398.

For formal parts of motions, generally, consult the title MOTIONS.

3. **Precedent of such a motion** may be found in State *v.* Foster, 79 Iowa 731.

grant him a continuance in this cause to the next term of this court, and as the grounds for this motion states the following:

First. (*Here were set out the facts showing grounds for continuance on account of the absence of counsel.*)[1]

Second. (*Here were set out facts showing grounds for continuance on account of the absence of a material witness.*)[2]

Morgan Maddox.

State of *Missouri*, }
County of *Shelby*. } ss.

Morgan Maddox, the above named defendant, being duly sworn, on his oath states, that the facts stated in the foregoing application for a continuance are true.

Morgan Maddox.

Subscribed and sworn to before me this *September 5*, 1892.

Frank Dimmitt, Clerk.

III. AFFIDAVIT[3] FOR CONTINUANCE.

1. For Want of Preparation.[4]

Form No. 6259.

(Precedent in Howell *v.* State, 5 Ga. 49.)[5]

[(*Title of court and cause, venue and commencement as in Form No.*

1. For forms of affidavits for continuance for absence of counsel see *infra*, Forms Nos. 6261 to 6269.

2. For affidavits of continuance for absence of witness see *infra*, Forms Nos. 6272 to 6298.

3. **For the formal parts** of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

Necessity for Affidavit. — See 4 Encycl. of Pl. and Pr. 873.

Who may Make Affidavit. — The affidavit is ordinarily made by the applicant, but may properly be made by an attorney, or other person who has the requisite knowledge. 4 Encycl. of Pl. and Pr. 875.

In Duberly *v.* Gunning, 1 Peake N. P. (ed. 1795), p. 97, the case was continued on an affidavit by the defendant's attorney stating that the absent witness was material and necessary.

In Sullivan *v.* Magill, 1 H. Bl. 637, it was held that the court will not receive the affidavit of an attorney's clerk to put off a trial unless it be stated that the clerk was particularly acquainted with the circumstances of the case and had the management of it.

In Hunter *v.* Kennedy, 1 Dall. (Pa.) 81, and Jackson *v.* Mason, 1 Dall. (Pa.) 135, continuances were granted on the affidavits of strangers to the record, who had, however, an interest in the suit.

See further, as to proper parties to make an affidavit, *infra*, note 1, p. 318, note 2, p. 320, note 3, p. 325, note 1, p. 327, note 1, p. 332, note 2, p. 352, note 2, p. 360, note 3, p. 362, note 1, p. 364, note 1, p. 371, note 1, p. 372, note 1, p. 374; Form No. 6288; precedents in note 1, p. 377; Form No. 6293; note 2, p. 391.

Affidavit should be entitled in the proper cause. Adams Express Co. *v.* Reno, 48 Mo. 264; Irroy *v.* Nathan, 4 E. D. Smith (N. Y.) 68.

4. **Want of preparation** as a ground for continuance, see 4 Encycl. of Pl. and Pr. 833 *et seq.*; Brooks *v.* Com., (Ky. 1896) 37 S. W. Rep. 1043.

5. The indictment charged the offense to have been committed on the twenty-first day of April, and the indictment was returned three days later. The defendant was put on trial on the twenty-fifth day of the same month. Though other grounds for continuance were united with that of want of preparation, the affidavit made sufficient showing by stating the facts given in the text. The particularity exacted in affidavits of this kind might lead the careful practitioner to expand the affidavit by asserting the innocence

6284) that he is the defendant[1] in the above entitled cause,][2] that he is not ready for trial because of his close confinement in custody since the commission of the crime imputed to him, and that he has not been able to subpœna witnesses or procure testimony material for his defense; that the bill was returned into court on yesterday, that he has not been advised sufficiently long as to what offense would be imputed to him; that he cannot go safely to trial until he can collect and prepare his testimony, which he has not been enabled to do at the present term of the court[3] * * *[4] that he does not make this showing for delay, but for the purpose of getting a fair trial

of defendant, and declaring that there were, in fact, witnesses whom he could produce to testify in his defense if time were given, and other circumstances showing that a continuance would be of actual service to him. See *infra*, note 3, this page; Form No. 6286.

A Precedent to be Shunned. — In Southern Bank *v.* Mechanics Sav. Bank, 27 Ga. 253, the affidavit failed to comply with the requirements set forth in note 3, *infra*, and is also condemned by 3 Ga. Code (1895), § 965, which is merely declaratory of the general rule, and provides that "the party making an application for a continuance must show that he has used due diligence."

1. Who may Make. — The affidavit, though usually made by the party himself, may be made by his counsel when the latter is cognizant of the facts, and particularly when the matters set forth relate to the attorney's own situation or conduct in respect to the case. Thus the motion was founded upon the affidavit of counsel in Dunlap *v.* Davis, 10 Ill. 84; Brotherton *v.* Brotherton, 41 Iowa 112; Brooks *v.* Com., (Ky. 1896) 37 S. W. Rep. 1043; People *v.* Shea, 147 N. Y. 78.

2. The words in [ ] are not found in the reported case, but have been added to make the form complete.

3. That reasonable exertions have been made for preparation without success, or that there was some good reason for not making such exertions must be shown. Dunlap *v.* Davis, 10 Ill. 84; People *v.* McGonegal, (Supreme Ct.) 17 N. Y. Supp. 147; Com. *v.* Mister, 79 Va. 5. It is not sufficient to aver inability to take steps toward preparation. The affidavit should show in what respect the party has not been able to prepare for trial. Thompson *v.* State, 24 Ga. 297. And a continuance was properly denied where the affidavit of defendant's counsel merely stated that counsel wanted time, and that it was not customary to go to trial on an indictment for so grave an offense so soon after it was found. People *v.* Shea, 147 N. Y. 78.

An affidavit that defendant's attorney had not been notified when the case would be reached until a few hours before it was called, was insufficient in not showing that defendant himself was unaware of the date fixed for the trial in time to prepare for the same. May *v.* State, 38 Neb. 211.

An affidavit was insufficient in not stating that counsel defending was unable by reason of his recent employment to fairly present defendant's case, where defendant had been abandoned by his former counsel a short time before trial, and had thereupon employed other counsel. Dacey *v.* People, 116 Ill. 555.

In Murphy *v.* Com., 92 Ky. 485, it appeared by affidavit of the defendant that he had been confined in jail since his arrest, that he was unable to read or write, that he was entirely without funds, that the attorney defending him was a volunteer and a stranger in the county, and that if he were granted a continuance defendant could prove that he was insane when the alleged crime was committed. It was held reversible error to overrule defendant's motion for continuance based on such affidavit. For similar cases see State *v* Hagan, 22 Kan. 490; Newman *v.* State, 22 Neb. 356.

In North *v.* People, 139 Ill. 81, the court said, "it has never been regarded necessary that defendant show the same degree of promptness and diligence in preparing for trial at the term at which the indictment is returned as at subsequent terms."

4. Here the affidavit proceeded to state the absence of counsel as a further ground for continuance. For affidavits presenting that ground see *infra*, Forms Nos. 6261 to 6269.

* * *.[1] [(*Signature and jurat as in Form No. 6284.*)][2]

2. For Public Excitement and Prejudice.[3]

Form No. 6260.

(*Title, venue and commencement as in Form No. 6283.*) That after the commission of the alleged homicide there was great public excitement in the minds of the people of *Marion* county, and such public excitement continues up to the present time, and such public excitement agitates the public mind to a high degree, and hath great prejudice against affiant, and that there is just and reasonable cause to apprehend that by reason of the excited state and condition of the public mind a jury obtained at this time might not be free to render justice to the defendant at this term of court. That there has not been since the time of the alleged homicide sufficient time for the public excitement to cool down. The public excitement was so intense that there was great danger that violence might have been done to affiant, by reason whereof extra guards had to be employed for the security of his person from the violence of the public since affiant has been in custody. That the said excitement in the public mind is sufficient to intimidate and swerve the jury.[4] That (*Here state special circumstances showing the existence of public excitement and prejudice*).[5] [Affiant further says that he believes that a fair and

1. The affidavit concluded with a further allegation of public excitement and prejudice as a ground for continuance. For affidavits in support of a motion for continuance upon that ground see *infra*, Form No. 6260.

2. The words in [ ] are not found in the reported case, but have been added to make the form complete.

3. **Public excitement** and prejudice as a ground for continuance, see 4 Encycl. of Pl. and Pr. 832, 878.

4. **"Sufficient to Intimidate and Swerve the Jury."**—That this averment is essential see State *v.* Abshire, 47 La. Ann. 542.

5. **Particular facts and circumstances** should be alleged from which the court can deduce the conclusion that public prejudice actually exists to such a degree that defendant cannot obtain a fair trial at the present term. See Hoover *v.* State, 48 Neb. 184; State *v.* Abshire, 47 La. Ann. 542, the latter case pointing out that an allegation that "means had been taken improperly to influence the jury" would be material to the point of prejudice. The form presented in the text is a part of the affidavit in Ballard *v.* State, 31 Fla. 280, in which the court said: "The mere fact that there is in the record neither any corroborative evidence of its statements, nor any attempt to show that the accused was prevented from getting such evidence by the stress of circumstances detailed, is sufficient reason for us to refuse to review the decision of the circuit judge in refusing a motion for a continuance on this ground."

The principles controlling such applications are said to be strictly analogous to those governing the application for a change of venue upon the same ground. Bishop *v.* State, 9 Ga. 121; Ballard *v.* State, 31 Fla. 280. As to the requisites of an affidavit for a change of venue, see vol. 4, Form No. 5560, and 4 Encycl. of Pl. and Pr. 399, 431, 432.

Other Forms. — In Jones *v.* State, (Tex. Crim. App. 1896) 35 S. W. Rep. 975, one ground of defendant's application for continuance was: "Because there exists at the present term of this court so great a prejudice in the public mind against him that witnesses knowing the facts material to his defense are terrorized and intimidated thereby, and will not declare such facts to him or to his attorney, and it would be extremely dangerous for him to go to trial; and a fair and impartial trial would be denied him if he is forced to trial at this term of the court." The motion was denied,

impartial trial can be had at the next term of this court.[1] And that this application is not made for delay, but for the purpose of securing a fair and impartial trial.] (*Signature and jurat as in Form No. 6283.*)

3. For Absence of Counsel.

a. In General.[2]

Form No. 6261.

(Precedent in Bartel *v.* Tieman, 55 Ind. 438.)

not because the affidavit was insufficient, but upon the ground that if the facts alleged were true the proper course was to move for a change of venue. See also Laughlin *v.* Com., (Ky. 1896) 37 S. W. Rep. 590.

In Howell *v.* State, 5 Ga. 49, the statement in the defendant's affidavit concerning public excitement, etc., was as follows: "Deponent further states that he cannot go safely to trial, because such is the excitement in the public mind, and so excited is public feeling at this time against him, as he has been advised and believes, that he has more to fear, and does fear, that he cannot obtain a fair trial." In Bishop *v.* State, 9 Ga. 121, the affidavit was almost exactly the same. In both of those cases it was held sufficient, but they must now be pronounced unsafe precedents to follow anywhere. As to the present law and practice in *Georgia*, see 4 Encycl. of Pl. and Pr. 832, note 7.

1. Fair Trial at the Next Term. — In State *v.* Abshire, 47 La. Ann. 542, the affidavit was pronounced defective because it "failed to disclose that a fair and impartial trial could be had at the term of court to which it was proposed to defer it."

2. Continuances for absence of counsel are not favored, particularly where the absence is occasioned by other professional engagements; actual prejudice resulting should always be shown. 4 Encycl. of Pl. and Pr. 839 *et seq.*, *cited* in Adarmek *v.* Plano Mfg. Co., 64 Minn. 304; Poppell *v.* State, 71 Ga. 276; Stringam *v.* Parker, 159 Ill. 304; Whitehall *v.* Lane, 61 Ind. 93; Geiger *v.* Payne, (Iowa, 1896) 69 N. W. Rep. 554; Watkins *v.* Ahrens, etc., Mfg. Co., (Ky. 1897) 38 S. W. Rep. 868; West *v.* Hennessey, 63 Minn. 378; State *v.* Inks, 135 Mo. 678; People *v.* Hildebrandt, 16 Misc. Rep. (N. Y. County Ct.) 195; Van Horn *v.* State, (Wyoming, 1895) 40 Pac. Rep. 964.

There is no prejudice where it appears that the case was ably tried by associate counsel. Reynolds *v.* Campling, 23 Colo. 105; Marshall *v.* State, 94 Ga. 589; Johnson *v.* Dean, 48 La. Ann. 100; St. Louis, etc., R. Co. *v.* Holaday, 131 Mo. 440; Weaver *v.* State, 34 Tex. Crim. Rep. 282; Ryan *v.* State, (Tex. Crim. App. 1896) 35 S. W. Rep. 288; Mixon *v.* State, (Tex. Crim. App. 1896) 35 S. W. Rep. 394. Or where no reason is shown why other counsel could not be procured. Condon *v.* Brockway, 157 Ill. 90.

Application After Trial Begun. — In Porter *v.* Triola, 84 Ill. 325, it was held that a motion for continuance for absence of counsel by reason of sickness came too late after trial begun, the remedy, if any, being by motion for a new trial.

Who may Make. — In Condon *v.* Brockway, 50 Ill. App. 625, the affidavit was made by the party and also by the absent attorney. In St. Louis, etc., R. Co. *v.* Holaday, 131 Mo. 440, it was made by associate counsel present. In Johnson *v.* Dean, 48 La. Ann. 100, by the absent counsel.

Requisites of Affidavit. — The affidavit should show the reason for counsel's absence. St. Louis, etc., R. Co. *v.* Holaday, 131 Mo. 440. And that his presence is needed to assist associate counsel, if there is any. Stringam *v.* Parker, 159 Ill. 304. And set out what time the absent attorney will be able to try the case. Condon *v.* Brockway, 50 Ill. App. 626. And "show with satisfactory certainty that the applicant had not ample time, after he learned that his attorney would be absent on the day set for the trial * * * to employ another attorney, and to inform him fully" of the difficulties involved in the case. Whitehall *v.* Lane, 61 Ind. 93, where the affidavit, insufficient in this particular, is set forth *in extenso*.

[(*Title, venue and commencement as in Form No. 6287.*)][1] that the cause was set down for trial on the *ninth* day of this month (*June*) and that she was ready for trial on that day; that she had procured the attendance of a very importance witness, who lived in *Cincinnati, Ohio*; that she had some time before employed *Henry C. Fox* and *John H. Popp*, attorneys, to prepare and conduct her defense in said suit; that they had prepared themselves to defend it, and were familiar with the facts and questions involved in it, and that she relied upon them to represent her; that said cause was not called in its order for trial until the evening of the *tenth* instant, at which time she was ready for trial with her attorneys; that the court passed said cause and called another one, and proceeded to the trial of it, whereupon her witness from *Cincinnati* immediately left for his home in that city. Affiant further says that her attorneys, who were then present, ready for trial, cannot be present at this trial, at this term, owing to professional engagements elsewhere, which engagements were entered into before the time set for trial of this cause, viz., the *ninth* instant; that they informed her of this fact for the first time on the *twelfth* instant; that she has not employed other counsel for the reason that no others were familiar with the facts of her defense, and that after she was informed by her retained counsel that they could not be at the trial on this day, the intervening time, being but two days, was too short to enable other attorneys to familiarize themselves sufficiently with the case to properly try it; and for the further reason that she is poor, as is also her husband, and unable to pay two sets of attorneys; that in the complaint she is charged with fraudulently receiving the titles to lands therein described, with intent to cheat, hinder and delay the creditors of her husband, all of which charges are untrue; that all she has for herself and children is involved, and it is of the greatest importance to her to have her said witness on the trial.[2] (*Signature and jurat as in Form No. 6287.*)

b. Associate Counsel.

Form No. 6262.

(Precedent in State *v.* Maddox, 117 Mo. 670.)[3]

(*Commencing as in Form No. 6291, and continuing down to* *.) That *Champ Clark*, an attorney-at-law, is one of the counsel for this defendant in this cause and has been such counsel ever since the indictment in this cause was found, and that said *Champ Clark*, as such counsel, is in charge of portions of the work in making the defense in this cause, which were peculiarly in the charge and knowledge of said *Clark*.

1. The words to be supplied in [ ] are not found in the reported case, but have been added to make the form complete.

2. Here followed a statement designed to support the application on the further ground of absence of a witness. The supreme court did not comment upon the merits of the affidavit further than to declare that it was sufficient, and that a continuance was erroneously denied.

3. The merits of so much of the affidavit as is here given were not alluded to by the court, as the case was decided on the part of the affidavit set out in Form No. 6291.

That said *Clark* is a resident of the city of *Bowling Green*, in *Pike* county, *Missouri*, and is a member of the bar at that place, and has a large practice as such attorney in the *Circuit* Court of said *Pike* county.

That the regular *September* term, 1892, of said *Pike Circuit* court is begun on this day, to wit, the *fifth* day of *September*, 1892.

That the docket of said *Circuit* Court of *Pike* county is set so that there are a great many of the cases in which said *Clark* is of counsel, set for trial on every day, beginning with this day and ending on the *fifteenth* day of *September*, 1892.

That said cases in which said *Clark* is engaged as counsel are important cases, and by reason of said employment of said *Clark* in said cases in said *Pike Circuit* Court, he, the said *C. Clark*, cannot be present at the trial of this cause at the present term of this court, and that if the defendant is compelled to go to trial without the presence and aid of said *Clark* as such counsel, a great and material harm would be done this defendant, and this defendant would be deprived of the means of making a full and fair defense in this cause.[1] (*Signature and verification as in Form No. 6291.*)

Form No. 6263.[2]

(*Title and venue as in Form No. 6284.*)

I, *Early W. Thrasher*, do swear that I am the defendant in the above entitled cause; that *B. H. Thrasher*, Esq., is my leading counsel[3] in this case; that I have had more frequent and fuller conversations with him concerning this case than with *Colonel Billups* or other counsel; that he has entire charge of getting up, preparing and arranging the evidence in this case; that I cannot safely go to trial without his services;[4] that I expect his services at the next

1. The affidavit then proceeded to set out as another ground for continuance the absence of a material witness, which constitutes Form No. 6291, and was duly subscribed and sworn to.

2. **This affidavit modifies and strengthens** the precedent found in Thrasher *v.* Anderson, 45 Ga. 540, wherein a new trial was granted for refusal of a continuance. For other cases, in which new trials were properly granted because continuances were refused upon a proper showing of the absence of leading counsel, see Smith *v.* Brand, 44 Ga. 588; Bagwell *v.* State, 56 Ga. 406.

Continuances for "illness of counsel or his absence, from providential cause, where there is but one, or of the leading counsel where there are more than one," are regulated by section 964 of the Georgia Code of 1895.

It was held by a majority of the court in Thomas *v.* State, 92 Ga. 8, that although a party makes a proper showing for a continuance as required by that section, the application is nevertheless controlled by section 966 of the code, and that the court may, in the exercise of a sound discretion, refuse to continue the case.

It was held a proper exercise of discretion to refuse a continuance on account of the absence of leading counsel where the defendant's affidavit merely stated as to the reason for counsel's absence that he, the defendant, "was informed by letter that [counsel's] wife was dangerously ill and too ill for his attendance on court," and other competent counsel tried the case. Loyd *v.* State, 45 Ga. 57.

3. **Leading Counsel.** — As to who is considered leading counsel, see Smith *v.* State, 78 Ga. 74; Bagwell *v.* State, 56 Ga. 406; Turner *v.* State, 70 Ga. 774.

4. He should swear that he cannot safely go to trial without the absent counsel. Turner *v.* State, 70 Ga. 774.

term; that he is not absent by my consent or procurement, but from providential cause, namely, an attack of pneumonia,[1] from which he is now recovering; and that the said *B. H. Thrasher* is unable to be present at this term of court by reason of said illness. This application is not made for delay only.[2] (*Signature and jurat as in Form No. 6284.*)

c. In Attendance upon Legislature.[3]

(1) By Party.

Form No. 6264.

(Precedent in Harrigan *v.* Turner, 53 Ill. App. 292.)

State of *Illinois*, } ss. In *Circuit* Court, *May* Term, 1893.
Peoria County. }

L. R. Turner
vs.
Michael Harrigan. } *Debt — Appeal.*

Michael Harrigan makes oath and says that he is the above named defendant, and that he can not safely proceed to the trial of this cause at present *May* term, 1893, of this *Circuit* Court of *Peoria* County, *Illinois*, for the reason that *John M. Niehaus*, his attorney, is at present a member of the upper branch of the legislature of the General Assembly, now in session at *Springfield*, *Illinois*, for the year of 1893, and that he is now in actual attendance on the same;[4] and that the attendance of *John M. Niehaus* in this *Circuit* Court is necessary to a fair and proper trial of said suit; and that the said *John M. Niehaus* was employed by the defendant, *Michael Harrigan*, prior to the commencement of the *January* session of the General Assembly of 1893; said session was held at *Springfield*, *Illinois*.

1. **For certificate of a physician** see *infra*, Form No. 6305, and annotations, showing that it is good practice to fortify an affidavit of sickness by filing therewith the certificate of a physician.

2. **Not Made for Delay.** — The affidavit must state that the application is not made for delay only. Burnett *v.* State, 87 Ga. 622; Smith *v.* State, 78 Ga. 74, where a defect in that particular was held fatal.

3. **Absence of counsel in attendance upon the legislature,** even of leading counsel, is not deemed a sufficient ground for continuance. Sharman *v.* Morton, 31 Ga. 34. But see Patin *v.* Poydras, 7 Martin N. S. (La.) 593, where it appeared by plaintiff's affidavit that her counsel was absent attending to public business as a senator and had her papers in his possession; that she was not apprised of his absence early enough to send for the papers which were necessary in her case, and had not time to employ or instruct other counsel, nor the means to do so. A refusal to grant a continuance was there held to be an abuse of discretion.

But statutes often provide for continuances on account of absence of counsel in attendance upon the legislature as a member thereof.

California. — Code Civ. Proc. (1897), § 595.

Illinois. — Starr & C. Anno. Stat. (1896), pp. 3041, 3042, pars. 47, 48.

Indiana. — Horner's stat. (1896), § 411*a*.

Louisiana. — Garland's Rev. Code (1894), § 466.

Missouri. — Burns' Anno. Pr. Code (1896), § 500.

4. **Showing actual attendance** upon the session of the legislature is sufficient cause for a continuance. Harrigan *v.* Turner, 53 Ill. App. 292. Consult also annotations to Form No. 6268, *infra*.

That this application is not made for delay, but that justice may be done; that he has a meritorious defense and believes he will be successful on a trial of said cause.

Michael Harrigan.

Subscribed and sworn to before me this *3d* day of *May*, A. D. 1893.

James E. Pillsbury, Clerk,
By *R. N. McCormick*, Deputy.

Form No. 6265.[1]

(*Title of court and cause, and venue as in Form No. 6287.*)

Thomas A. Smith, being duly sworn, on his oath says that he is the plaintiff (or *defendant*) in the above entitled cause; that *John Jones*, of *Indianapolis*, is his attorney in said cause; that the said *Jones* is a member of the general assembly of the state of *Indiana*, and that said general assembly is now in session; and further, that said *Jones* was employed in said cause by the affiant as his chief attorney before the beginning of said session, and before the election of said *Jones* to said general assembly, and that said *Jones* is the only attorney employed in said cause by the affiant [who is prepared to try said cause for him].[2] (*Signature and jurat as in Form No. 6287.*)

Form No. 6266.[3]

(*Title of court and cause, and venue as in Forms Nos. 832, 2566.*)

John Smith makes oath and says that he is the plaintiff (or *defenaant*) in the above entitled cause; that *Samuel Short* is an attorney at law and employed as the leading counsel for the said plaintiff (or *defendant*) in said cause; that said *Samuel Short* is absent from the court and employed in the service of the state of *Louisiana*, as a member of the general assembly thereof, which is now in session. (*Signature and jurat as in Form No. 832.*)

(2) By Attorney.

Form No. 6267.[4]

(*Title of court and cause, and venue as in Forms Nos. 814, 2534.*)

John Smith, being duly sworn, deposes and says, that he is the

1. *Indiana.* — Horner's Stat. (1896), § 411, providing that "whenever any plaintiff or defendant in a civil action, or a defendant in a criminal action, shall make affidavit," etc., "and upon such affidavit move the court for a continuance," the same shall be granted until three days after the adjournment of the legislature.

See also annotations to Form No. 6268, *infra*.

2. If there is only one attorney, omit the words in [ ]; if more than one, they are indispensable.

3. *Louisiana.* — Garland's Rev. Code (1894), § 466, providing that "whenever any attorney at law shall be employed in the service of the state, as a member of the general assembly, his absence from court, unless it be the supreme court, during the session of the general assembly, shall constitute a peremptory cause for the continuance of any case wherein he is employed as leading counsel."

The code does not expressly require an affidavit in support of the motion for continuance. For construction of similar statutes, and practice thereunder, see annotations to Forms Nos. 6264, 6265, 6267, 6268, 6269.

4. *California.* — Code Civ. Proc.

attorney of record for the plaintiff (or *defendant*) in the above entitled cause; that he is actually engaged in attendance upon a session of the legislature of the state of *California* as a member thereof; and that he was employed as attorney of record as aforesaid before the commencement of said session of the legislature.[1] (*Signature and jurat as in Form No. 814.*)

Form No. 6268.[2]

(*Title of court and cause, and venue as in Form No. 6285 or Form No. 6291.*)

I, *John Smith*, do swear that I am the attorney (or *solicitor* or *counsel*)[3] of the plaintiff (or *defendant*, or other party) in the above entitled cause; that I was actually employed[4] in said suit by said party prior to the commencement of the general assembly of the state of *Illinois*, which is now in session[5] [and was prior to and at the date of said employment and am now duly authorized and admitted to prac-

(1897), § 595, not expressly requiring an affidavit but providing for the postponement of trial. In People *v.* Goldenson, 76 Cal. 343, where the junior counsel was absent as a member of the legislature, it appears that an affidavit was filed by the senior counsel present. In the same case the court deems it doubtful if section 595, above mentioned, applies to criminal proceedings.

1. In People *v.* Goldenson, 76 Cal. 343, the court expressed the opinion that the Code, § 595, cited in the preceding note, authorized a continuance only for the absence of those who become attorneys of record before the commencement of the session of the legislature.

2. *Illinois.* — Starr & C. Anno. Stat. (1896), p. 3041, par. 47 *et seq.*, applying to all civil "suits at law or in equity."

It is mandatory upon the court to continue the cause upon this ground under the statute, the word "may" being construed as "shall" or "must." St. Louis, etc., R. Co. *v.* Teters, 68 Ill. 144; Wicker *v.* Boynton, 83 Ill. 545; Ware *v.* Jerseyville, 158 Ill. 234; Chicago Public Stock Exch. *v.* McClaughry, 148 Ill. 372, *affirming* 50 Ill. App. 358, refusing, however, to disturb the ruling of the trial court denying the continuance, it appearing that the error was harmless.

Counter affidavits are not admissible for the purpose of contradicting the affidavit. Chicago Public Stock Exch. *v.* McClaughry, 148 Ill. 379.

A second application on a sufficient affidavit will not be entertained at the same term that a first application on the same grounds has been overruled on account of a defective affidavit. Stockley *v.* Goodwin, 78 Ill. 127.

Missouri. — Burns' Anno. Prac. Code, § 500, applying to all civil "suits at law or in equity."

3. **Who may Make.** — In *Illinois* and *Missouri* the statutes provide for a continuance if it shall appear by affidavit, etc., not specifying who must make the affidavit. In Joiner *v.* Drainage Comrs., 17 Ill. App. 607, the affidavit was made by the absent attorney. In McClory *v.* Crawley, 59 Ill. App. 392, it was made by the defendant, and held insufficient only for intrinsic defects. In Harrigan *v.* Turner, 53 Ill. App. 292, it was made by the defendant and held to be in proper form, and so in Ware *v.* Jerseyville, 158 Ill. 234. In St. Louis, etc., R. Co. *v.* Teters, 68 Ill. 144, it was made by plaintiff's agent, and the precedent approved in this case is given *infra*, Form No. 6269.

4. **"Actually Employed."** — An affidavit alleging employment of counsel implies actual employment in the language of the *Illinois* statute. Harrigan *v.* Turner, 53 Ill. App. 294. In *Missouri* the section of the *Illinois* statute requiring actual employment prior to the session, etc., was not adopted, and it is possible that the affidavit in that jurisdiction need not contain such statement. By judicial interpretation, however, in *California*, it was thought to be necessary in People *v.* Goldenson, 76 Cal. 343. See *supra*, note 4, p. 324.

5. **Time of Employment.** — A motion is properly overruled if the affidavit fails to state that the attorney had been employed in the cause prior to the commencement of the session of the

tice in the *Supreme* Court of *Illinois*];[1] that I am now[2] a member of the house of representatives (or *senate*) of said general assembly, and in actual attendance[3] on a session of the said general assembly at the capital of said state;[4] that my attendance in court at the trial of this suit is necessary to a fair and proper trial of said suit.[5] (*Signature and jurat as in Form No. 6285 or Form No. 6291.*)[6]

(3) By Agent.

Form No. 6269.

(Precedent in St. Louis, etc., R. Co. *v.* Teters, 68 Ill. 144.)[7]

[(*Title of court and cause, and venue as in Form No. 6285.*)][8]

A. L. Gardiner being first duly sworn says that he is the agent of the plaintiff; that said plaintiff cannot safely proceed to the trial of said cause[9] at this term of court on account of the absence of *Thomas S. Casey*, who is the principal or senior counsel in said cause; that said *Thomas S. Casey* is a member of the senate, one of the houses of the general assembly of the state of *Illinois*, and now in actual attendance upon a session of the said general assembly at the capital of said state; that said attorney was employed by plaintiff in said cause before the election of said attorney to the office aforesaid, and before the present session thereof was begun, and before the present term of this court began, and further saith not.

A. L. Gardiner, Agent.

[(*Jurat as in Form No. 6285.*)][8]

legislature. Stockley *v.* Goodwin, 78 Ill. 127.

1. **Admission to practice** in the supreme court is a requisite of the affidavit under the *Illinois* statute. Starr & C. Anno. Stat. (1896), p. 3042, par. 48. This, however, is not mentioned in the *Missouri* statute, and for that reason the words in [ ] may be omitted in the latter state.

2. **Affidavit should be made during, not before, the session** of the legislature under both the *Illinois* and *Missouri* statutes. Joiner *v.* Drainage Comrs., 17 Ill. App. 607.

3. **Actual attendance upon the session** must be shown in the affidavit, and it is not sufficient to state merely that counsel intends presently to be in attendance. Joiner *v.* Drainage Comrs., 17 Ill. App. 607.

4. See *supra*, note 5, p. 325.

5. **That the presence of counsel is necessary** need not be stated; a general state ment in the language of the statute is sufficient. Wicker *v.* Boynton, 83 Ill. 545. But the affidavit should either state facts as to the character of the suit, so as to enable the court to judge intelligently, or it should state in the language of the statute that "the attendance of counsel is necessary to a fair and proper trial." McClory *v.* Crawley, 59 Ill. App. 392.

An affidavit stating that the presence of the absent attorney is "necessary to a trial of the cause" is a fatal departure from the statute. Williams *v.* Baker, 67 Ill. 238. And so is an affidavit stating that the party "cannot safely proceed to the trial" in the absence of the counsel. McClory *v.* Crawley, 59 Ill. App. 392. But *compare* with this case the precedent in Form No. 6269, and *infra*, note 9, this page.

6. In *Illinois* the affidavit may be verified before the clerk of the court. Harrigan *v.* Turner, 53 Ill. App. 294.

7. It was held to be reversible error to overrule a motion for continuance upon this affidavit.

8. The words in [ ] are not found in the reported case, but have been added to make the form complete. Consult also annotations to Form No. 6268, *supra*.

9. **"Cannot safely proceed," etc.,** is not in the words of the statute which is

4. For Absence of Party.[1]

a. Needed as a Witness.[2]

Form No. 6270.

(Precedent in Welcome *v.* Boswell, 54 Ind. 298.)[3]

quoted in the annotation to Form No. 6268, *supra*, together with cases showing the peril of paraphrasing the statute. In this case, however, the circumstance that the absent attorney was stated to be "the principal or senior counsel" may have prompted the court to declare that "the affidavit * * * states * * * that the presence of such attorney was necessary to a full, fair and proper trial of the case."

1. Absence of party as a ground for continuance, see 4 Encycl. of Pl. and Pr. 834 *et seq.*, relating to continuances on the ground of the absence of a party, coparty, or adverse party, and the following notes to this form and notes to Form No. 6271, *infra*.

Who may Make. — The affidavit was made by the party himself, in Pate *v.* Tait, 72 Ind. 450; McClurg *v.* Ingleheart, (Ky. 1895) 33 S. W. Rep. 81; Clark *v.* Carey, 41 Neb. 780; by counsel in Simpson *v.* Simpson, (Cal. 1895) 41 Pac. Rep. 804; McBride *v* Stradley, 103 Ind. 465; Post *v.* Cecil, 11 Ind. App. 362; Hefling *v.* Van Zandt, 162 Ill. 162; Hodges *v.* Nash, 141 Ill. 392; Beard *v.* Mackey, 51 Kan. 131; West *v.* Hennessey, 63 Minn. 378; by the agent of the party, in Sanford *v.* Cloud, 17 Fla. 532; by the secretary of the defendant corporation, in Cerealine Mfg. Co. *v.* Bickford, 129 Ind. 236; Fisse *v.* Katzentine, 93 Ind. 490; by the party, his physician and his counsel in Jaffe *v.* Lilienthal, 101 Cal. 175.

2. Statement of Proposed Testimony, Defense, etc. — Where the presence of the party is not sought merely as a witness, but for aid and advice, etc., it is not necessary to state or allude to the proposed testimony by him. Jaffe *v.* Lilienthal, 101 Cal. 175. But where his presence is desired as a witness the affidavit should conform to the requirements of affidavits in the case of absent witnesses, for which see *infra*, Forms Nos. 6272 to 6298, so that the affidavit must set forth the facts expected to be proved, and their materiality. Hodges *v.* Nash, 141 Ill. 391; Hefling *v.* Van Zandt, 162 Ill. 162; Fisse *v.* Katzentine, 93 Ind. 490; McGehee *v.* Minter, (Tex. Civ. App. 1894) 25 S. W. Rep. 718; Sanford *v.* Cloud, 17 Fla. 532, where the opinion sets forth verbatim the affidavit upon which it was held that a continuance was rightly refused.

Diligence used to procure the party's presence or the testimony must be shown. Hefling *v.* Van Zandt, 162 Ill. 162. And a higher degree of diligence must be shown than when the absent witness is a stranger to the suit. Mantonya *v.* Huerter, 35 Ill. App. 27. But it need not show that he has been served with a subpœna. Douglass *v.* Blakemore, 12 Heisk. (Tenn.) 565.

Inability to prove the same facts by other witnesses must be shown. Hodges *v.* Nash, 141 Ill. 392. Consult also note 2, p. 343, *infra*.

Cause of party's absence must be shown. Hazen *v.* Pierson, 83 Ill. 241; Davis *v.* Foreman, (Tex. 1892) 20 S. W. Rep. 52. "Definitely and clearly." McBride *v.* Stradley, 103 Ind. 467, holding "sickness in his family" not a sufficient averment. Steele *v.* Com., 3 Dana (Ky.) 84, holding "circumstances beyond his control" insufficient. And if ill, the nature of the party's illness should be stated. Pate *v.* Tate, 72 Ind. 452. See also Solomon *v.* State, 71 Miss. 568.

Reasonable expectation of securing party's presence or testimony at the term to which it is sought to defer the trial must be shown. Mantonya *v.* Huerter, 35 Ill. App. 27. Consult also note 8, p. 345, *infra*.

Admission to Obviate Continuance.— See Elliott *v.* Field, 21 Colo. 378; Kitchens *v.* Hutchins, 44 Ga. 620; Pate *v.* Tait, 72 Ind. 450; Pruyn *v.* Gibbons, 24 La. Ann. 231.

3. "When the application is made on account of the absence of a witness merely, certain formal and necessary facts must be shown by the affidavit to entitle the party to a continuance (*citing* statute, now Horner's Stat. (1896), § 410). * * * In other cases good cause only need be shown by the affidavit or otherwise (*citing* statute, now Horner's Stat. (1896), § 411). In the case before us the applicant was more than a witness in his relations to the action. He was also a defendant, and the only de-

[(*Title of court and cause, and venue as in Form No. 6287.*)][1] *Thomas S. Cogley*, being duly sworn, on his oath says, that he is attorney for the defendant, *Frank D. Welcome*, in the above entitled cause, and that he makes this affidavit for and on his behalf; that said *Welcome* resides at *Port Huron* in the state of *Michigan*; that he is detained at his home by the dangerous illness of his wife, as affiant is informed and believes; that affiant was not employed in the defense in time to get the deposition of said defendant, and affiant has been informed and he believes that the defendant has been anxiously watching for a favorable change in the illness of his wife, so he could safely leave her to attend the trial of this cause; that he, affiant, believes the defendant has a meritorious defense to the above action; that he expects to prove by him that he is the owner of the steam-tug "*Grace Donner*"; that he employed the plaintiff to take charge of said vessel as master; that the services rendered by the plaintiff for the defendant were as master of said steamer and in no other capacity; that the plaintiff as such master received all the money and earnings of said vessel and applied them to the payment of himself for his services as master; that said plaintiff not only paid himself for his said services out of the moneys of said steamer and of the defendant, but that he appropriated large sums of money earned by said steamer and belonging to the defendant, in excess of the indebtedness of defendant to plaintiff *two or three hundred* dollars, as affiant is informed and believes; that affiant believes the defendant will testify to the above facts, and that he believes they are true; that he believes the testimony of said defendant can be procured by the next term of this court; that he, affiant, knows of no other witness by whom he can prove the facts above set forth, whose testimony can be as readily procured. [(*Signature and jurat as in Form No. 6287.*)][1]

b. Needed for Assistance and Advice.[2]

Form No. 6271.

(*Title of court and cause, and venue as in Form No. 6287.*) *John Smith*, being duly sworn, deposes and says that he is the sole attorney and

fendant in the cause. The rule, therefore, governing the application for a continuance on account of the absence of an ordinary witness was not, in our opinion, strictly applicable to him in the motion made in his behalf for the continuance of this cause. His application, we think, was not within any strict statutory rule, but was addressed to the sound legal discretion of the court. The affidavit shows what we consider a reasonable excuse for the absence of the appellant [defendant] when the motion for a continuance was entered. It also shows the materiality and importance of the proposed testimony of the appellant to the issues in the cause. By its terms it fairly excludes every conclusion that the application was made for delay merely. * * * We think that in the exercise of a proper judicial discretion the court below ought to have continued the cause, and that consequently it erred in refusing to do so." Welcome *v.* Boswell, 54 Ind. 298.

For another case of reversible error in refusing a continuance because of the absence of a party on account of his illness see Douglass *v.* Blakemore, 12 Heisk. (Tenn.) 564.

1. The words to be supplied in [ ] are not found in the reported case.

2. **Absence of Party Needed for Assistance and Advice.** — "It is unquestionably an important privilege of the party

counsel for the defendant in the above entitled cause and that he cannot safely go to trial without the presence of his client, who is now absent in *Europe*. The plaintiff's action is brought to recover damages for an alleged breach of warranty in a contract of sale by the defendant to the plaintiff of *four* automatic machines for turning the heads of carriage bolts.

to be present at the trial of his cause, which should not be denied on application made, unless for weighty reasons." Elliott *v.* Field, 21 Colo. 378, holding that a continuance was properly granted; Jaffe *v.* Lilienthal, 101 Cal. 175, granting a new trial for refusal of continuance; Pate *v.* Tait, 72 Ind. 452; Beard *v.* Mackey, 51 Kan. 133. See also annotations to Form No. 6270, *supra*.

That a party, especially a sole party, stands in a different attitude from an ordinary witness in respect of his application for a continuance was affirmed in Post *v.* Cecil, 11 Ind. App. 364 (and conceded by the dissenting opinion therein), granting a new trial for refusal of a continuance; *citing* Welcome *v.* Boswell, 54 Ind. 297, which furnished the precedent for Form No. 6270, *supra*. But his voluntary absence by reason of prior engagements is not a ground for continuance. West *v.* Hennessey, 63 Minn. 378.

Moreover, the presumption is in favor of the action of the court, and the refusal of a continuance will not be ground for a new trial unless it is affirmatively shown to have been an abuse of discretion. Bowling *v.* Whatley, 53 Ga. 24; Harris *v.* Rose, 26 Ill. App. 237; Fisse *v.* Katzentine, 93 Ind. 490; Pate *v.* Tait, 72 Ind. 452; Beard *v.* Mackey, 51 Kan. 131; McClurg *v.* Ingleheart, (Ky. 1895) 33 S. W. Rep. 81; Labouisse *v.* Orleans Cotton Rope, etc., Co., 43 La. Ann. 582; Owens *v.* Tinsley, 21 Mo. 423; Solomon *v.* State, 71 Miss. 568. Nor where the error, if any, appears to have been harmless. Simpson *v.* Simpson, (Cal. 1895) 41 Pac. Rep. 804; Bowling *v.* Whatley, 53 Ga. 24; Hazen *v.* Pierson, 83 Ill. 241. See also State *v.* Rogers, 56 Kan. 362.

Necessity for Motion and Affidavit. — In Montgomery *v.* Wilson, 58 Ind. 591, the record set forth in the bill of exceptions recited that "Now come the parties by their attorneys, * * * and said cause being called for trial, the said [attorney] on behalf of the defendant objected to going into the trial at the present hour of the day, on account of the absence of his client, who was old and infirm in health, and unable to attend court"; but the court proceeded to trial and judgment. In affirming the judgment, it was said: "There is no substantial fact here shown why the court should have delayed the trial — no affidavit for a continuance, no motion for a continuance, only the objection of the attorney," etc.

That the party's presence is essential "must be shown, when the case is called for trial, by an affidavit setting forth the special circumstances which sustain and justify the application." Cowperthwaite *v.* Miller, 2 Phila. (Pa.) 219.

Time to Prepare Application. — Refusal to grant counsel time to prepare and present a formal application in writing for a continuance on the ground of the absence of his client, is reversible error where the record fails to show any reason for denial of the privilege. Mayton *v.* Guild, (Tex. Civ. App. 1894) 29 S. W. Rep. 218.

Application After Trial Begun. — The application is made too late after the jury are impaneled and the trial has begun. Leavitt *v.* Kennicott, 54 Ill. App. 633. See also Cowperthwaite *v.* Miller, 2 Phila. (Pa.) 219.

Requisites of Affidavit. — The affidavit must clearly show that the presence of the absent party is necessary. National Exch. Bank *v.* Walker, 80 Ga. 281; Cowperthwaite *v.* Miller, 2 Phila. (Pa.) 219. See also Telford *v.* Brinkerhoff, 45 Ill. App. 588. And that he is possessed of knowledge not shared by his counsel. Beard *v.* Mackey, 51 Kan. 133.

Counter-affidavits or Testimony. — Whatever may be the result of the conflicting authorities as to the admissibility of counter-affidavits to resist an application for continuance on the ground of the absence of a witness (see annotations to Form No. 6308), it seems to be wholly within the discretion of the court to receive counter-affidavits or testimony where a continuance is asked for the absence of a party to the suit whose presence is not desired

The affiant says that to the best of his information and belief the defendant's defense is[1] that the machines sold by him to the plaintiff were warranted only to turn bolts either of Norway iron or of iron as soft as Norway iron, and that plaintiff used the machines for turning bolts made of a certain iron called "*charter oak*," which is much harder than Norway iron, thus subjecting the machines to a greater strain than they were warranted to sustain and necessitating constant repairs, which were made by ignorant and unskilled mechanics.

The affiant says that the defendant is a skilled machinist and inventor of automatic machinery and has a thorough knowledge of the various grades and brands of iron and steel; that he has exclusive knowledge of the details of the defense, and is the only person who knows the names and whereabouts of the expert witnesses necessary to be called on his behalf; that his peculiar knowledge, information and technical skill render it indispensable to a proper presentation of his side of the case that he should be personally present in order to give his aid and advice as to the conduct and management of the trial and the examination and cross-examination of witnesses upon the technical details of the case.

Affiant says that the facts of the defendant's case were communicated by the defendant to his attorney, *George Jones*, of *Indianapolis*, who with the defendant's assistance was prepared and expected to try the case at the time when it was set down for trial, but the said *Jones* died three weeks ago and the affiant, who was thereupon for the first time employed in the case by the defendant's agent, has been unable to get important papers and memoranda relating to the case which were in the possession of the said *Jones*, although as soon as employed he wrote and afterward telegraphed to said *Jones's* son and clerk to forward to him all such papers as soon as possible.

The absence of the defendant is because of the following facts: (*Here state the reasons for the defendant's absence and his efforts to be present in time for the trial.*)[2]

merely as a witness. McClurg *v.* Ingleheart, (Ky. 1895) 33 S. W. Rep. 80, where a physician was allowed to testify that the defendant was not physically unable to be present as stated in defendant's affidavit for a continuance. See also Bowling *v.* Whatley, 53 Ga. 24; McElveen Commission Co. *v.* Jackson, 94 Ga. 549.

1. Good Cause of Action or Defense. — In Fisse *v.* Katzentine, 93 Ind. 494, the court held the defendant's affidavit insufficient, because, among other things, it did not show any defense to the action, *citing* Montgomery *v.* Wilson, 58 Ind. 591. See also Beard *v.* Mackey, 51 Kan. 133; Telford *v.* Brinkerhoff, 45 Ill. App. 588.

2. See Cerealine Mfg. Co. *v.* Bickford, 129 Ind. 236, containing copious extracts from the affidavit, which was held to make a sufficient showing of the importance of the defendant's presence but an insufficient showing of diligence to secure his attendance. Hefling *v.* Van Zandt, 162 Ill. 162, where the affidavit was insufficient on the same point. Clark *v.* Carey, 41 Neb. 780, where the defendant's good faith was doubtful. Jaffe *v.* Lilienthal, 101 Cal. 175, where the affidavit was held sufficient in every particular and a new trial was granted for refusal to allow a continuance.

In Pate *v.* Tait, 72 Ind. 450, the defendant's affidavit, after stating what his testimony would be, and the fact of his sickness and inability to attend court, his residence in the county, and other formal matters, continued as follows: "And he further says that his presence at the trial of said cause is necessary to the proper defense thereof; that it is necessary to his proper defense

Affiant further says that he is thoroughly satisfied and believes that said defendant has not absented himself for the purpose of delay; that the affiant expects and fully believes that said defendant will be present at the next term of this court, and that said defendant will then be able to and will take charge of and conduct said case, and be present at the trial to aid and assist in the defense. (*Signature and jurat as in Form No. 6287.*)

5. For Absence of Witness.[1]

a. In General.

Form No. 6272.

[The State of *Alabama*, } In the *Circuit* Court.
Dale, County. } *October* Term, 1897.

John Doe, plaintiff,
against
Richard Roe, defendant.

The State of *Alabama*, }
County of *Dale*. } ss.

Before me, *Calvin Clark*, clerk of the *Circuit* Court in and for the

that he be personally present at said trial in order that he may advise and confer with his counsel during the progress of said trial, and that he desires to be present at said trial, and would be present now but for his inability to be there on account of said sickness." It was held that there was no error in refusing a continuance. "There was nothing in the affidavit," said the court, "to show when, if ever, the defendant would or expected to be able to be in attendance. The nature of the sickness was not shown, nor the age and general condition of health of the defendant. For aught that appears the court may have had reason to believe that the defendant would never be able to attend the trial. In fact the defendant died thereafter," etc., and "if a new trial were granted * * * he could not attend it."

1. For provisions relating to continuances on account of absent witnesses in the various jurisdictions consult the following:

Alabama. — Circuit and Inferior Ct. Rules, No. 16 (Civ. Code (1886), p. 808); Chancery Rules Nos. 71, 72 (Civ. Code (1886), p. 824).

Arizona. — Rev. Stat. (1887), § 752; Pen. Code (1887), § 1606.

Arkansas. — Sand. & H. Dig. (1894), §§ 2157, 2158, 5797.

California. — Code Civ. Proc. (1897), § 595; Pen. Code (1897), § 1052.

Colorado. — Mills' Anno. Code (1896), § 177; Mills' Anno. Stat. (1891), § 2113.

Connecticut. — Gen. Rules of Prac., No. VIII, § 2. See also *infra*, Form No. 6273.

District of Columbia. — Comp. Laws (1894), c. LV, § 120.

Florida. — See Harrell *v.* Durrance, 9 Fla. 500; Sanford *v.* Cloud, 17 Fla. 543; Gladden *v.* State, 12 Fla. 562; Green *v.* King, 17 Fla. 457. See also *infra*, Form No. 6283.

Georgia. — 2 Code (1895), § 5129; 3 Code (1895), § 962. See also *infra*, Form No. 6284.

Idaho. — Rev. Stat. (1887), §§ 4372, 7795; Territory *v.* Guthrie, 2 Idaho 403.

Illinois. — Starr & C. Anno. Stat. (1896), p. 3036, par. 43 (Prac. Act, c. 110, § 43). See also *infra*, Forms Nos. 6285, 6286.

Indiana. — Horner's Stat. (1896), §§ 410, 1781. See also *infra*, Forms Nos. 6287, 6288.

Iowa. — Code (1897), § 5370. See also *infra*, Forms Nos. 6289, 6290.

Kansas. — Gen. Stat. (1897), c. 95, § 329.

Kentucky. — Bullitt's Civ. Code (1895), § 315; Bullitt's Crim. Code (1895), § 189. See also Simms *v.* Alcorn, 1 Bibb (Ky.) 348; Carr *v.* Marshall, 1 Bibb (Ky.) 363. See also precedent *infra*, note 3, p. 358.

Louisiana. — Garland's Rev. Code (1894), § 464 *et seq.* The motion must

county aforesaid, personally appeared *John Doe* (or *Richard Roe*),[1]

be supported by affidavit. Winchester *v.* Rightor, 12 La. 256; State *v.* Rountree, 32 La. Ann. 1144; Thompson *v.* Mississippi M. & F. Ins. Co., 2 La. 234; Roby *v.* Brown, 14 La. 247. *Contra*, where the motion for postponement is only from evening to the following morning in order to enable a witness summoned and in town to get in condition to testify. Leckie *v.* Crane, 12 La. 432.

Maine. — Supreme Judicial Ct. Rules (1896), No. XV.

Maryland. — Pub. Gen. Laws (1888), art. 75, § 57 *et seq.*

Massachusetts. — Supreme Ct. Rules (Com. Law), No. 34.

Michigan. — Circuit Ct. Rules, No. 22; Chancery Rules, No. 15. See also *infra*, Form No. 6275.

Minnesota. — Stat. (1894), §§ 5366, 7321.

Mississippi.—Anno. Code (1892), § 723.

Missouri. — Burns' Anno. Pr. Code (1896), § 497 *et seq.*; Rev. Stat. (1889), § 4181 *et seq.* See also *infra*, Form No. 6291.

Montana. — Code Civ. Proc. (1895), § 1039; Pen. Code (1895), § 2010 *et seq.* See also *infra*, Form No. 6292.

Nebraska. — See *infra*, Form No. 6293, and annotations thereto.

Nevada. — Gen. Stat. (1885), §§ 3182, 4198. See also precedent *infra*, note on p. 359.

New Hampshire. — Supreme Ct. Rules, No. 30.

New Jersey. — See *infra*, Form No. 6276, and annotations thereto.

New Mexico. — Comp. Laws (1884), § 2049 *et seq.*

New York. — See *infra*, Form No. 6277, and annotations thereto.

North Carolina. — Code Civ. Proc. (1891), § 401 *et seq.*

North Dakota. — District Ct. Rules, No. 32 (3 N. Dak. xxxi); Rev. Codes (1895), § 8141. See also *infra*, Form No. 6278.

Ohio. — Supreme Ct. Rules, No. 23; Ct. Com. Pl. Rules (Cuyahoga Co.), Nos. 19*a*, 20*a*.

Oklahoma. — Stat. (1893), §§ 4207, 5162.

Oregon. — Hill's Anno. Laws (1892), §§ 179, 1344.

Pennsylvania. — See *infra*, Form No. 6277, and annotations thereto.

Rhode Island. — Rules of Prac., No. 16 *et seq.* (15 R. I. 634 *et seq.*). See also *infra*, Form No. 6279.

South Carolina. — Circuit Ct. Rules, No. 27. See also *infra*, Form No. 6280.

South Dakota. — Circuit Ct. Rules (6th Jud. Cir.), No. 29. See also *infra*, Form No. 6294.

Tennessee. — Code (1896), § 4662.

Texas. — Rev. Stat. (1895), art. 1277 *et seq.* See also *infra*, Forms Nos. 6295 to 6298, and notes thereto.

Utah. — Comp. Laws (1888), §§ 3353, 5003.

Vermont. — Supreme Ct. Rules, No. 9.

Virginia. — See precedent *infra*, note 3, p. 358–9, and authorities there cited. See also *infra*, Form No. 6281.

Washington. — 2 Hill's Anno. Stat. (1891), §§ 338, 1296.

West Virginia. — See Wilson *v.* Wheeling, 19 W. Va. 323; Dimmey *v.* Wheeling, etc., R. Co., 27 W. Va. 32.

Wisconsin. — Circuit Ct. Rules, No. 20 (Sanb. & B. Anno. Stat., § 2845, note). See also *infra*, Form No. 6282.

Wyoming. — Rev. Stat. (1887), § 3397 *et seq.*

Federal Courts. — An affidavit for continuance in a civil case should conform in its substantive allegations to the practice in the courts of record of the state in which the federal court is held (U. S. Rev. Stat., § 914), except, however, that the sufficiency of the averment of diligence to obtain the testimony of the witness is to be tested by the laws of the United States rather than by the practice in the state courts. Texas, etc., R. Co. *v.* Nelson, 50 Fed. Rep. 814, referring as to diligence to the U. S. Rev. Stat., §§ 876, 877.

1. Who may Make Affidavit. — See list of statutes, etc., cited *supra*, note 1, p. 331, note 3, p. 317.

Arizona. — Rev. Stat. (1883), § 3.

Arkansas. — In Turner *v.* Eustis, 8 Ark. 119, the affidavit was made by the party's attorney, and not criticised in that particular, although held defective on other grounds.

California. — In People *v.* Jenkins, 56 Cal. 5, the affidavit was made on behalf of the defendant by his attorney, and under the circumstances it was held that the motion for continuance was properly overruled. The court said: "An attorney cannot, in the nature of things, be supposed to have cognizance of the witnesses to an alleged criminal transaction or of the facts which they can prove in relation to it, except so far as he may have been informed of one or the other by his client.

who being duly sworn deposes and says:[1].[2]

Upon such a subject affidavits, when required, should be made by the defendant himself or some one who has direct knowledge of the facts."

Colorado. — In Glenn *v.* Brush, 3 Colo. 31, affidavit was made by party's attorney, but discussed and overruled on its merits.

Florida. — Consult Form No. 6283 *infra*, and notes thereto.

Georgia. — Consult Form No. 6284 *infra*, and notes thereto.

Iowa. — "Must be founded on the affidavit of the party, his agent or attorney." Miller's Anno. Code (1890), § 2750. In Widner *v.* Hunt, 4 Iowa 357, where the refusal of a continuance was sustained, the court said: "The affidavit is made by the plaintiff's attorney, who states that he had once before tried the cause, and is as well acquainted with the facts as the plaintiff himself. He deposes that he was not advised of the inability of the witness to be in attendance at that term of the court until so informed by the sheriff on the previous day. No reason is given why this affidavit was not made by the plaintiff himself. In the absence of the party there is no good reason why it may not be made by the attorney, if the interest of his client requires. It is not shown in this case, however, that the client was not present and able to make the necessary affidavit himself. It is not competent for the attorney to swear to facts which are solely within the knowledge of his client. The second affidavit does not allege that the fact of the inability of the witness to attend the court was not known to the plaintiff before the term and in time to have her testimony taken by deposition."

Kansas. — Should generally be made by the party asking the continuance. Baker *v.* Knickerbocker, 25 Kan. 288. When made by some other person, the reason therefor should generally in some manner be shown, as that the applicant was absent, or that the person making the affidavit was better acquainted with the facts stated therein. Clouston *v.* Gray, 48 Kan. 34.

Kentucky. — May be made by any person professing to be informed as to the facts which the absent witness will state. Hardesty *v.* Com., 88 Ky. 537, holding that the act of May 15, 1886 (appended to Bullitt's Crim. Code (1889), § 189) is not intended to confine the right to make the affidavit to the defendant alone. In the case above cited, the affidavit made by a stranger to the record stated that the party on whose behalf it was made was insane.

Louisiana. — Ordinarily, it is necessary that the affidavit shall be made by the party himself and not by his attorney. Lizardi *v.* Arthur, 16 La. 579; Beatty *v.* Tete, 9 La. Ann. 129. See also Brander *v.* Flint, 10 La. 391. But in Benne *v.* Tourne, 2 La. 462, the court said: "If the case be such a one as presents a fair apology for the party not being present himself in court, we think the person who represents him may make the necessary affidavits." See also Lizardi *v.* Arthur, 16 La. 579; State *v.* Boitreaux, 31 La. Ann. 188.

Nebraska. — See *infra*, note 4, p. 394.

New Mexico. — In Faulkner *v.* Territory, 6 N. Mex. 464, the affidavit was made by the party's attorney.

Washington. — Should be made by attorney, not by the party, where the former is alone cognizant of the necessary facts. State *v.* Wilson, 9 Wash. 218, where the affidavit of the defendant stated that his counsel had "made unceasing efforts to ascertain the whereabouts of said witness." The defendant had been in jail, and his statement was merely hearsay.

1. Commencement of affidavit when running in the first person may be as follows: "I, *John Doe* (or *Richard Roe*), being duly sworn on oath say," or words of like effect. See the title AFFIDAVITS, vol. 1, p. 556 *et seq.*

2. For formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548 *et seq.*

Variance between Affidavits and Plea. — In Golden *v.* State, 19 Ark. 590, defendant was indicted by the name of "Harrison Golden," and in this name pleaded not guilty. He filed a motion and affidavit for continuance, the motion being embodied in an affidavit and consisting of one document, which was entitled and commenced as follows: "State *v. Harrison Golden.* And the said defendant, who is indicted by the name of *Harrison Golden*, in his proper person and by his proper name of *Alexander Golden*, comes and, being duly sworn according to law, says," etc. This motion and affidavit was signed "Alexander Golden." It was held by a divided court that the paper

I. That affiant is (or *I am*) the plaintiff (or *defendant*) in the above entitled cause.

II. That affiant (or *I*) cannot safely proceed to (or *go into*) the trial of this cause at the present term of this court on account of the absence (or *for the want of the testimony*) of *George Jones*,[1] who (*is*

was properly stricken from the file because it was not filed in the name by which defendant was indicted and in which he had pleaded.

1. Cannot Safely Proceed to Trial. — The court must be satisfied that the party cannot safely proceed to trial without the testimony of the absent witness. Danielson *v.* Gude, 11 Colo. 87. And it should be alleged that the party cannot safely go to trial for want of the testimony of an absent witness. Dimmey *v.* Wheeling, etc., R. Co., 27 W. Va. 32; Wilson *v.* Wheeling, 19 W. Va. 323; Wilson *v.* Kochnlein, 1 W. Va. 145. Consult also list of statutes, etc., cited *supra*, note 1, p. 331.

Name and Residence of Absent Witness — *Generally.* — In Smith *v.* Dobson, 2 D. & R. 420, 16 E. C. L. 100, and Brown *v.* Murray, 4 D. & R. 830, note *a.*, 16 E. C. L. 224, it was held that in a first application the name of the witness need not be stated; but in Smith *v.* Barker, 3 Day (Conn.) 280, a case in the United States circuit court, it was said that "the name of the witness must always be disclosed * * * unless there are circumstances to show that the party, without any fault of his, was unable to learn his name." In many of the states it is expressly required by statute, or rule of court, that the name and residence of the witness, if known, shall be stated, and in the absence of such provisions this is believed to be the universal practice. See list of statutes, etc., cited *supra*, note 1, p. 331, and the cases cited *infra*, this note.

Arkansas. — The statute does not expressly require it, but the averment is doubtless essential in order to identify the witness in connection with averments of diligence used to obtain his testimony. See Jackson *v.* State, 54 Ark. 243.

California. — Should state the name of the witness. Carey *v.* Philadelphia, etc., Petroleum Co., 33 Cal. 694.

Colorado. — The code does not expressly require it, but the affidavit is regarded as defective without the averment. Michael *v.* Mills, 22 Colo. 439; Dawson *v.* Coston, 18 Colo. 493; unless it is shown that sufficient diligence has been used to ascertain the name and residence of the witness. Wilson *v.* People, 3 Colo. 325; Outcalt *v.* Johnston, 9 Colo. App. 519, holding that a mere statement that efforts had been used to ascertain the whereabouts of the witness, but not stating in what the efforts consisted, was not sufficient. See also Litchfield *v.* Daniels, 1 Colo. 268.

Idaho. — As to the residence of the witness, see Herron *v.* Jury, 1 Idaho 164.

Kansas. — If it appear that the witnesses's whereabouts are unknown, the affidavit must state specific acts of diligence in making inquiries, and when and of whom the inquiries were made. Clouston *v.* Gray, 48 Kan. 31; Struthers *v.* Fuller, 45 Kan. 735; Kilmer *v.* St. Louis, etc., R. Co., 37 Kan. 84. A statement that affiant had made "numerous inquiries" was held insufficient. Bliss *v.* Carlson, 17 Kan. 325.

Kentucky. — Though not expressly required by statute, the averment should be made. See Benge *v.* Com., 92 Ky. 1; McClurg *v.* Ingleheart, (Ky. 1895) 33 S. W. Rep. 80; Earp *v.* Com., 9 Dana (Ky.) 301.

Louisiana. — Not expressly required by statute, but should be stated if known. Huff *v.* Freeman, 15 La. Ann. 240; Barron *v.* Mertens, 14 La. Ann. 305; State *v.* Morgan, 39 La. Ann. 214; Brown *v.* Forsyth, 10 Rob. (La.) 116.

Minnesota. — Should be stated. Lowenstein *v.* Greve, 50 Minn. 383.

Mississippi. — In Lundy *v.* State, 44 Miss. 673, the affidavit was criticised because "the witness is stated to have been in the jurisdiction of the court, but his residence or whereabouts is not given."

Nebraska. — Consult Form No. 6293, *infra*, and note.

Nevada. — Should be given if known, though not expressly required by statute. If the whereabouts of the witness is unknown, the affidavit should show reasonable efforts to ascertain the same. State *v.* Chapman, 6 Nev. 320.

Sufficiency of averment relating to the

now absent and) resides in (*stating place of residence*). [And that affiant (or *I*) verily believe(*s*) this cause cannot be tried with justice to himself (or *myself*) without the testimony of the said *George Jones*.][1]

[*Or* II. That affiant (or *I*) cannot safely proceed to (or *go into*) the trial of this cause at the present (or *next*) term of this court (*the same being the term at which this cause is regularly triable*), on account of the (*expected*) absence of *George Jones*, who resides at (*stating place of residence*), ("and that the grounds of affiant's (or *my*) expectation of the nonattendance of the said *George Jones* at the next term of this court are as follows," *stating grounds of expectation*).][2]

III. That said *George Jones* is a material witness on the part of this affiant (or *on my behalf*).[3]

[*Or* III. That said *George Jones* is a material, competent and proper witness in this suit.][4]

[*Or* III. That the testimony of the said witness is material for establishing the affiant's claim (or *supporting affiant's defense*).][5]

IV. That affiant expects[6] (or *I expect*) to prove by the said *George Jones* that (*State facts expected to be proved*).[7]

name and residence of the absent witness as a compliance with the statutory requirement, see *infra*, note 2, p. 364.

For necessity of showing diligence in ascertaining the residence or whereabouts of a witness when unknown, see *infra*, note 5, p. 339.

Although name and residence of witness were both unknown, an affidavit may be sufficient under peculiar circumstances; for illustration see *infra*, Form No. 6286.

1. The words enclosed by [ ] should be inserted under the practice in the *District of Columbia*. Consult list of statutes, etc., cited *supra*, note 1, p. 331.

2. The averments enclosed by [ ] constitute paragraph II of the affidavit as it should be under the *North Carolina* practice. See list of statutes, etc., cited *supra*, note 1, p. 331.

3. The affidavit should allege that the witness is material. Wilson *v.* Wheeling, 19 W. Va. 323; Dimmey *v.* Wheeling, etc., R. Co., 27 W. Va. 32. See also list of statutes cited *supra*, note 1, p. 331.

4. This is paragraph III as it should be framed under the practice in the *District of Columbia*. See statutes, etc., cited *supra*, note 1, p. 331.

5. This is paragraph III as it should be framed under the *Louisiana* practice. See list of statutes, etc., cited *supra*, note 1, p. 331.

6. **Affiant Expects and Believes he can Prove, etc.**—It was said in Day *v.* Samson, Barnes 448, that deponent must aver absolutely, and not merely declare his belief, that the witness will testify to the facts stated, but in the United States the practice is to state that deponent "expects" to prove, etc. However, the language of the statute in the particular states should be strictly followed on this point. See list of statutes, etc., cited *supra*, note 1, p. 331.

Kentucky.—The code provision relating to this averment is declaratory of the practice prior to the code so far as it requires the affiant to state what "he believes" the witness will prove. See Owens *v.* Starr, 2 Litt. (Ky.) 232, and Smalley *v.* Anderson, 2 T. B. Mon. (Ky.) 56, holding that affiant's statement that he "expected to prove certain facts" was not equivalent to an expression of a firm belief, and was therefore insufficient.

Louisiana.—That affiant is "advised" or "hopes" he can prove the facts stated will not alone suffice. He should swear positively that he expects or believes he can do so. Brander *v.* Flint, 10 La. 391.

New Mexico. — An affidavit which states what the affiant "expects" instead of "believes" witness will prove, etc., is insufficient. Kent *v.* Favor, 3 N. Mex. 219.

7. **Statement of Expected Testimony.** — *At common law*, on a first application for continuance, if there were no circumstances creating a suspicion that the application was made merely for delay, it was sufficient to state that the testimony of the witness was material. On subsequent applications, or where

the circumstances were suspicious, or the witness was expected to be absent for a long period, it was necessary to show the materiality of his testimony by a statement of the facts to which he was expected to testify. 4 Encycl. of Pl. and Pr. 884; 2 Tidd's Pr., p. 773.

The common-law practice in this particular still obtains in a few of the states. See this practice expounded and illustrated *infra*, this note, paragraphs relating to *Kentucky* and *Tennessee*; note 3, p. 358–9, relating to *Virginia*; Forms Nos. 6276, 6277, and notes to the latter.

But even in those states it is the constant practice to insert in an affidavit a full statement of the facts.

In most of the states, however, it is expressly required by statute or rule of court that the affidavit shall state the facts expected to be proved, and show the materiality thereof. See list of statutes, etc., cited *supra*, note 1, p. 331. In some jurisdictions the practice is enforced without any requirement of statute or rule of court. See *infra*, this note, part relating to *New Mexico*; and as to the practice where the statute seems to leave it to the option of the applicant, see *infra*, this note, part relating to *California* and *Nevada*

Alabama. — As indicating the practice in criminal cases, it may be noted that in Johnson *v.* State, 102 Ala. 1, the court said that there was a motion made by defendant for a continuance on account of absent witnesses "with separate written affidavits, setting forth what they were severally expected to prove."

California. — The following cases held apparently that it is necessary to state the facts to which the absent witness will testify. Carey *v.* Philadelphia, etc., Petroleum Co., 33 Cal. 694; Kern Valley Bank *v.* Chester, 55 Cal. 49; People *v.* Ah Fat, 48 Cal. 63. The latter case is cited to the same point in Deering's Anno. Code Civ. Proc., § 595, in a note where the editor adds parenthetically, "although the section seems to give the court an option as to requiring the moving party to show the evidence he expects to obtain."

Colorado. — The facts must be set forth with sufficient certainty to enable the court to determine the materiality of the evidence, and to enable the opposite party to admit the facts and thus avoid continuance. Glenn *v.* Brush, 3 Colo. 31; Cody *v.* Butterfield, 1 Colo. 377; Chase *v.* People, 2 Colo. 513.

Florida. — Consult Form No. 6283, *infra*, and notes thereto.

Idaho. — In Territory *v.* Guthrie, 2 Idaho 403, and Cox *v.* Northwestern Stage Co., 1 Idaho 376, may be found an affidavit which sets forth the facts.

Illinois. — Consult Forms Nos. 6285, 6286, *infra*, and notes thereto.

Indiana. — Consult Forms Nos. 6287, 6288, *infra*, and notes thereto.

Iowa. — Consult Forms Nos. 6289, 6290, and notes thereto.

Kentucky. — The affidavit must show what facts the affiant believes witness will prove, and not merely the effect of such facts. McClurg *v.* Ingleheart, (Ky. 1895) 33 S. W. Rep. 80. In Slater *v.* Sherman, 5 Bush (Ky.) 211, the defendant filed an affidavit stating in substance that he could prove, by a witness who was then absent, that one Mary Oats, a witness who would be relied on by the plaintiff, was not present when the alleged trespasses were supposed to have been committed, and the court said: "As the affidavit did not disclose what facts it was expected the plaintiff would attempt to prove by Mary Oats, it did not appear whether it was material to the defense to prove her absence or not, and it seems to us that the court did not abuse its discretion in overruling the motion."

Prior to the code, it seems to have been the universal practice, where the witness lived within the state not to require that the facts to be proved by him should be set forth in the affidavit but where the witness was a nonresident, it was necessary to set forth what the party expected to prove by him. Simms *v.* Alcorn, 1 Bibb (Ky.) 348; Letcher *v.* Starling, 1 Bibb (Ky.) 433; Smith *v.* Snoddy, 2 A. K. Marsh. (Ky.) 382. Likewise, where the application for continuance was repeated by the same party. Letcher *v.* Sterling, 1 Bibb (Ky.) 432.

Louisiana. — It is the usual practice to state the facts to which it is believed the witnesses will testify in the first instance. Allard *v.* Lobau, 3 Martin N. S. (La.) 293; State *v.* Bolds, 37 La. Ann. 312; State *v.* Duffy, 39 La. Ann. 419; State *v.* Moultrie, 33 La. Ann. 1146; Burton *v.* Maltby, 18 La. 531; Lex *v.* Southern Express Co., 23 La. Ann. 59; Cobb *v.* Franks, 6 La. Ann. 769. And the court may require the party to state the facts. Raby *v.* Brown, 14 La. 247; State *v.* Celestin, 48 La. Ann. 272.

Maryland. — See Dean *v.* Turner, 31 Md. 58, and Form No. 6274, *infra*, and notes thereto.

Michigan. — See People *v.* Burwell, 106 Mich. 27; People *v.* Anderson, 53 Mich. 60, and Form No. 6275, *infra*, and annotations thereto.

Minnesota. — A mere statement that the witness is material is insufficient. Mackubin *v.* Clarkson, 5 Minn. 247.

Missouri. — Consult Form No. 6291, *infra*, and notes thereto.

Nebraska. — Consult Form No. 6293, *infra*, and notes thereto.

Nevada. — It is customary to state the facts at the outset. State *v.* O'Flaherty, 7 Nev. 153; State *v.* Chapman, 6 Nev. 320.

New Mexico. — Dold *v.* Dold, 1 N. Mex. 397; Kent *v.* Favor, 3 N. Mex. 219; Deemer *v.* Falkenburg, 4 N. Mex. 57; Faulkner *v.* Territory, 6 N. Mex. 464.

New York. — Consult Form No. 6277, *infra*, and notes thereto.

Pennsylvania. — Consult Form No. 6277, *infra*, and notes thereto.

Tennessee. — If the application for continuance is made at the first term at which the case stands for trial, it is not necessary to disclose the facts to which it is expected the absent witness will testify. Crane *v.* State, 94 Tenn. 86; Jones *v.* State, 10 Lea (Tenn.) 585; State *v.* Morris, 1 Overt. (Tenn.) 220; Nelson *v.* State, 2 Swan (Tenn.) 482. But if the application is made at a second or subsequent term, the facts to which the witness is expected to testify should be stated. Nelson *v.* State, 2 Swan (Tenn.) 482; Womack *v.* State, 6 Lea (Tenn.) 153; Rhea *v.* State, 10 Yerg. (Tenn.) 258.

In a criminal case, the defendant's affidavit on a first application, which did not disclose the facts expected to be proved by the witness, was held defective, because it was nowhere stated, either directly or indirectly, that the defendant was innocent of the crime charged against him. Crane *v.* State, 94 Tenn. 86.

Texas. — Consult Forms Nos. 6295 to 6298, *infra*, and notes thereto.

Utah. — McGrath *v.* Tallent, 7 Utah 256.

West Virginia. — Under the act of 1882, c. 120, § 6, it was held necessary, if required by any party opposing the motion for continuance, to set forth in the affidavit the testimony the witness was expected to give. Riddle *v.* McGinnis, 22 W. Va. 268.

Wisconsin. — Consult Form No. 6282, *infra*, and notes thereto.

Facts and not legal conclusions must be stated. See list of statutes cited *supra*, note 1, p. 331. Also *infra*, note 1, p. 367, note 3, p. 374, note 1, p. 387; Chase *v.* People, 2 Colo. 513; Glenn *v.* Brush, 3 Colo. 31; State *v.* McCoy, 29 La. Ann. 595; Wilson *v.* Purl, 133 Mo. 367; State *v.* Good, 132 Mo. 114; State *v.* Hilsabeck, 132 Mo. 353; State *v.* Pinnell, 93 Mo. 480.

In Payne *v.* Kansas City First Nat. Bank, 16 Kan. 153, the defendant's affidavit for a continuance stated the evidence of the absent witness as follows: "Said evidence is of the following nature, to wit, proving and tending to prove that defendant, Payne, was at the time of the taking of the note herein sued on by plaintiff only a surety, or indorser, on the same, and was so known to be at said time by said plaintiff, the said plaintiff, so as aforesaid knowing said party, released by its actions said defendant Payne from all liability thereunder; that plaintiff has accepted other security, and taken other notes in lieu of the one sued on." In pronouncing this affidavit insufficient, the court said: "First, the facts are not stated in sufficient detail. They should be stated with the same detail that they would be stated by the witness if he were on the stand testifying, or if his deposition was being taken. They are to be stated so that they may be read as the deposition of the absent witness, if the court should consider the affidavit sufficient, and the opposite side should choose to admit them. Second, these facts are not stated to be the facts which the witness says would prove by their direct testimony. They are not stated to be the facts which it is believed the witnesses would testify to if they were present. * * * They are often known as conclusions of facts or conclusions of law. * * * The statute requires that the party asking a continuance shall state in his affidavit the 'facts he believes the witness will prove.' He is not authorized to state the facts which he believes will be proved by the facts which he believes the witness will prove. He must state the original primary facts as he would believe they would come from the witness, and not the conclusions or inferences which might be drawn from these facts. And he must state the facts in detail, so that they may be used as a deposition, and not in that general

and comprehensive manner generally adopted for the statement of facts in pleadings, or in findings of courts, or verdicts of juries." These views were reiterated in Brown *v.* Johnson, 14 Kan. 377; Board of Regents *v.* Linscott, 30 Kan. 240; Clouston *v.* Gray, 48 Kan. 31. In the latter case, the defendant stated that he expected to prove by one James Gray "that the property in controversy herein, and which is sought to be recovered by this plaintiff, was the property of the said absent witness, James Gray, and that this plaintiff never did have any right, title or interest in the same." The defendant's claim was that the absent witness had fraudulently conveyed the property to the plaintiff, and the foregoing statement was held insufficient as an averment of ownership. On this point the court said: "He could have set forth in the affidavit that James Gray would have testified if present at the trial; that he was largely indebted (giving details): That it pretended to sell the property to S. F. Gray for the purpose of defrauding his creditors: That S. F. Gray had knowledge of such intention: That S. F. Gray did not pay him anything for the property: That James Gray continued in the possession of the property: That S. F. Gray never had possession thereof: That S. F. Gray never claimed to be the owner, but on the contrary admitted that he was not the owner, and that James Gray was, and that both James Gray and S. F. Gray had full knowledge of all these matters and things, and the affiant should have set forth in his affidavit all these matters and things in greater detail than we have stated them." Johnston, J., dissented, holding that the affidavit, though not perfect, was substantially sufficient.

Materiality of Testimony. — The affidavit must show that the testimony is material. See list of statutes, etc., cited *supra*, note 1, p. 331, also *supra*, note 2, p. 327, relating to absent party needed as a witness.

California. — Kern Valley Bank *v.* Chester, 55 Cal. 49; Storch *v.* McCain, 85 Cal. 306; Cohn *v.* Brownstone, 93 Cal. 362; People *v.* Mellon, 40 Cal. 648; People *v.* Williams, 43 Cal. 344.

Colorado. — It must appear that the facts to which it is expected the witness will testify not only may be but actually will be relevant and material. Dawson *v.* Coston, 18 Colo. 493; Cody *v.* Butterfield, 1 Colo. 377. This can usually be determined by the issues made by the pleadings, but when there are no pleadings it must appear from the affidavit that such issues will arise upon the trial and will render the testimony material. Hewes *v.* Andrews, 12 Colo. 161, where the application was made for the continuance of a case pending in the county court on appeal from a justice of the peace.

Kansas. — Swenson *v.* Aultman, 14 Kan. 273; Perley *v.* Taylor, 21 Kan. 712.

Kentucky. — McClurg *v.* Ingleheart, 33 S. W. Rep. 80; Owens *v.* Starr, 2 Litt. (Ky.) 231; Grubbs *v.* Pickett, 1 A. K. Marsh. (Ky.) 255; Chambers *v.* Handley, 3 J. J. Marsh. (Ky.) 98.

Louisiana. — State *v.* Hollier, 49 La. Ann. 371; Fusz *v.* Trager, 39 La. Ann. 292. But the affiant need not swear to the competency of the testimony. State *v.* Bolds, 37 La. Ann. 312. Affiant's statements in his affidavit that he expected to prove "all the matters alleged in his petition" was held a sufficient declaration of materiality, where the facts set forth in the petition were material. Winter *v.* Donaldsonville, 6 Martin N. S. (La.) 534.

Mississippi. — See McDaniel *v.* State, 8 Smed. & M. (Miss.) 401. The facts disclosed must appear to be pertinent and material. Sellars *v.* Kelly, 45 Miss. 323.

Nebraska. — Burgo *v.* State, 26 Neb. 639; Clark *v.* Millen, 16 Neb. 481; Polin *v.* State, 14 Neb. 549. Consult also Form No. 6293, *infra*, and note.

West Virginia. — Wilson *v.* Wheeling, 19 W. Va. 323; Dimmey *v.* Wheeling, etc., R. Co., 27 W. Va. 32.

Continuance is properly refused where the facts as set forth appear to be immaterial, irrelevant or otherwise inadmissible. Hill *v.* Austin, 19 Ark. 230; Ware *v.* Kelly, 22 Ark. 441; Hamilton *v.* State, 62 Ark. 543; Robson *v.* State, 83 Ga. 169; Cox *v.* Northwestern Stage Co., 1 Idaho 376; Moore *v.* Hawkins, 6 Dana (Ky.) 289; State *v.* Dale, 89 Mo. 579; Waldo *v.* Beckwith, 1 N. Mex. 184; Walte *v.* Walsh, 10 Heisk (Tenn.) 314.

If the court doubts the materiality of the expected evidence, or the good faith of the applicant, it may properly require him to state on oath the facts he expects to prove by the witness. Wormley *v.* Com., 10 Gratt. (Va.) 658; Harman *v.* Howe, 27 Gratt. (Va.) 676; Harris *v.* Harris, 2 Leigh (Va.) 584. And if it appears by the affidavit or by

[*Or* IV. That affiant believes (or *I believe*) the testimony of the said *George Jones* will prove that (*State facts*).][1]

[*Or* IV. That affiant believes (or *I believe*) said witness will testify to and prove the following facts: (*Here state facts.*)][2]

[*Or* IV. That affiant believes (or *I believe*) the said *George Jones* will prove that (*Here state facts*).][3]

[*Or* IV. The evidence I expect (or *affiant expects*) to obtain from the said *George Jones* is as follows: (*State the evidence.*)][4]

V. That affiant has (or *I have*) used due diligence to obtain (or *procure* or *secure*) the testimony of the said *George Jones* in that (*State diligence used*).[5]

oral examination that the expected testimony would be immaterial or inadmissible, a continuance is properly refused. Nash *v.* Upper Appomattox Co., 5 Gratt. (Va.) 332; Harris *v.* Harris, 2 Leigh (Va.) 584; Moore *v.* Com., 9 Leigh (Va.) 639; Wormeley *v.* Com., 10 Gratt. (Va.) 684. But it is error to overrule the motion supported by a sufficient affidavit upon the incorrect assumption that the evidence was inadmissible. Cannon *v.* State, 60 Ark. 564.

Sufficiency of Averment in Particular Cases. — To prove threats, see *infra*, note 1, p. 367–8, note 3, p. 374.

To prove deponent is not guilty, see *infra*, Form No. 6284 and note 1, p. 367.

To prove eviction of deponent from leased premises, see *infra*, Form No. 6285.

To prove part payment of claim, see *infra*, precedent in note 4, p. 363.

To prove defendant's intoxication, etc., in murder case, see *infra*, Form No. 6286.

To prove an alibi, see *infra*, note 3, p. 374; Form No. 6291; note 2, p. 384.

To prove insanity, see *infra*, Form No. 6288; note 1, p. 387, note 2, p. 392.

To prove killing in self-defense, see *infra*, precedent in note 2, p. 384–5; Form No. 6292.

To prove plaintiff's contributory negligence and defendant's due care, see *infra*, Form No. 6293.

Grounds for expecting that the witness will so testify are sometimes required to be stated by statute or rule of court. For sufficiency of grounds stated, see *infra*, Form No. 6273.

In *Maine*, *Massachusetts* and *New Hampshire*, to paragraph IV should be added this additional averment, "that affiant's grounds of expectation that the said witness will prove the foregoing facts are as follows" (*stating grounds of expectation*), or "that affiant's grounds for expecting the said *George Jones* to testify to the foregoing facts are as follows" (*stating the grounds of expectation*). See list of statutes, etc., cited *supra*, note 1, p. 331.

1. This is paragraph IV as it should be under the *Arkansas* and *New Mexico* practice. See list of statutes, etc., cited *supra*, note 1, p. 331.

2. This is paragraph IV as it should be under the *Kansas* and *Oklahoma* practice. See list of statutes, etc., cited *supra*, note 1, p. 331.

3. This is paragraph IV as it should be under the *Kentucky*, *Missouri* and *Wyoming* practice. See list of statutes, etc., cited *supra*, note 1, p. 331, and for the practice in *Missouri* in criminal cases see also Form No. 6291.

4. This is paragraph IV as it should be under the *Nevada*, *Oregon* and *Utah* practice. See list of statutes, etc., cited *supra*, note 1, p. 331.

5. **Statement of Diligence.** — *The common-law practice* requires that ordinary diligence to procure the testimony of the absent witness must be shown in the affidavit in all cases. 2 Tidd's Pr. 772; and see *infra*, note 2, p. 354.

In most of the states this averment is required by statute or rule of court, and the statement ordinarily shows the particular efforts that have been made. See 4 Encycl. of Pl. and Pr. 881; also list of statutes cited *supra*, note 1, p. 331.

Arkansas. — An averment of diligence in general terms is insufficient. The facts constituting diligence should be stated so that the court may decide upon their sufficiency. Winter *v.* Bandel, 30 Ark. 362. For other cases where the diligence was held sufficient see Jackson *v.* State, 54 Ark. 243; Price *v.* State, 57 Ark. 165; Burriss *v.* Wise, 2 Ark. 33; Golden *v.* State, 19 Ark. 590.

California. — Must state what steps have been taken to procure the attend-

ance or deposition of the witness. Cohn *v.* Brownstone, 93 Cal. 362; People *v.* Thompson, 4 Cal. 241, holding that an allegation that the party had used all the diligence in his power without stating the particulars, is insufficient. The party must have resorted to the proper legal means for that purpose, or must show to the satisfaction of the court that a resort to such means would have been unavailing. Kuhland *v.* Sedgwick, 17 Cal. 123, see also People *v.* Baker, 1 Cal. 403, holding that a mere promise by the witness to attend does not dispense with the use of legal means to procure attendance. People *v.* Lampson, 70 Cal. 204. But circumstances may relieve a party from the necessity of taking the deposition of a witness. People *v.* Dodge, 28 Cal. 445, where the witness was sick, but the party had supposed that he would recover in time to attend to the trial.

If the witness has been subpœnaed, the affidavit should state at what time the subpœna was taken out. People *v.* Baker, 1 Cal. 403. And show that service was such that witness was bound to obey. People *v.* Jocelyn, 29 Cal. 562. And in People *v.* Weaver, 47 Cal. 106, it was held that it must be shown that the summoned witness cannot be readily reached by an attachment.

For cases where it was held that insufficient diligence was shown see Lightner *v.* Menzel, 35 Cal. 452; Leszinsky *v.* White, 45 Cal. 278; People *v.* Ashnauer, 47 Cal. 98, where the affidavit, omitting the formal parts, is given in full.

For cases where the diligence shown was held sufficient see People *v.* Diaz, 6 Cal. 248; People *v.* Dodge, 28 Cal. 445; People *v.* McCrory, 41 Cal. 458.

Colorado. — A statement that a subpœna was issued to another county and the witness there served is insufficient, unless it is shown that the subpœna was issued in the manner provided for the issuance of subpœnas to foreign counties. Dawson *v.* Coston, 18 Colo. 493. For cases where sufficient diligence was not shown see Cody *v.* Butterfield, 1 Colo. 377; Boyle *v.* People, 4 Colo. 176, where a subpœna was not issued until the day the application was made. Litchfield *v.* Daniels, 1 Colo. 268. In Hirsch *v.* Ferris, 1 Colo. 402, the diligence disclosed was held sufficient, and the refusal of a continuance to be reversible error. Sickness of a witness disabling him from attending court is most properly shown by the affidavit of a physician stating the facts upon which his opinion is based. Danielson *v.* Gude, 11 Colo. 87, holding that a party's affidavit that a physician not named told him that the witness was sick, etc., was insufficient.

Florida. — Consult Form No. 6283, *infra*, and notes thereto.

Georgia. — Consult Form No. 6284, *infra*, and notes thereto.

Illinois. — Consult Forms Nos. 6285, 6286, *infra*, and notes thereto.

Indiana. — Consult Forms Nos. 6287, 6288, *infra*, and notes thereto.

Iowa. — Consult Forms Nos. 6289, 6290, *infra*, and notes thereto.

Kansas. — What efforts have been used must be set forth in the affidavit. Kilmer *v.* St. Louis, etc., R. Co., 37 Kan. 84. In the following cases the affidavit was held insufficient for want of proper showing of diligence. Educational Assoc. *v.* Hitchcock, 4 Kan. 36; Campbell *v.* Blanke, 13 Kan. 62; Swenson *v.* Aultman, 14 Kan. 273; Payne *v.* Kansas City First Nat. Bank, 16 Kan. 147; Wyandotte, etc., Gas Co. *v.* Schliefer, 22 Kan. 468; Wilkins *v.* Moore, 20 Kan. 538; see also Tucker *v.* Garner, 25 Kan. 454; State *v.* Rhea, 25 Kan. 576; Clouston *v.* Gray, 48 Kan. 31; State *v.* Barker, 43 Kan. 262; State *v.* McClain, 49 Kan. 730; State *v.* Lewis, 56 Kan. 374; Bliss *v.* Carlson, 17 Kan. 325; Struthers *v.* Fuller, 45 Kan. 735. In State *v.* Burwell, 34 Kan. 312, the affidavit showed sufficient diligence, and it was held reversible error to refuse a continuance.

Kentucky. — Must state what steps have been taken. Benge *v.* Com., 92 Ky. 1. And it ought to be shown that the witness has been summoned, or some legal excuse alleged for failure to summon him. Chambers *v.* Handley, 3 J. J. Marsh. (Ky.) 98; Helfrich Saw, etc., Mill Co. *v.* Everly, (Ky. 1895) 32 S. W. Rep. 750; McClurg *v.* Ingleheart, (Ky. 1895) 33 S. W. Rep. 80; Simms *v.* Alcorn, 1 Bibb (Ky.) 348; Carr *v.* Marshall, 1 Bibb (Ky.) 363. "In considering the question of diligence on a motion for continuance by the accused on account of the absence of a witness, the fact that the Commonwealth had such witness recognized should have the same effect as if he had been recognized at the instance of the accused." Saylor *v.* Com., 97 Ky. 184, holding that the continuance should have been granted. Where the affidavit stated that subpœnas were issued for the ab-

sent witness, but did not state that they had been delivered to any officer or other person authorized to serve them, it was held insufficient. Mackey *v.* Com., 80 Ky. 345; Unsel *v.* Com., 87 Ky. 368. *Contra* where the affidavit did not state that subpœnas had been issued, but subpœnas were on file or exhibited to the court with the officer's return of actual service duly endorsed thereon. Vogt *v.* Com., 92 Ky. 68.

In Thurman *v.* Virgin 18 B. Mon. (Ky.) 791, it was held that a continuance ought not to be allowed on the ground of the absence of witnesses residing in another county, unless the affidavit showed a tender or payment of witness fees, to which the witness was thus entitled by statute, or a waiver of the same. The statute was subsequently amended, and it appears from Bullitt's Civ. Code Ky. (1895), § 315, note *b*, that the averment of tender or payment of fees to such witness would not now be necessary unless the officer serving the subpœna returns that the witness demanded his fees.

Louisiana. — For a construction of the section of the statute relating to this averment see Klathenhoff *v.* Ardry, 14 La. 301. The affidavit should state specifically what efforts have been taken to procure the testimony of the absent witness. State *v.* Clark, 37 La. Ann. 128; State *v.* Ryan, 30 La. Ann. 1176; McCarty *v.* McCarty, 19 La. 296. A mere declaration in the affidavit that diligence has been used is not conclusive. State *v.* Clark, 37 La. Ann. 128.

In Pruyn *v.* Gibbons, 24 La. Ann. 232, the affidavit was held insufficient because it did not show that the applicant was not aware of the witness's departure, and could not have obtained his testimony. See also Bank of Orleans *v.* Whittemore, 15 La. 276. For other cases where the showing of diligence was held insufficient see State *v.* Morgan, 39 La. Ann. 214; Ryan *v.* Sewell, 18 La. Ann. 221; Edwards *v.* Farrar, 2 La. Ann. 307; State *v.* Bradley, 6 La. Ann, 554; Golding *v.* Steamer C. Castro, 20 La. Ann. 458; State *v.* Nelson, 28 La. Ann. 46; State *v.* Hornsby, 33 La. Ann. 1110; State *v.* Primeaux, 39 La. Ann. 673; State *v.* Coudier, 36 La. Ann. 291; State *v.* Comstock, 36 La. Ann. 308; State *v.* Chevallier, 36 La. Ann. 81; State *v.* Foster, 36 La. Ann. 877; State *v.* Williams, 36 La. Ann. 854; State *v.* Venables, 40 La. Ann. 215; Mills *v.* Fellows, 30 La. Ann. 824; Beatty *v.* Tete, 9 La. Ann. 129; State *v.* Horton, 33 La. Ann. 289; Cobb *v.* Franks, 6 La. Ann. 769; Lex *v.* Southern Express Co., 23 La. Ann. 59; State *v.* George, 37 La. Ann. 786; State *v.* Moultrie, 33 La. Ann. 1146; State *v.* Bassenger, 39 La. Ann. 918.

For cases where the diligence disclosed was held sufficient, and the refusal of a continuance ground for new trial, see State *v.* Davis, 37 La. Ann. 441; State *v.* Egan, 37 La. Ann. 368; State *v.* Briggs, 34 La. Ann. 69; State *v.* Thomas, 40 La. Ann. 151; Bell *v.* Williams, 3 La. 447; State *v.* Boitreaux, 31 La. Ann. 188; Klathenhoff *v.* Ardry, 14 La. 301.

Minnesota. — Facts stating diligence should be set forth. Washington County *v.* McCoy, 1 Minn. 100, being a case before a justice of the peace, holding that it is not enough to swear that due diligence has been used. If a subpœna has been served, and the party applies for a continuance for the term, it ought to appear that the witness is not within reach of a process of attachment. West *v.* Henessey, 63 Minn. 378.

For cases where diligence was held insufficient, see Mackubin *v.* Clarkson, 5 Minn. 247; Holmes *v.* Corbin, 50 Minn. 209. The showing was held sufficient in Wright *v.* Levy, 22 Minn. 466.

Mississippi. — Should state what steps have been taken to procure the testimony, such as the issuance and service of a subpœna, or a sufficient excuse for the omission. See Lundy *v.* State, 44 Miss. 673; Noe *v.* State, 4 How. (Miss.) 330.

Missouri. — Consult Form No. 6291, *infra*, and notes thereto.

Nebraska. — Consult Form No. 6293, *infra*, and notes thereto.

Nevada. — If a subpœna has been issued, but not served, the affidavit should aver positively that the officer was informed of the whereabouts of the witness. State *v.* O'Flaherty, 7 Nev. 153; State *v.* Gray, 19 Nev. 212. For a sufficient showing of diligence see Beatty *v.* Sylvester, 3 Nev. 228; Choate *v.* Bullion Min. Co., 1 Nev. 73.

New Mexico. — Diligence must be affirmatively established. Anderson *v.* Territory, 4 N. Mex. 108, where the affidavit held insufficient is quoted so far as it relates to diligence. For other cases of insufficient diligence see Waldo *v.* Beckwith, 1 N. Mex. 184;

[*Or* V. That I have used proper and reasonable endeavors to procure the testimony of the said *George Jones* in that (*Here state the endeavors made*).][1]

VI. That affiant believes (or *I believe*) the matters (or *facts* or *evidence*) above set forth (*as facts*), which he expects (or *I expect*) to prove by (or *procure from*) the said *George Jones*, are (or *is*) true.[2]

Territory *v.* McFarlane, 7 N. Mex. 421; Faulkner *v.* Territory, 6 N. Mex. 464.

New York. — Consult Form No. 6277, *infra*, and notes thereto.

Pennsylvania. — Consult Form No. 6277, *infra*.

Tennessee. — Even on the first application the applicant must show that he has used due diligence to obtain the absent testimony. Womack *v.* State, 6 Lea (Tenn.) 153; State *v.* Morris, 1 Overt. (Tenn.) 220, *quoted* in Jones *v.* State, 10 Lea (Tenn.) 589. See also Nashville, etc., R. Co. *v.* Johnson, 15 Lea (Tenn.) 677.

Texas. — Consult Forms Nos. 6295 to 6298, *infra*, and notes thereto.

Utah. — See McGrath *v.* Tallent, 7 Utah 256; People *v.* Wiggins, 1 Utah 324. If a subpœna was issued and returned not found, this is not sufficient, unless the affidavit shows when the subpœna was issued. People *v.* Garns, 2 Utah 260.

Virginia. — Consult precedent in note 3, p. 358–9, and cases cited.

Washington. — An affidavit which did not show any effort to locate a witness whose whereabouts were unknown was held insufficient. State *v.* Craemer, 12 Wash. 217; State *v.* Hutchinson, 14 Wash. 580. See also, for insufficient showing of diligence, State *v.* Wilson, 9 Wash. 218; Juch *v.* Hanna, 11 Wash. 676.

West Virginia. — What steps have been taken to procure the testimony should be stated. Buster *v.* Holland, 27 W. Va. 511. For cases where diligence was held insufficient see Dimmey *v.* Wheeling, etc., R. Co., 27 W. Va. 32; Tompkins *v.* Burgess, 2 W. Va. 187; Davis *v.* Walker, 7 W. Va. 447; Wilson *v.* Wheeling, 19 W. Va. 323.

Wisconsin. — Consult Form No. 6282, *infra*, and notes thereto.

Wyoming. — Where it did not appear from the record that any subpœna had been issued or asked for, the refusal of a continuance was sustained. Kearney Stone Works *v.* McPherson, (Wyoming, 1895) 38 Pac. Rep. 920. Likewise, where it appeared that subpœnas were issued, but did not clearly appear when issued or served. McKinney *v.* State, 3 Wyoming 721.

As to the sufficiency of the averment of diligence, etc., see generally *supra*, this note, including the cross-references, and *infra*, Form No. 6292.

As to the sufficiency of averments) concerning issuance and service of a subpœna see *supra*, this note, including cross-references; *infra*, *Virginia* precedent in note 3, p. 358–9, note 2, p. 361, note 5, p. 362, note 1, p. 376; Form No. 6289; note 1, p. 380; Form No. 6291 and precedents in the notes thereto; precedents in note 4, p. 398; Form No. 6295; note 1, p. 401, note 9, p. 402–3.

Sufficiency of averments of unsuccessful efforts to ascertain the whereabouts of the witness, see *infra*, precedent in note 4, p. 363; Form No. 6286; note 3, p. 375; Forms Nos. 6289, 6293; note 3, p. 393.

Sufficiency of showing that the witness is absent by reason of sickness, see *supra*, note 2, p. 327; *infra*, Form No. 6284; Form No. 6288 and notes thereto; note 1, p. 380; Forms Nos. 6291, 6295; note 4, p. 385, note 1, p. 386; precedent in note 4, p. 388–9; Form No. 6305 and notes thereto.

1. This is paragraph V as it should be under the practice of the *District of Columbia*.

In *Maine*, *Massachusetts* and *New Hampshire*, paragraph V of the affidavit should read as follows: "V. That the endeavors and means which affiant has (or *I have*) used to procure the attendance or deposition of said witness are as follows" (*stating endeavors used*); or "V. That endeavors and means have been used to procure the attendance or deposition of the said *George Jones* as follows, to wit" (*stating endeavors used*).

2. Expected Testimony Believed to be True. — This averment is sometimes required by statute or rule of court. See *infra*, note 2, p. 388.

And apart from statutory requirement it is frequently inserted, and, furthermore, courts have held it to be necessary. See *infra*, note 2, p. 368.

Kentucky. — The affidavit must show

[VI*a*. That affiant (or *I*) verily believe (*s*) this cause cannot be tried with justice to himself (or *myself*) without the testimony of said *George Jones*.][1]

VII. That affiant knows (or *I know*) of no other person (or *witness*) by whom affiant (or *I*) can prove the same matters (or *facts*).[2]

"that the affiant believes" the testimony to be true. Benge *v.* Com., 92 Ky. 1; Helfrich Saw, etc., Co. *v.* Everly, (Ky. 1895) 32 S. W. Rep. 750, where the affidavit was held defective in this particular.

Missouri. — Must state that applicant believes the facts to which the absent witness will testify are true. For want of this averment the affidavit will be held defective. In State *v.* Dusenberry, 112 Mo. 277; State *v.* Bryant, 93 Mo. 273; State *v.* Alred, 115 Mo. 471; State *v.* Underwood, 76 Mo. 630; State *v.* Maguire, 69 Mo. 198, holding that this averment was unnecessary where the defendant had pleaded not guilty, was decided before the enactment of the present provision of the statute. See, for the practice in criminal cases, *infra*, Form No. 6291 and notes thereto.

1. Paragraph VI*a* should be inserted under the *District of Columbia* practice. See list of statutes, etc., cited *supra*, note 1, p. 331.

2. No Other Witness to Same Facts. — This averment, with slight variations and phraseology, is required by statute or rule of court in many of the states. That the language of the statute must be followed *verbatim et literatim*, see *infra*, note 3, p. 388. It has also been held to be necessary in the absence of any specific requirement or rule of court. See *infra*, this note, also *supra*, note 2, p. 327, and *infra*, note on p. 359 relating to *Virginia*; note 10, p. 362, note 1, p. 368, note 1, p. 393.

Arkansas. — This averment is not required by the statute now in force (Sand. & H. Dig. (1894), § 5797), nor was it required by Mansfield's Dig. (1884), § 5108; nevertheless, in Jackson *v.* State, 54 Ark. 243, decided in 1891, where the affidavit was held insufficient in its showing of diligence, the court said: "It will also be observed that the motion does not say that there were not other witnesses by whom the same facts could be proved, but only that defendant knew of no other by whom he could so well prove them." It seems that there was a statute in force in 1847, cited in Turner *v.* Eustis, 8 Ark. 120, which required an averment that the same facts could not be established by any other witness.

California. — The affidavit should state that the same facts could not be proved by any other witness whose testimony can be procured. Pierce *v.* Payne, 14 Cal. 419; Pope *v.* Dalton, 31 Cal. 218; People *v.* Gaunt, 23 Cal. 156; People *v.* Thompson, 4 Cal. 241; People *v.* Ah Fat, 48 Cal. 63; People *v.* Jenkins, 56 Cal. 5; People *v.* Ashnauer, 47 Cal. 98; People *v.* Quincy, 8 Cal. 89. But the rule requiring that the absent evidence shall not be merely cumulative does not apply where the only evidence to the same fact is that of an interested party, especially where it is that of a defendant in a criminal case. People *v.* Ah Lee Doon, 97 Cal. 171.

Colorado. — The code does not require this statement. But in Danielson *v.* Gude, 11 Colo. 87, where it was held that a continuance was properly refused, the court said: "It does not appear from the affidavit but that the same facts desired to be proved by the witness can be proven by other witnesses." And in Mutzenburg *v.* McGowan, (Colo. App. 1897) 51 Pac. Rep. 523, this averment in the affidavit was held to be essential.

Georgia. — Consult Form No. 6284, *infra*, and notes thereto.

Illinois. — Consult Forms Nos. 6285, 6286, *infra*, and notes thereto.

Indiana. — Consult Forms Nos. 6287, 6288, *infra*, and notes thereto.

Iowa. — Consult Forms Nos. 6289, 6290, *infra*, and notes thereto.

Kansas. — This statement is not required by the statute, but if it is apparent that the facts stated could be proved by other witnesses the continuance will be denied. Board of Regents *v.* Linscott, 30 Kan. 240. But see also Clouston *v.* Gray, 48 Kan. 36.

Kentucky. — This statement is not required by the code, but is proper in all cases. If it appears that the same facts can be proved by other witnesses present, it is not necessarily conclusive against the application, for these witnesses may not be entitled to credit or may be witnesses for the opposite party and hostile to the applicant; but under

[*Or* VII. That such testimony cannot be obtained from any other source.][1]

[*Or* VII. That affiant cannot prove the same facts by any other person (or *witness*).][2]

[*Or* VII. That affiant is unable to prove said facts by any other person whose testimony can be procured.][3]

[*Or* VII. That there is no other person by whom affiant can prove the same facts.][4]

[*Or* VII. That affiant has no other witness by whom he can prove the same facts.][5]

[*Or* VII. That affiant knows of no other person, whose evidence or attendance could have been procured at this term, by whom he could

such circumstances care should be taken to assert positively in the affidavit that the presence of absent witnesses is indispensable and that the case on this point cannot safely be trusted to the testimony present. Owens *v.* Starr, 2 Litt. (Ky.) 232.

Louisiana. — This averment not required by the statute; nevertheless the affidavit is regarded defective without it. State *v.* Comstock, 36 La. Ann. 308. Thus, in State *v.* Robinson, 29 La. Ann. 364, where the affidavit was held insufficient, the court said: It does not aver that the fact sought to be proved by him could not be proved by other witnesses known to the accused, but merely that "the deponents cannot prove the facts by any other witness summoned here today on their behalf," which latter case was followed in State *v.* Bradley, 30 La. Ann. 326. To the same effect also State *v.* Bolds, 37 La. Ann. 312; State *v.* Primeaux, 39 La. Ann. 673. But *compare* Harrison *v.* Waymouth, 3 Rob. (La.) 340, and Hewlett *v.* Henderson, 9 Rob. (La.) 379.

Mississippi. — See Long *v.* State, 52 Miss. 33, where the affidavit contained this averment.

Missouri. — Consult Form No. 6291, *infra*, and notes thereto.

Nebraska. — Consult Form No. 6293, *infra*, and notes thereto.

Nevada. — This averment is necessary. State *v.* Marshall, 19 Nev. 240. And was inserted in the affidavits in State *v.* O'Flaherty, 7 Nev. 153; and Choate *v.* Bullion Min. Co., 1 Nev. 73.

New Mexico. — An affidavit is defective which, instead of using the language of the statute, states that affiant "cannot prove the same facts by any other person present." Kent *v.* Favor, 3 N. Mex. 219.

New York. — Consult Form No. 6277, *infra*, and notes thereto.

Pennsylvania. — Consult Form No. 6277, *infra*.

South Dakota. — Consult Form No. 6294, *infra*, and notes thereto.

Tennessee. — This averment is necessary, though not required by the code. See Walt *v.* Walsh, 10 Heisk. (Tenn.) 314; Rhea *v.* State, 10 Yerg. (Tenn.) 258; Brown *v.* State, 85 (Tenn.) 440; State *v.* Morris, 1 Overt. (Tenn.) 220; Cornwell *v.* State, Mart. & Y. (Tenn.) 147; Jones *v.* State, 10 Lea (Tenn.) 589.

Texas. — Consult Forms Nos. 6295 to 6298, *infra*, and notes thereto.

Utah. — In People *v.* Garns, 2 Utah 260, it was held that the affiadavit should show that there are no other witnesses by whom the same facts can be proved.

Virginia. — Consult precedent *infra*, note on p. 359.

West Virginia. — Affidavit should state that the same facts cannot be proved by any other witness, or at least not by any other witness in attendance. Dimmey *v.* Wheeling, etc., R. Co., 27 W. Va. 32; Wilson *v.* Wheeling, 19 W. Va. 323.

Wisconsin. — Consult Form No. 6282, *infra*, and notes thereto.

1. This is paragraph VII as it should be under the *Arizona* practice.

2. This is paragraph VII as it should be under the *Arkansas*, *Nevada*, *North Carolina*, *Tennessee*, *Utah* and *Washington* practice.

3. This is paragraph VII as it should be under the *California* practice.

4. This is paragraph VII as it should be under the *Colorado* practice.

5. This is paragraph VII as it should be under the *Florida* practice.

prove, or so fully prove, the same facts.][1]

[*Or* VII. That affiant knows of no other witness by whom the foregoing facts can be fully proved.][2]

[*Or* VII. That the facts which the said *George Jones* will prove cannot be proved by any other witness.][3]

[*Or* VII. That affiant is unable to prove these facts by any other witness whose testimony can be readily procured.][4]

VIII. That the said *George Jones* is not absent by the consent, procurement or connivance of the affiant.[5]

[*Or* VIII. That the said witness is absent without the consent or procurement of affiant, directly or indirectly given.][6]

[*Or* VIII. That the absence of the said *George Jones* has not been procured by the act or connivance of the affiant, nor by others at his request, nor with his knowledge or consent.][7]

IX. That affiant expects (or *I expect*) to procure (or *obtain* or *secure*) the testimony of the said *George Jones* at the next term of this court.[8]

1. This is paragraph VII as it should be under the *Missouri* practice.

2. This is paragraph VII as it should be under the *New Mexico* practice.

3. This is paragraph VII as it should be under the *West Virginia* practice.

4. This is paragraph VII as it should be under the *Wyoming* practice.

5. **Witness Not Absent by Consent, etc.**— This averment is frequently required by statute, in which case the language of the statute must be strictly followed. See *infra*, note 2, p. 404. And the averment has been held to be necessary even where no statute requires it. See *infra*, note 3, p. 361, note 2, p. 369, and also *infra*, this note.

Georgia.— See Collins *v.* State, 78 Ga. 87.

Illinois.— Consult Forms Nos. 6285, 6286, *infra*, and notes thereto.

Indiana.— Consult Forms Nos. 6287, 6288, *infra*, and notes thereto.

Iowa.— Consult Forms Nos. 6289, 6290, *infra*, and notes thereto.

Mississippi.— Lundy *v.* State, 44 Miss. 673. In Ogle *v.* State, 33 Miss. 384, an affidavit stated that the witness was not absent by consent or procurement.

Missouri. — State *v.* Bryant, 93 Mo. 273.

South Dakota. — Consult Form No. 6294, *infra*, and notes thereto.

Tennessee. — As to this averment, see State *v.* Morris, 1 Overt. (Tenn.) 220, quoted in Jones *v.* State, 10 Lea (Tenn.) 589; Walt *v.* Walsh, 10 Heisk. (Tenn.) 314; Brown *v.* State, 85 Tenn. 440.

Texas. — Consult Forms Nos. 6295 to 6298, *infra*, and notes thereto.

Utah. — In People *v.* Wiggins, 1 Utah 324, where the continuance was held to have been properly refused, the court said: "There is nothing in the affidavit to show that the witness did not go away by his consent."

Wisconsin. — Consult Form No. 6282, *infra*, and notes thereto.

6. This is paragraph VIII as it should be under the *Florida* practice.

7. This is paragraph VIII as it should be under the *Wyoming* practice.

8. **Expectation of Procuring the Testimony.** — Obviously the court will not continue a cause on account of the absence of a witness if it appears altogether improbable that his testimony will not be had at the time to which it is sought to defer the trial. Hence it is the almost invariable practice to insert this averment in the affidavit. It is frequently required by express statutory provision or rule of court, and in the absence of such requirements it has been held to be necessary. See *supra*, note 2, p. 327, and *infra*, note 4, p. 354, note 1, p. 369.

California. — The application will be denied if the affidavit does not make it probable that the testimony of the absent witness can be procured within a reasonable time. People *v.* Sanders, 114 Cal. 216; Harper *v.* Lamping, 33 Cal. 641; People *v.* Ah Fat, 48 Cal. 63; People *v.* Lewis, 64 Cal. 401; People *v.* Francis, 38 Cal. 188; People *v.* Ah Yute, 53 Cal. 613, the last two cases being very exacting on this point.

Colorado. — The code does not require this statement, but it is prudent to insert it. Wilson *v.* People, 3 Colo. 325; Michael *v.* Mills, 22 Colo. 439;

[*Or* IX. That I have reasonable expectation and belief that the

Dawson *v.* Coston, 18 Colo. 493, all of which held that the continuance will be refused if it does not appear probable that the testimony can be procured.

Georgia. — Consult Form No. 6284, *infra*, and notes thereto.

Illinois. — Consult Forms Nos. 6285, 6286, *infra*, and notes thereto.

Indiana. — Consult Forms Nos. 6287, 6288, *infra*, and notes thereto.

Iowa. — Consult Forms Nos. 6289, 6290, *infra*, and notes thereto.

Kansas. — Where the witness was absent in another state, and his address unknown, the continuance was properly denied. "The defendant said he expected to procure his testimony at the succeeding term, but no facts were alleged from which the court could see that there was any probability thereof." Bliss *v.* Carlson, 17 Kan. 325. And under similar circumstances a continuance was denied in Kilmer *v.* St. Louis, etc., R. Co., 37 Kan. 84.

Kentucky. — This statement is not required by the code, but is commonly inserted. Where the witness has no fixed residence, and his whereabouts are unknown, the affidavit ought to show that his attendance is expected at the next term. Earp *v.* Com., 9 Dana (Ky.) 301. And where the witness resided in Kansas, and was admittedly unfriendly to the affiant, the continuance was refused because nothing was stated to induce the belief that the witness could be procured by the next term. Kennedy *v.* Com., 78 Ky. 454. But if the affidavit shows that the witness is within reach of process it is fair to presume that he can be coerced to attend at the next term. Morgan *v.* Com., 14 Bush (Ky.) 111. And where the witness resided in Ohio, but the affidavit stated that he was in the habit of visiting the place where the trial was pending, had been served with process, and had promised to appear at the next term, and it was alleged that the affiant could procure his attendance at the next term, the affidavit being in other respects sufficient, it was held reversible error to refuse the continuance, as there were reasonable grounds to believe that his attendance could be had. White *v.* Com., 80 Ky. 480.

Louisiana. — The affidavit must allege that the party expects to have the testimony of the absent witness at the time to which he seeks to continue the case, although this showing is not required by the statute. Allard *v.* Labau, 3 Martin N. S. (La.) 293; Gay *v.* Kendig, 2 Rob. (La.) 472; Silva *v.* Lafaye, 2 La. 198; Richardson *v.* Debuys, 4 Martin N. S. (La.) 129; State *v.* Williams, 36 La. Ann. 854; State *v.* Robinson, 29 La. Ann. 364; Borron *v.* Mertens, 14 La. Ann. 305; Brander *v.* Flint, 10 La. 391; Anderson *v.* Birdsall, 19 La. 441; Thompson *v.* Mississippi M. & F. Ins. Co., 2 La. 234. That such is the practice see also State *v.* Moultrie, 33 La. Ann. 1146; State *v.* Egan, 37 La. Ann. 368; State *v.* Bolds, 37 La. Ann. 312; State *v.* Briggs, 34 La. Ann. 69.

And if it appears that there is no reasonable certainty that the testimony can and will be procured, the continuance will not be granted. State *v.* Duffy, 39 La. Ann. 419, where the only statement on the subject was as follows: "That the witnesses are laboring men, and your deponent is informed that they have procured work across the lake, in the state of *Mississippi*, which will occupy them some time, but not more than a month; that they are residents of this state, which is their home, and will not return before the next term," coupled with the additional statement that "The presence of such witnesses can be had at the next term." This was held insufficient.

And in Harrison *v.* Waymouth, 3 Rob. (La.) 340, the court said: "Had the defendants sworn that they were informed that the witness was expected to return within a week or a month, this would have sufficed. They swore that they were informed that he had left the city for a few days. This certainly means that he intended to return within that time," and the affidavit was held sufficient.

Minnesota. — In Lowenstein *v.* Greve, 50 Minn. 383, it was held that the application was properly denied because the residence of the witnesses was unknown, and the witnesses had not been heard from for many years, and it did not satisfactorily appear that there was any prospect of getting their evidence.

Mississippi. — The averment is not required by statute. But in Noe *v.* State, 4 How. (Miss.) 330, the affidavit was pronounced insufficient "in not stating that he expected to procure the attendance of the witness at the next term."

testimony of the said *George Jones* can be procured by the next term of this court.][1]

[*Or* IX. That affiant expects to have the said witness present at the next term of this court.][2]

[*Or* IX. That this affiant believes he will procure the attendance and testimony of the said *George Jones* by the next term of this court, and affiant's grounds for such belief are as follows: (*Here state facts showing reasonable grounds of belief, if these are not apparent in the other parts of the affidavit.*)][3]

[*Or* IX. That affiant believes the attendance or testimony of the said *George Jones* will be procured at the next term of this court, and that the grounds for such belief are as follows: (*Here state facts showing reasonable grounds of belief.*)][4]

[*Or* IX. That affiant believes he can procure the testimony of the said *George Jones* at the next term of this court.][5]

[*Or* IX. That affiant expects and believes he can procure the testimony of the said *George Jones* by the next term of this court.][6]

X. That this application (or *continuance*) is not made (or *sought*) for delay merely, but that justice may be done.[7]

Missouri. — Consult Form No. 6291, *infra*, and notes thereto.

Nebraska. — Consult Form No. 6293, *infra*, and notes thereto.

Nevada. — This averment is usually deemed necessary. State *v.* O'Flaherty, 7 Nev. 153. And the facts showing a reasonable ground for belief that the testimony can be procured should be alleged where the witnesses's whereabouts are unknown. State *v.* Gray, 19 Nev. 212. Or where he is out of the state. State *v.* Chapman, 6 Nev. 320; State *v.* Rosemurgey, 9 Nev. 308.

New York. — Consult Form No. 6277, *infra*, and notes thereto.

Oregon. — Where the witness has no fixed residence, a clear showing should be made of the circumstances tending to prove the probability of obtaining his evidence. State *v.* Leonard, 3 Oregon 157, where the substance of an insufficient affidavit is given. The same rule obtains where the witness resides out of the state. State *v.* O'Neil, 13 Oregon 183, holding that in such a case it was not enough for the affiant to declare in his affidavit "I am confident I can procure his attendance at the next term."

Pennsylvania. — Consult Form No. 6277, *infra*, and notes thereto.

South Dakota. — Consult Form No. 6294, *infra*, and notes thereto.

Tennessee. — See State *v.* Morris, 1 Overt. (Tenn.) 220, quoted in Jones *v.* State, 10 Lea (Tenn.) 589.

Texas. — Consult Forms Nos. 6295 to 6298, *infra*, and notes thereto.

Washington. — Where the witness resides out of the state, the affidavit should state the facts, showing the probability of procuring the testimony of such witness in case of a continuance. State *v.* Hutchinson, 14 Wash. 580.

Wisconsin. — Consult Form No. 6282, *infra*, and notes thereto.

1. This is paragraph IX as it should be under the practice in the *District of Columbia*.

2. This is paragraph IX as it should be under the *Florida* practice.

3. This is paragraph IX as it should be under the *Missouri* practice.

Grounds for expectation in procuring the testimony of the absent witness within a reasonable time, or at the next term of court, under some circumstances must be stated. 2 Tidd's Pr., pp. 772, 773; Rex *v.* D'Eon, 3 Burr. 1514. See also *infra*, note 1, p. 369; Form No. 6286; note 2, p. 376, note 3, p. 381, note 1, p. 388, note 4, p. 393; Form No. 6294; note 3, p. 405.

4. This is paragraph IX as it should be under the *New Mexico* practice.

5. This is paragraph IX as it should be under the *Washington* practice.

6. This is paragraph IX as it should be under the *Wyoming* practice.

7. **Application Not Made for Delay, etc.**— This averment is one of the commonplaces of affidavits for continuance, and is almost invariably inserted, being sometimes expressly required by statute or rule of court. See list of statutes, etc., cited *supra*, note 1, p. 331. And

[*Or* X. That this application is not made for vexation or delay, but in good faith, for the purpose of obtaining a fair and impartial trial.][1]

[XI. That the facts on which this application is founded occurred, or came to the knowledge of the affiant, too late to allow affiant to apply for a continuance, as prescribed by section 401 of the North Carolina Code of Civil Procedure; and that this application is made as soon as it reasonably could be made after the facts stated herein came to affiant's knowledge.][2]

John Doe (or *Richard Roe*).

[Subscribed and sworn to before me this *fifth* day of *October*, 1897.
Calvin Clark, Clerk of the *Circuit* Court.][3]

Form No. 6273.[4]

John Doe against *Richard Roe.* } In the *Superior* Court, *Litchfield* County. *April* Term, to wit, *May 3*, 1898.

State of *Connecticut*, *Litchfield* County. } ss.

John W. Hester, of *Warren*, of lawful age, being duly sworn,

in several states where the averment is not required by statute or rule of court, the courts have nevertheless held it to be necessary. See *infra*, this note.

Arkansas. — This averment is not required by the statute now in force (Sand. & H. Dig. (1894), § 5797); but a statute in force in 1847, quoted in Turner *v.* Eustis, 8 Ark. 121, required that the affidavit should state that the "application is not made for delay, but that justice may be done." And it was held in the case last cited, where the affidavit recited that "this application is not made for delay, but that the law may be administered," that the departure from the language of the statute was a fatal defect.

California. — Should state that it is not made for delay merely. People *v.* Thompson, 4 Cal. 241; People *v.* Jenkins, 56 Cal. 5.

Florida. — Consult Form No. 6283, *infra*, and notes thereto.

Georgia. — Consult Form No. 6284, *infra*, and notes thereto.

Kansas. — See Clouston *v.* Gray, 48 Kan. 36.

Louisiana. — Statement not required by statute, but deemed necessary by the courts. Allard *v.* Lobau, 3 Martin N. S. (La.) 293; Richardson *v.* Debuys, 4 Martin N. S. (La.) 129; see also State *v.* Foster, 36 La. Ann. 877; State *v.* Moultrie, 33 La. Ann. 1146; Bradner *v.* Flint, 10 La. 391; Harrison *v.* Waymouth, 3 Rob. (La.) 340.

Missouri. — Consult Form No. 6291, *infra*, and notes thereto.

Nevada. — This averment was inserted in State *v.* O'Flaherty, 7 Nev. 153.

1. This is paragraph X as it should be under the *Missouri* practice in civil cases. As to *Missouri* practice in criminal cases, see Form No. 6291, *infra*.

2. Paragraph XI should be added under *North Carolina* practice. See list of statutes, etc., cited *supra*, note 1, p. 331.

3. **For formal parts** of an affidavit generally, and particularly of jurats, consult the title AFFIDAVITS, vol. 1, p. 560 *et seq.*

4. **Connecticut.** — Section 2, rule No. 8, of the General Rules of Practice provides that "Whenever a motion is made for the continuance of a cause, on account of the absence of a material witness, such motion, if the adverse party require it, shall be supported by an affidavit, stating the name of the absent witness, if known, and the particular facts, which, it is believed, can be proved by him, with the grounds of such belief." In practice an affidavit is seldom required, an oral statement being accepted as satisfactory, and there is no well defined usage as to the form of an affidavit. The rule above quoted further provides that a continuance may be avoided by a written admission at the foot of the affidavit that the witness would testify to

deposes and says: My name is *John W. Hester*. I am *sixty-seven* years of age. I reside in *Warren, Connecticut*. I am a carriage-maker by trade and am engaged in that business. I know the parties in this case. I know *William Muldoon*, on account of whose absence a continuance is asked by the plaintiff. Mr. *Muldoon* has worked for me in my shop for *seven* years, or thereabouts. He is a native of *Ireland*, and is now on a voyage to his birthplace. He expects to return in the fall or early winter. He is an intelligent man, and is a credible person. In conversation with him last year he told me (*Here follows a statement of the particular facts which it was believed the witness would prove*).

John W. Hester.

Subscribed and sworn to before me this *third* day of *May*, 1898.
Elbert P. Roberts, Justice of the Peace.

Form No. 6274.[1]

John Doe against *Richard Roe.* } In the *Circuit* Court of *Allegany* County.

(*Suggestion for Continuance.*)[2]

State of *Maryland*, County of *Allegany*. } To wit.

I hereby certify that on the *first* day of *February*, in the year 1898, before the subscriber, a justice of the peace of the state of *Maryland* in and for the county of *Allegany* aforesaid, personally appeared *John Doe* (or *Richard Roe*)[3] and made oath upon the Holy Evangely of Almighty God.

I. (*Like paragraph I in Form No. 6272*).

II. That affiant believes his cause cannot be tried with justice to

the facts stated in the affidavit. Of course if such an admission is sought the showing for a continuance must be made by affidavit. The foregoing rule was first promulgated in 1847 (see 18 Conn. 565) and is quoted in 2 Swift's Dig. (ed. 1884), p. 699, preceded by the statement that "The materiality of the testimony generally rests on the professional statement of counsel."

This form, excepting dates and names, is substantially a copy of an affidavit used in a case by one of the most eminent practitioners in the state.

1. The Statutory Provisions. — "Upon suggestion, supported by the affidavit of the party, or some other credible person, that the evidence of a witness who resides in some place beyond the limits of this state, or the evidence of a witness residing within this state, is wanting, the court shall continue the cause for such time as may be deemed necessary to enable the party to procure the attendance or obtain the testimony of such absent witness; provided, the party applying for the continuance shall comply with the provisions of the two following sections." Md. Pub. Gen. Laws (1888), art. 75, § 57.

2. The suggestion referred to in the text may be made by the attorney in the following form: "*John Doe* (or *Richard Roe*), plaintiff (or *defendant*) in the above entitled cause, appearing by *Daniel Webster*, his attorney, respectfully suggests to the court here that the evidence of one *George Jones*, a witness who resides in the *city* of *Wilmington*, state of *Delaware*, is wanting, and that (*Here set out allegations in substance as set out in the affidavit in Form No. 6274*).

Daniel Webster,
Attorney for Plaintiff (or *Defendant*)."

3. Who may Make Affidavit. — The affidavit may be made by "the party applying for a continuance" or "some other credible person." Md. Pub. Gen. Laws (1888), art. 75, § 58.

himself without the evidence of *George Jones*,[1] who is an absent witness.

III. That said *George Jones* resides in (*State place of residence*).[2]

IV. That the testimony of the said *George Jones* is material, competent and proper in this suit.[3]

V. That affiant believes the said *Jones* will prove the following facts (*Here state facts*).[4]

VI. That affiant has used his proper and reasonable endeavors to procure the testimony of the said *George Jones*.[3]

VII. That he has reasonable expectations and belief that the same can be procured in a reasonable time,[3] to wit, by the ——— day of ———, 1898 (or *by the next term of this court*).

Abraham Kent, Justice of the Peace.

Form No. 6275.[5]

Circuit Court for the County of *Calhoun*.

John Doe, plaintiff,
against
Richard Roe, defendant.

Calhoun County, ss.

John Doe (or *Richard Roe*), being duly sworn, says:

I. (*Like paragraph I in Form No. 6272.*)

II. That notice that said cause would be brought on for trial at the next term of said court, to be held at the court-house in the city of *Marshall*, in said county, on the *first* day of *March*, 1897, was served by said plaintiff (or *defendant*) upon said defendant (or *plaintiff*) on the *tenth* day of *February*, 1897.

III. That deponent has fully and fairly stated the case in this cause to *Daniel Webster*, *Esquire*, his counsel therein, who resides at *Marshall*, and that he has a good and substantial cause of action (or *defense*) upon the merits thereof, as he is advised by his counsel after such statement made as aforesaid and verily believes to be true.

IV. That deponent has also fully and fairly disclosed to his said counsel the facts which he expects and believes he shall be able to prove by *George Jones*, who resides at (*Here state place of residence*), who is a witness for this deponent therein, and that said *George Jones* is a

1. **The name of the witness** must be stated. Md. Pub. Gen. Laws (1888), art. 75, § 58. See *supra*, note 1, p. 334.

2. **Residence of Witness.** — See *supra*, note 1, p. 334.

3. Following the language of the statute. Md. Pub. Gen. Laws (1888), art. 75, § 58.

4. **Statement of Facts to be Proved.** — See, generally, *supra*, note 7, p. 335.

"Whenever a party seeks a continuance upon the ground of the absence of a material witness, it is his duty to state in his affidavit fully and frankly, if he knows them, all the material facts which the witness will prove, as well those which are unfavorable as those which are in his favor." Dean *v.* Turner, 31 Md. 58.

Md. Pub. Gen. Laws (1888), art. 75, § 59, provides that the court may examine the affiant in regard to the materiality of the testimony, probability of procuring it, etc., and shall refuse a continuance if the facts alleged are admitted by the adverse party.

5. **Michigan.** — This affidavit is drawn under the provisions of Circuit Court Law Rule No. 22, which rule also governs continuances in chancery cases by virtue of Chancery Rule No. 15. Consult also the annotations to Form No. 6272, *supra*.

material witness for this deponent in said cause, as he is advised by his said counsel after such statement made as aforesaid and verily believes to be true.

V. That deponent cannot safely proceed to the trial of said cause without the testimony of said *George Jones*, as this deponent is also advised by his said counsel after such statement made as aforesaid and verily believes to be true.[1]

VI. That said witness has been duly subpœnaed,[2] and is absent without deponent's consent, procurement or connivance.

VII. That deponent expects and believes that he will be able to procure the attendance of said witness at the next term of this court, or his testimony by commission.

VIII. That this application for continuance is not made for the purpose of delay merely, but for the purpose of obtaining a fair and impartial trial upon the merits.[3]

John Doe (or *Richard Roe*).

Sworn and subscribed to before me this *first* day of *March*, 1898.
(SEAL) *Norton Porter*, Notary Public,
Calhoun County, *Michigan*.

Form No. 6276.[4]

New Jersey Supreme Court.

Richard Roe ads. *John Doe.* } In *Tort.*

Essex County, ss.

Richard Roe, being duly sworn according to law upon his oath, says:

1. Expected Testimony. — This form is drawn for an affidavit on a first application for continuance. On a second application insert at the point indicated in the text a statement of "the facts which he expects to prove by the absent witness" (Circuit Ct. Rule No. 22); that is, "And this deponent further says that he expects to prove by the said witnesses the following facts," proceeding then to state the facts.

In a Criminal Case. — It was held in People *v.* Burwell, 106 Mich. 27, which appears to have been a first application, that the motion was properly overruled because the affidavit did not state what the defendant expected to prove by the absent witnesses. See also People *v.* Anderson, 53 Mich. 60.

2. Diligence to Secure Testimony. — On a second application Circuit Court Rule No. 22 requires the applicant to "state with particularity the diligence he has used" to procure the attendance of the witness; by which we understand that the applicant should state every step that has been taken and every known circumstance which may explain the absence of the witness; as, for instance, that he is sick, the prospect of his recovery, etc.

3. Motion Made After First Day in Term. — If the motion is made after the first day in term, a sufficient excuse must be shown for the delay (Circuit Ct. Rule No. 22). And in such case it would be prudent, if not necessary, to insert the excuse in the affidavit at this point. For a form under a statutory provision requiring an excuse for laches see Form No. 6289.

4. New Jersey. — There is no statute or rule of court in *New Jersey* prescribing the requisites of an affidavit for continuance. The form given in the text is what is denominated in common-law practice the "common affidavit," which differs from a special affidavit in that the latter contains a statement of the facts expected to be proved by the witness. The circumstances under which a special affidavit is required are shown *infra*, note 1, p. 352, note 3, p. 353, and it is believed that the practice there laid down would be enforced in *New Jersey* under like circumstances. Consult also annotations to Form No. 6272, *supra*.

That he is the defendant in this cause. That issue was joined herein on the *third* day of *February*, A. D. 1898. That *George Jones*, who resides at *Hackensack*, in *Bergen* county, is a material witness for this deponent in this cause, as he is advised by his counsel and verily believes to be true. That said deponent cannot safely proceed to the trial of this cause without the testimony of the said *George Jones*. That this deponent has used due diligence to procure the attendance of the said *George Jones* in that for the purpose of subpœnaing him this deponent, on the *fifth* day of *February*, A. D. 1898, went to his dwelling in *Hackensack*, and was informed that he had gone to *Jersey City*, in the county of *Hudson*, and state of *New Jersey*, to which place this deponent went on the same day, and was then told and believed it to be true that said *George Jones* had gone away. That this deponent cannot get any information as to the present whereabouts of said *George Jones*, but is informed that he will return to his home in *Hackensack* in a month. That this deponent expects to be able to procure the attendance of the said *George Jones* at the first sittings of the next ——— term of this court.

Richard Roe (or *John Doe*).

Sworn and subscribed to before me this *twelfth* day of *February*, A. D. 1898. *Abraham Kent*, Justice of the Peace.

Form No. 6277.[1]

[*Supreme* Court, *Suffolk* County.

John Doe, plaintiff, against *Richard Roe*, defendant.

State of *New York*, County of *Suffolk*, } ss.

John Doe (or *Richard Roe*),[2] being duly sworn, says:][3]

I. (*Like paragraph I in Form No. 6272.*)

1. **New York and Pennsylvania** — *Common Affidavit.* — In common-law practice, which for the most part has always prevailed in *New York* in applications for continuances, the affidavit in support of a first application, when there are no suspicious circumstances, is denominated the "common affidavit." 4 Encycl. of Pl. and Pr. 884. In *Pennsylvania* there is no statute prescribing the requisites of an affidavit for continuance, nor is there any uniform practice on the subject. In some courts an oral application by counsel is deemed sufficient, while in others the affidavit is required; but it appears that the common affidavit, as used in *New York*, will suffice under ordinary circumstances on a first application.

Special Affidavit. — On a second or subsequent application, in *New York*, or where the circumstances are such as to cast suspicion on the good faith of the application, a "special affidavit," so called, should be filed by the applicant. 4 Encycl. of Pl. and Pr. 884. Doubtless a special affidavit might properly be required in *Pennsylvania* under similar circumstances.

2. **Who may Make.** — Ordinarily the affidavit should be made by the party himself. Brooklyn Oil Works *v.* Brown, 7 Abb. Pr. N. S. (N. Y. Super. Ct.) 382. But an attorney may make the affidavit when it is made to appear that he has personal knowledge of the facts. Garfield Nat. Bank *v.* Colwell, (Supreme Ct.) 28 N. Y. St. Rep. 723. See also *supra*, note 3, p. 317, note 1, p. 332.

3. For the formal parts of an affidavit in *Pennsylvania* see the title AFFIDAVITS, vol. 1, p. 587.

II. That issue was joined in the above entitled cause on the ——— day of ———, 1898.

III. That the above entitled cause was noticed for trial by the plaintiff on the ——— day of ———, 1898.

[IV. That deponent has fully and fairly stated the case in this cause to *Robert McLean, Esq.*, his counsel therein, who resides at *Patchogue*, in *Suffolk* county, state of *New York*, and that he has a good and substantial defense upon the merits thereof, as he is advised by his counsel after such statement made as aforesaid and verily believes to be true.][1]

V. That deponent has fully and fairly disclosed to his said counsel the facts which he expects and believes he shall be able to prove by *George Jones*, who resides at *Babylon* in said *Suffolk* county, and is a material witness for this deponent in this cause, as he is advised by his said counsel after such statement made as aforesaid and verily believes to be true.[2]

VI. (*Like paragraph V in Form No. 6275.*)

[VI*a*. That deponent expects to prove by the said *George Jones* the following facts (*Here state the facts expected to be proved*).[3] That deponent believes the foregoing facts are true.[4] That deponent cannot prove the same facts by the testimony of any other witness.[5]][6]

VII. That said *George Jones* is not in attendance, and [that this deponent, for the purpose of subpœnaing him, went to his dwelling in *Babylon*, in said *Suffolk* county, on the *tenth* day of *March*, 1898,

1. Paragraph IV is to be inserted when the affidavit is by the defendant. **An affidavit of merits** is necessary when the application is made by the defendant. Brooklyn Oil Works *v.* Brown, 7 Abb. Pr. N. S. (N. Y. Super. Ct.) 382.

2. **Materiality of Testimony.** — On the first application, when there is no cause for suspicion that the object is delay, it is sufficient to state that the testimony of the witness is material without setting forth the facts which he is expected to prove. People *v.* Vermilyea, 7 Cow. (N. Y.) 369; Ogden *v.* Payne, 5 Cow. (N.Y.) 15; Brooklyn Oil Works *v.* Brown, 7 Abb. Pr. N. S. (N. Y.) 382. The affidavit must be positive in the averment that the testimony is material. Brooklyn Oil Works *v.* Brown, 7 Abb. Pr. N. S. (N. Y. Super. Ct.) 382, where the court said: "The practice now is to swear that the defendant is advised and believes the witness to be material." See also People *v.* Jackson, 111 N. Y. 362.

In order to show the materiality of the alleged absent testimony it must appear by the affidavit that there is, in fact, an absent witness. "Current rumor about the village" that there was such a witness, whose name and whereabouts are unknown, is not sufficient. People *v.* Jackson, 111 N. Y. 362.

In a criminal case the court said: "Whatever may be the ordinary practice, I have no doubt that the strict rule requires the prisoner in every case to make a full disclosure of the names of his witnesses, and of the facts he expects to prove by them, though this strictness may very well be waived by the district attorney or by the court, on application made, at the term when the indictment is found." People *v.* Krummer, 4 Park. Cr. Rep. (Buffalo Super. Ct.) 217. See generally also, as to the sufficiency of statement of expected testimony, *supra*, note 7, p. 335 *et seq.*

3. The principal feature that distinguishes the special affidavit from the common affidavit is that the special affidavit must state the facts which it is expected the absent witness will testify to or prove. Brooklyn Oil Works *v.* Brown, 7 Abb. Pr. N. S. (N. Y. Super. Ct.) 382. See also Onderdonk *v.* Ranlett, 3 Hill (N. Y.) 323.

4. **Testimony believed to be true,** see *supra*, note 2, p. 342.

5. **No other witness** to same facts, see *supra*, note 2, p. 343.

6. This paragraph should be inserted when the affidavit is a special affidavit.

and was informed that he had gone to *Huntington*, in said county, to which place this deponent went on the same day, and was then and there told, and believed it to be true, that said *George Jones* had gone to *Connecticut*, but intended to return to his home in *Babylon* in about a month.][1]

[VII*a*. That deponent has used due diligence to procure the attendance of the said *George Jones* in that he (*Here state what diligence has been used*).][2]

VIII. That said *George Jones* is not absent by the consent, procurement or connivance of the deponent.[3]

IX. That deponent expects and believes that he can procure, and intends to procure, the attendance of the said *George Jones* as a witness in this cause at the next circuit appointed to be held at *Riverhead* on the *third* day of *October*, 1898.[4]

X. That this application is not made for delay, but that justice may be done.[5]

John Doe (or *Richard Roe*).

[Sworn to before me this *seventeenth* day of *March*, 1898.

Calvin Clark,
County Clerk of *Suffolk* County.][6]

Form No. 6278.[7]

1. If the witness has been subpœnaed, state, in lieu of the averment in the text, "but that he was duly subpœnaed on the *tenth* day of *March*, 1898." It has been held, however, that the common affidavit need not state the date when the witness was subpœnaed unless the omission be made a ground of objection. Hooker *v.* Rogers, 6 Cow. (N. Y.) 577.

2. Paragraph VII*a* should be inserted instead of paragraph VII when the affidavit is a special affidavit.

The affidavit must show that due diligence has been used to procure the attendance of the witness. Brooklyn Oil Works *v.* Brown, 7 Abb. Pr. N. S. (N. Y. Super. Ct.) 382. For sufficient averments of diligence see Hooker *v.* Rogers, 6 Cow. (N. Y.) 577, where the witness was sick in bed; Kelly *v.* Weir, 19 Misc. Rep. (N. Y. City Ct.) 366; Michelsen *v.* Spies, 83 Hun (N. Y.) 509; Nixen *v.* Hallett, 2 Johns. Cas. (N. Y.) 218.

For insufficient diligence shown see Keller *v.* Feldman, 29 Abb. N. Cas. (N. Y. C. Pl.) 426; Fake *v.* Edgerton, 6 Duer (N. Y.) 653; Hays *v.* Berryman, 6 Bosw. (N. Y.) 679, where no special reason was assigned for not taking the deposition of the witness and thus preventing the loss of his testimony. See also *supra*, note 5, p. 339.

The special affidavit must be more minute than the common affidavit in stating the facts and circumstances on which the application rests with respect to diligence in obtaining the testimony of the absent witness. People *v.* Vermilyea, 7 Cow. (N. Y.) 369.

3. Witness not absent by consent, etc., see *supra*, note 5, p. 345.

4. Expectation of Procuring testimony. — The affidavit should state that applicant expects to procure the testimony of the absent witness by the time to which it is sought to defer the trial. People *v.* Vermilyea, 7 Cow. (N. Y.) 369; Brown *v.* Moran, 65 How. Pr. (N. Y. C. Pl.) 349; Brooklyn Oil Works *v.* Brown, 7 Abb. Pr. N. S. (N. Y. Super. Ct.) 382. See also Onderdonk *v.* Raulett, 3 Hill (N. Y.) 328; also, generally, with respect to the statement of expectation of procuring testimony, see *supra*, note 8, p. 345. And if the facts alleged show that there is no reasonable ground for the expectation a continuance should be refused. People *v.* Jackson, 111 N. Y. 362.

5. Application not made for delay, etc., see *supra*, note 7, p. 347.

6. See *supra*, note 3, p. 352.

7. North Dakota. — *In civil cases*, continuances are regulated by District Court Rule No. XXXII (3 N. Dak. xxxi), which provides that "All affidavits for continuances on account of the absence of a material witness or ma-

State of *North Dakota*, } ss. In the *District* Court,
County of *Burleigh*. } *Fifth Judicial* District.

John Doe, plaintiff,
against
Richard Roe, defendant.

State of *North Dakota*, } ss.
County of *Burleigh*. }

John Doe (or *Richard Roe*), being first duly sworn, says:

I. (*Like paragraph I in Form No. 6272.*)

I*a*. That affiant has a valid cause of action or defense herein, to wit (*Here state the facts showing a valid cause of action or defense, as the case may be*).

II. (*Like paragraph II in Form No. 6272.*)

III. (*Like paragraph III in Form No. 6272.*)

IV. That affiant expects and believes that the said *George Jones*, if he were present and orally examined by the court, would testify as follows: (*State expected testimony.*)

V. That affiant has used due diligence to prepare for trial and to procure the testimony of the said *George Jones* in that (*Here state the nature and kind of diligence used*).

VI. That affiant believes said testimony is true.

VII. That the same facts cannot satisfactorily be shown by any other available evidence.

VIII. (*Like paragraph VIII in Form No. 6272.*)

IX. (*Like paragraph IX in Form No. 6272.*)

X. (*Like paragraph X in Form No. 6272.*)

Subscribed and sworn to before me this *fifth* day of *March*, 1897.

Calvin Clark, Clerk of the *District* Court.

Form No. 6279.[1]

Supreme Court.
Common Pleas Division.

Providence, Sc.

John Doe
against
Richard Roe. } No. *2102*.

I, *John Doe* (or *Richard Roe*) on oath declare and say:

terial evidence shall show to the satisfaction of the court all facts therein stated, that the applicant has a valid cause of action or defense, in whole or in part, and if in part only he shall specify particularly to what part, and shall also show as aforesaid that he has used due diligence to prepare for trial, and the nature and kind of diligence used, and the name and residence of the absent witness or witnesses, and what he expects and believes such witness (or witnesses) would testify to were he or they present and orally examined in court, or the nature of any document wanted and where the same may be found, and that the same facts cannot satisfactorily be shown by any other available evidence."

In criminal cases, continuances are governed by the rule of court above quoted, by virtue of N. Dak. Rev. Codes (1895), § 8141.

Consult also the annotations to Form No. 6272, *supra*.

1. **Rhode Island.** — This affidavit is drawn under the provisions of Rules of Practice No. 10 *et seq.* (15 R. I. 634

I. (*Like paragraph I in Form No. 6272.*)

II. That I cannot safely proceed to the trial of this cause at the present term of this court without the testimony of *George Jones*, who resides at (*Here state place of residence*) and is a material witness in my behalf, and is now absent.

III. *Like paragraph IV in Form No. 6272.*)

IV. The endeavors which have been used to procure the attendance or depositions of the said *George Jones* are as follows: (*Here state the endeavors.*)

V. (*Like paragraph VI in Form No. 6272, adding*) and the grounds of my expectation that the said *George Jones* will prove the said facts are that (*Here state grounds*).

VI. That I know of no other person by whom I can prove the aforesaid facts which I expect the said *George Jones* to prove.

VII. (*Like paragraph VIII in Form No. 6272.*)

VIII. That I expect to procure the attendance or deposition of the said *George Jones* at the next term of this court, because (*State reasons*).

IX. (*Like paragraph X in Form No. 6272.*)

John Doe (or *Richard Roe*).

Subscribed and sworn to before me at *Barrington*, in the county of *Bristol* and state of *Rhode Island*, this *tenth* day of *March*, 1898.

George L. Cooke, Notary Public.

Form No. 6280.[1]

The State of *South Carolina*, } In the *Court of Common Pleas.*
County of *Chester*.

John Doe, plaintiff,
against
Richard Roe, defendant.

The State of *South Carolina*, } ss.
County of *Chester*.

Comes now *John Doe* (or *Richard Roe*) and on oath says:

I. (*Like paragraph I in Form No. 6272.*)

II. (*Like paragraph II in Form No. 6272.*)

III. (*Like paragraph III in Form No. 6272.*)

IV. That affiant believes the said *George Jones*, if he were present, would testify to the following facts (*Statement of facts*).

V. That affiant has used due diligence to procure the testimony of the said *George Jones* in that he caused a subpœna to be issued for the said *Jones*, which was duly served, and is attached hereto and made a part hereof, together with the sheriff's return of service indorsed thereon.

et seq.) Consult also the annotations to Form No. 6272, *supra*.

Absence on Account of Sickness. — "If the continuance be asked on account of the sickness of a party or witness, it must be accompanied by a sworn certificate of a practicing physician, in good standing, of the fact, kind, and necessary degree of sickness to warrant the motion." Rules of Practice, No. 17 (15 R. I. 635).

1. **South Carolina.** — This affidavit is drawn under the provisions of Circuit Ct. Rule No. 27. Consult also the annotations to Form No. 6272, *supra*.

VI. (*Like paragraph VI in Form No. 6272.*)

VI*a*. That the said *George Jones* has repeatedly told the affiant that he would testify to the foregoing facts under oath.

VII. That the same facts cannot be proved by any other person.

VIII. (*Like paragraph VIII in Form No. 6272.*)

IX. That affiant expects to procure the attendance of the said *George Jones* as a witness at the next term of this court.

X. That the affiant's motion for a continuance is not intended for delay, but is made solely because he cannot go safely to trial without the testimony above set forth.

John Doe (or *Richard Roe*).

Sworn to before me this *tenth* day of *March*, 1*898*.

(SEAL) *Abraham Kent*, Magistrate.

Form No. 6281.[1]

John Doe
against
Richard Roe.

I, *John Doe* (or *Richard Roe*), on oath depose and say:

I. (*Like paragraph I in Form No. 6272.*)

II. (*Like paragraph II in Form No. 6272.*)

III. (*Like paragraph III in Form No. 6272.*)

IV. That the substance of the testimony I expect the said *George Jones* to give is as follows (*Here state the substance of the testimony*).

John Doe (or *Richard Roe*).

Washington County, ss.

At *Montpelier*, in said county, this *fifth* day of *March*, 1*898*, personally appeared the said *John Doe* (or *Richard Roe*), and made oath to the truth of the foregoing affidavit by him subscribed.

Before me:

Abraham Kent, Justice of the Peace.

Form No. 6282.[2]

Circuit Court, *Milwaukee* County.

John Doe, plaintiff,
against
Richard Roe, defendant.

State of *Wisconsin*,
County of *Milwaukee*. } ss.

John Doe (or *Richard Roe*), being duly sworn, says:

I. (*Like paragraph I in Form No. 6272.*)

II. (*Like paragraph II in Form No. 6277.*)

1. **Vermont.** — Supreme Ct. Rule No. IX provides that "if the motion (for continuance) is founded on the absence of a witness, the affidavit shall state the name and residence of the witness, and the substance of the testimony expected from him." Consult also the annotations to Form No. 6272, *supra*.

2. **Wisconsin.** — The provisions regulating continuances, both as to the motion and affidavit for the same, are prescribed by Circuit Ct. Rule No. XX (Sanb. & B. Anno. Stat. Wis., § 2845, note). Consult also *supra*, Form No. 6272, and notes thereto.

III. (*Like paragraph II in Form No. 6275 or paragraph III in Form No. 6277.*)

IV. (*Like paragraph III in Form No. 6275.*)

V. (*Like paragraph IV in Form No. 6275.*)

VI. (*Like paragraph V in Form No. 6275.*)

VII. That this deponent expects to prove by the said *George Jones* the following facts (*State the facts*),[1] and that the grounds of his expectation that he can prove the foregoing facts by the said *George Jones* are (*State grounds of expectation*).

VIII. (*Like paragraph VI in Form No. 6272.*)

IX. That no other evidence is at hand or witness in attendance, or known to this deponent, whose testimony could have been procured in time, upon whom this deponent can safely rely to prove the particular facts above stated, which this deponent expects and believes can be proved by the said *George Jones*, or to maintain the issue in respect thereto on the part of this deponent.

X. That this deponent has used due diligence and endeavors for the purpose of procuring the testimony of the said *George Jones* in that this deponent (*Here state the endeavors used*).[2]

XI. (*Like paragraph VIII in Form No. 6272.*)

XII. That deponent expects and believes that he will be able to procure the attendance of the said *George Jones* at the next term of this court.

XIII. That this application for continuance is not made for the purpose of delay merely, but that justice may be done and a fair and impartial trial be had upon the merits.

John Doe (or *Richard Roe*).

State of *Wisconsin*, } ss.
County of *Milwaukee*. }

The above named *John Doe* (or *Richard Roe*) before me personally appeared and made oath that the foregoing affidavit subscribed is true. On this *fifth* day of *March*, 1898.

Abraham Kent, Justice of the Peace
in and for *Milwaukee* County, *Wisconsin*.

b. Precedents.[3]

1. Expectation of Proving. — In Winslow *v.* Bradley, 15 Wis. 394, the absent witness was a defendant in the suit, and it was held that the affidavit must "disclose fully the precise facts or the substance of the testimony expected to be proven by such party" and a statement that he was a "material witness," and that the facts constituting the defense were within his personal knowledge was not sufficient. See also Ballston Spa Bank *v.* Marine Bank, 16 Wis. 135.

2. Due Diligence Used. — In Andrews *v.* Elderkin, 24 Wis. 531, the continuance was refused because the affidavit did not show due diligence. See also Ballston Spa Bank *v.* Marine Bank, 16 Wis. 135.

3. Kentucky. — In Morgan *v.* Com., 14 Bush (Ky.) 106, the defendant was indicted for the murder of one Best. He was brought to trial at the first term after his arrest and commitment to jail, and on the calling of the cause, March 21, 1878, to which day it had been postponed when first called on March 18, he filed his affidavit for a continuance for the following among other reasons: "'On the *16th* day of *March*, 1878, he had *Robert Collins* summoned as a witness in this case, and without whom he cannot safely go into trial; said *Collins* is

not in attendance at this term of the court, and was not in attendance when the case was called on *Monday* last, and on that day affiant obtained an attachment against said *Collins*, both to this county and *Estill* county, where said *Collins* resides. The attachment to *Madison* county was placed in the hands of the sheriff of said county to be served, and the one to *Estill* county was sent by mail to the sheriff of *Estill* county, but neither of said attachments has been returned executed. He can prove by *Robert Collins* that he was standing seven or eight feet from *Best* at the time he was killed, and that he knows that the defendant *Morgan* did not kill *Best*, but that *Best* was shot and killed by *Andrew Conn*; that witness saw *Conn* present his pistol at *Best*, saw the smoke rise from the pistol, and heard the report, and at the report of the pistol saw *Best* throw up his hands, reel a few steps and fall; and he knows that *Best* was killed by the shot fired by *Conn* and not by the accused. *Best* threw up his hands, reeled and fell when *Conn* fired, and then *Conn* put up his pistol, and, after the excitement, stepped behind a tree and reloaded his pistol; and will prove that at the time *Best* was shot the defendant *Morgan* and *Jerry Higgins* were in a scuffle over a pistol.' His affidavit also stated that he could prove by *Mary Sigman* that she was present when *Best* was killed, and that she saw a man run round the crowd where *Best* was standing and level his pistol and fire, when *Best* staggered a few steps and fell; she is of opinion that the man that fired the pistol was either *Andrew Conn* or *Andrew Cummins*, but she is certain it was not the defendant *Morgan*. He stated that he obtained an attachment against this witness also on the first day of the term, and placed it in the hands of the sheriff, but the same had not been executed. He swore further that his motion for a continuance was not made for delay, but that justice might be done him, and a fair trial of his case had." It was held by the court of appeals that the affidavit disclosed sufficient diligence, that the evidence was material, and that it was reversible error to overrule the motion for continuance.

Nevada. — In Choate *v.* Bullion Min. Co., 1 Nev. 73, the tatement of the case is as follows: "The affidavit on motion for continuance in this case shows that affiant is the superintendent of the Bullion Mining Company, the defendant; that defendant could not safely proceed to trial during that term of the court because of the absence of one M. E. Letts, a material witness on the part of defendant; that Letts left the territory of Nevada for the state of California in the month of November, 1862, and left said state in March, A. D. 1863; that immediately after arriving in said state he, the said Letts, in company with others, started to Lower California on a prospecting tour, and had been absent ever since; that immediately after this suit was commenced the affiant wrote to different places in order to ascertain his whereabouts so that his deposition might be taken, but that all his efforts to ascertain his whereabouts had failed; that said Letts was intending to return to Virginia City, and affiant believed that he would so return before the next term of the court; that affiant had written to every place where said Letts might be expected to get his letters, yet that he had received no answer; that Lett's business is such that affiant knew he would return before many months. The affidavit also stated the facts which defendant expected to prove by said witness; that affiant knew of no one else by whom the same facts could be proved, and that his testimony could be obtained by the next term of the court." The affidavit was held sufficient, and the refusal of a continuance reversible error.

Virginia — *The Form.* — In Welch *v.* Com., 90 Va. 319, the affidavit for continuance, omitting the formal parts, was as follows:

"*John Welch*, the defendant, being first duly sworn, says that upon the trial of the above mentioned indictment he desires to introduce *Sidney Hoffheimer* as a witness in his behalf; that said *Hoffheimer* was present in the city of *Norfolk* at the time of the occurrences which constitute the subject of said indictment; that he is a material witness for the defendant, and can prove facts not within the knowledge of any other witness procurable by the defendant; that this defendant has caused to be issued subpœnas for the attendance of this witness, returnable to the *first* day of this term and to this day, directed to the sergeant of the city of *Norfolk*, which subpœnas have been returned "Not found"; that the said witness has not been kept from attendance by the solicitation or procurement

Form No. 6283.

(Precedent in Blige *v.* State, 20 Fla. 743.)[1]

In the *Circuit* Court, *Sixth* Circuit of *Florida*, in and for *Hillsborough* County, *Fall* Term, A. D. 1*883*:

The State of *Florida*,
vs.
William Blige.
} *Assault with intent to murder.*

Now, on this *10th* day of *October*, A. D. 1*883*, comes the defendant, *William Blige*,[2] who being duly sworn, says that *Thomas Whitehead* and *Nixon Brown* are material witnesses for his defense; that he expects to

of this defendant, or by any connivance of his, and that he has used every effort in his power, in addition to the issuing of process as aforesaid, to secure his attendance."

It was held reversible error to refuse a continuance on this affidavit.

For other cases where a refusal was held to constitute reversible error see Anthony *v.* Lawhorne, 1 Leigh (Va.) 1; Hook *v.* Nanny, 4 Hen. & M.(Va.) 157; Higginbotham *v.* Chamberlayne, 4 Munf. (Va.) 547; Vaught *v.* Rider, 83 Va. 659; Walton *v.* Com., 32 Gratt. (Va.) 855; Phillips *v.* Com., 90 Va. 401; Carter *v.* Wharton, 82 Va. 264; Myers *v.* Trice, 86 Va. 835.

Facts to be Proved and Materiality Thereof. — See Wormeley *v.* Com., 10 Gratt. (Va.) 658; Harman *v.* Howe, 27 Gratt. (Va.) 676; Harris *v.* Harris, 2 Leigh (Va.) 584. See also *supra*, note 7, p. 335 *et seq.*

No Other Witness to the Same Facts. — See Mull's Case, 8 Gratt. (Va.) 695. See also *supra*, note 2, p. 343.

Diligence to Obtain Testimony. — See Carter *v.* Wharton, 82 Va. 264, and *supra*, note 5, p. 339.

For cases showing insufficient diligence see Deanes *v.* Scriba, 2 Call (Va.) 419; Hurd *v.* Com., 5 Leigh (Va.) 715; Holt *v.* Com., 2 Va. Cas. 156; Deford *v.* Hayes, 6 Munf. (Va.) 390; Milstead *v.* Redman, 3 Munf. (Va.) 219; Com. *v.* Mister, 79 Va. 5; Early *v.* Com., 86 Va. 921; Richmond, etc., R. Co. *v.* Humphreys, 90 Va. 425; Norfolk, etc., R. Co. *v.* Shott, 92 Va. 34; Baltimore, etc., R. Co. *v.* Wightman, 29 Gratt. (Va.) 431; Wormeley *v.* Com., 10 Gratt. (Va.) 683.

1. **Florida.** — The application for continuance was denied and the supreme court in awarding a new trial said: "The affidavit upon which a motion for a continuance was based comes up to the rule as laid down in Harrell *v.* Durrance, 9 Fla. 490, and in Gladden *v.* State, 12 Fla. 562. The application is addressed to the sound discretion of the court, and ordinarily such discretion will not be interfered with by the appellate court. But when the court can see that the rights of the party may have been jeopardized and the rule in regard to the application had been fully complied with, and there had been no previous delay, and especially when the application is made on the very day of the finding of the indictment, this court will control such discretion. We think a continuance should have been granted." (*Citing* McNealy *v.* State, 17 Fla. 198; Sanford *v.* Cloud, 17 Fla. 532; Green *v.* King, 17 Fla. 452; State *v.* Wood, 68 Mo. 444; State *v.* Hagan, 22 Kan. 490.)

In Civil Cases. — The requisites of an affidavit for continuance for the term in a civil case are laid down in Harrell *v.* Durrance, 9 Fla. 500, *followed* in Sanford *v.* Cloud, 17 Fla. 543, and are substantially the same as in criminal cases. See Gladden *v.* State, 12 Fla. 562; Green *v.* King, 17 Fla. 452.

For a form of affidavit held insufficient see Sanford *v.* Cloud, 17 Fla. 543, commented on in Blige *v.* State, 20 Fla. 743.

In Criminal Cases. — In Bryant *v.* State, 34 Fla. 294, the court said: "An affidavit of this character, on account of the greater temptation to delay, should be more closely scrutinized in a criminal than in a civil case." *Citing* Gladden *v.* State, 12 Fla. 562. To which may be added Hall *v.* State, 35 Fla. 535, and Ballard *v.* State, 31 Fla. 282.

2. **Who may Make.** — In Sanford *v.* Cloud, 17 Fla. 543, the affidavit was made by defendant's agent, the ground being defendant's absence, and that his testimony was desired on his own behalf. Consult also annotations to Form No. 6272, *supra*, and note 3, p. 317.

prove by said witnesses[1] that about *fifteen* or *twenty* minutes before the difficulty took place in which he is charged with assaulting the said *Samuel J. Ingraham*, [that] the said *Ingraham* assaulted the defendant on board the steamship *Lizzie Henderson*, on which defendant was employed, cursed and abused defendant, threatened his life, and attempted to throw defendant overboard, and was prevented from doing so by one of the witnesses, and that this was done without any sufficient provocation on the part of the defendant; that as soon as the bill of indictment was returned against defendant, his counsel filed a præcipe for said witnesses and tendered the fees for issuing subpœnas;[2] that said witnesses are both employed on board the said steamship *Lizzie Henderson*, which steamship had sailed before the finding of said bill of indictment; and affiant is informed and believes that said witnesses could not be gotten here during the present term of the court; that they are both residents of this county, and affiant expects to have them present at the next term of court; that they are not absent by his consent or procurement, directly or indirectly given;[3] that he cannot safely go to trial without their testimony, or that of at least one of them; that he has no other witness by whom he can prove these facts, and that this application is not made for delay only;[4] wherefore a continuance is prayed.

[*William Blige.*

Sworn to and subscribed before me, this *tenth* day of *October*, A. D. 1883.

(SEAL) *Calvin Clark*, Clerk of the *Circuit* Court.][5]

1. Statement of Expected Testimony and Materiality Thereof.—In Hall *v.* State, 35 Fla. 534, the affidavit stated that the affiant expected to prove certain threats, but did not expressly state that he expected to prove them by the absent witnesses. In pronouncing the affidavit insufficient the supreme court took notice of the circumstance that it was "not even stated that the absent witnesses would swear to such threats." Consult also annotations to Form No. 6272, *supra*.

2. Statement of Diligence Used. — In Bryant *v.* State, 34 Fla. 295, the court criticised the affidavit because, although it stated that a subpœna had been issued for the witnesses named, it contained no statement of the inability of the sheriff to find them.

In Hall *v.* State, 35 Fla. 534, the affidavit was held insufficient, the court saying: "The affidavit made when the trial was had states that affiant had caused a subpœna to issue for absent witnesses named, but the subpœna had not been sent by the officer; and also that 'some of said summonses have been returned not found.' When the subpœna was issued is not stated, nor does it appear that affiant exercised any due diligence in having the subpœna issued and delivered to the proper officer in time to have it served before the court met." Consult also annotations to Form No. 6272, *supra*.

Date of Issuance of Subpœna. — It would be advisable to state upon what date the subpœna was issued, for upon close scrutiny by the court an omission in that particular might seriously affect the application. See Gladden *v.* State, 12 Fla. 571.

3. Witness Not Absent by Consent, etc.— In Bryant *v.* State, 34 Fla. 291, the affidavit was held insufficient because it did not allege that the witness was absent without the consent of the applicant directly or indirectly given. Consult also annotations to Form No. 6272, *supra*.

4. Application Not Made for Delay. — In adverse comments upon an affidavit in Ballard *v.* State, 31 Fla. 284, the court said: "It is not improper to call attention to the fact that the affidavit does not even state that the application for continuance was not 'made for delay only.'" See also note 7, p. 347.

5. The court said that "This affidavit

Form No. 6284.[1]

(Precedent in Cunneen *v.* State, 95 Ga. 330.)[2]

[*The State of Georgia* against *John J. Cunneen.*] In the *City* Court of *Savannah, Georgia, November* Term, 1894.

Georgia, Chatham County, ss.

John J. Cunneen,[3] being duly sworn, upon his oath deposes and says, that he is the defendant in the above entitled cause;][4] that *W. J. O'Dell* is a witness in behalf of defendant, and is absent; that he has been subpœnaed;[5] that he resides in the county where the above case is pending; that his testimony is material;[6] that such witness is not absent by the permission, directly or indirectly, of this applicant;[7] that he expects that he will be able to procure the testimony of such witness at the next term of the court;[8] that the application for a continuance is not made for the purpose of delay,[9] but to enable him to procure the testimony of such absent witness; that there is no other witness by whom he can prove the same facts;[10]

was subscribed and sworn to before the clerk of the court on the 10th day of October, 1883."

1. **Georgia.** — 3 Ga. Code (1895), § 963; 2 Ga. Code (1895), § 5129, provides that "it must be shown to the court," etc., but does not expressly require an affidavit, though in practice the application is commonly supported by affidavit. The showing may be by parol. See Glover *v.* State, 89 Ga. 392; Williams *v.* State, 69 Ga. 24; Huffman *v.* State, 95 Ga. 469.

A counter-showing to motion for continuance is allowed in all civil and criminal cases in the discretion of the presiding judge. Williams *v.* Stoll, 69 Ga. 11; Waldrup *v.* Maxwell, 84 Ga. 113; Horn *v.* State, 62 Ga. 362. And particularly, as to the proper scope of a counter-showing, see Johnson *v.* State, 65 Ga. 98; Pyburn *v.* State, 84 Ga. 195. See also Form No. 6308, *infra*.

2. For another available precedent see Johnson *v.* Martin, 28 Ga. 184.

3. **Who may Make.** — In Fogarty *v.* State, 80 Ga. 450, it was held that the affidavit should be made by the party himself unless some reason is shown why he cannot make it. See also 2 Ga. Code (1895), § 4417, and *supra*, note 3, p. 317, note 1, p. 332.

4. The words and figures within [ ] are not found in the reported case, but are added to make the form complete.

5. **Diligence Used.** — It must be shown "that he (witness) has been subpœnaed." 3 Ga. Code (1895), § 962; 2 Ga. Code (1895), § 5129. But in Pyburn *v.* State, 84 Ga. 193, where the defendant showed that he had caused a subpœna to be put in the hands of an officer for a material witness who lived within the jurisdiction of the court and was temporarily absent from home in another state, the refusal of the continuance was held to be reversible error. As to the diligence in procuring and serving a subpœna, see Jones *v.* Rome Grocery Co., (Ga. 1896) 24 S. E. Rep. 959; Glover *v.* State, 89 Ga. 391; Harris *v.* State, (Ga. 1896) 24 S. E. Rep. 145; Thomas *v.* State, 94 Ga. 484; Smith *v.* State, 97 Ga. 352. Consult also annotations to Form No. 6272, *supra*.

6. **Materiality of Evidence.** — If it appears that the expected evidence is immaterial, continuance is properly denied. Robson *v.* State, 83 Ga. 169. Consult also annotations to Form No. 6272, *supra*.

7. **Absence without permission** of applicant must be shown. Collins *v.* State, 78 Ga. 87. Consult also annotations to Form No. 6272, *supra*.

8. **That applicant expects to procure the attendance** of the witness at the next term must be shown. Collins *v.* State, 78 Ga. 87. Consult also annotations to Form No. 6272, *supra*.

9. **That application is not made for delay** must be shown. Farmer *v.* State, 95 Ga. 498. Consult also annotations to Form No. 6272, *supra*.

10. **Averment of inability to prove the same facts** by other witnesses present

and that deponent expects to prove by said absent witness that[1] deponent did not keep, maintain or carry on a scheme for the hazarding of money or other valuable thing, called a policy-lottery; that the said witness has been tried and found guilty of carrying on the selfsame scheme or device for which this defendant has been indicted or accused; that said witness has full knowledge of the facts and all attending circumstances; that he knows that the said scheme was not and is not kept, maintained or carried on by this defendant; that said witness is expected to testify that this defendant never has had any connection with the keeping, carrying on or maintaining said scheme or device.

Defendant further says that he is informed and believes that the reason of the absence of said witness is on account of [his] illness, and appends as part of this affidavit the certificate of Dr. *R. J. Nunn.* Defendant does swear that said witness was sick, and that he is absent from the city.[2]

[*John J. Cunneen.*

Sworn and subscribed in open court *November 14th*, 1894.
Calvin Clark, Clerk.][3]

Form No. 6285.

(Precedent in Wade *v.* Halligan, 16 Ill. 507.)[4]

[State of *Illinois*, *La Salle Circuit* Court. }
Thomas J. Wade ads. *Patrick Halligan.* } *May* Term, 1854.
State of *Illinois*, *La Salle* County. } ss.]

is not required by the *Georgia* code; nevertheless, the courts hold it to be necessary. Anderson *v.* State, 72 Ga. 100. See also Huffman *v.* State, 95 Ga. 469. Consult also annotations to Form No. 6272, *supra*.

1. **Facts expected to be proved** by witness must be stated. 3 Ga. Code (1895), § 962; 2 Ga. Code (1895), § 5129.

Consult also annotations to Form No. 6272, *supra*.

2. **Certificate of Physician.** — In the statement of the case it is said "attached to this affidavit was a statement signed by R. J. Nunn, M. D., to the effect that 'W. J. O'Dell is ill with rheumatism and is out of the state for treatment.' This was dated two days before the date of defendant's affidavit, and does not appear to have been sworn to."

As to the certificate of physicians, see Form No. 6305, *infra*.

3. The words and figures within [ ] are not in the reported case, but are added to make the form complete.

4. This was a proceeding by a landlord against his tenant by distress. It was held that the court erred in refusing a continuance on this affidavit.

Other Precedents. — In Searls *v.* Munson, 17 Ill. 558, the affidavit for continuance, omitting the formal parts, is as follows: "*William S. Searls*, of said county, being duly sworn, doth depose and say, that he is the defendant in the above entitled cause; that he cannot now safely proceed to the trial of said cause on account of the absence from said county of one *Jeremiah Thorn*, who is a material witness for said defendant, upon the trial of said cause, and who resides in the state of *Wisconsin*; that the said witness left *Waukegan* last night for his home in *Wisconsin*, where he was called without any notice sufficient to enable this deponent to take his deposition, on account of sickness in his family; and that this deponent expects and verily believes he shall be able to prove by said witness that this deponent paid to said

Thomas J. Wade,[1] being first duly sworn, saith on oath, that *Conrad Birkell*, *T. D. Brewster*, and *C. A. Holmes*, and *John Hoffman*, and *Henry Fessler*, who now reside in *La Salle* county, *Illinois*,[2] are mate-

Francis F. Munson the sum of *two hundred* dollars, to apply upon the note sued upon in this case, and that said *Munson* then agreed to indorse it upon the note sued upon in this case, which said *Munson* has not done. And this deponent further says, that said *two hundred* dollars form a good and valid set-off to said plaintiff's cause of action; was paid previous to the commencement of this suit, and that he does not now know of any other person by whom this deponent can prove the same facts. And further, that this deponent was ready for trial of said cause yesterday, at which time said witness could be had, but that he is not now, for the reason that said witness has gone out of the state, and out of the reach of this deponent. And further, that said witness was yesterday in attendance on this court, at the request of this deponent, as a witness in this cause, and that this deponent did not know that said witness was going away until he had started on his way, and when it was too late for this deponent to get a subpœna for said witness, and that said witness was sent for on account of the sickness of his family; and that this deponent verily believes that he can produce said witness at the next term of this court, as a witness herein; and that said sum of *two hundred* dollars is over and above any and all sums indorsed upon said note; and that this application is not made for delay, but that justice be done; and that this deponent has used due diligence and every manner to be ready for a trial of this cause at this term of said court, and the not being ready is not his fault." In this case the court held that this "affidavit was sufficient in every material part, and the cause should have been continued."

In Adams *v.* Colton, 3 Ill. 72, an action of assumpsit in which the defendant pleaded general issue with notice of set-off, it was held that the affidavit was sufficient, which was, omitting the formal parts, as follows: "*R. E. W. Adams*, being duly sworn, on oath, says, that *Joel Jenks* is an important witness, on the part of the above defendant, in the trial of the above cause, and that he cannot safely proceed to trial without his testimony; and that he expects to prove by said *Jenks* that said plaintiff was to give said defendant $*150* for one-half of the claim mentioned in said defendant's account of set-off; and this deponent further says that a subpœna was issued to the sheriff of *De Kalb* county, in which *Jenks* had formerly been residing, and this deponent is now informed by the coroner of said county that there is no sheriff in said county, and that he, said coroner, received the said subpœna and made search for said *Jenks*, but could not find him, he having removed from said county, which was unknown to said deponent. And this deponent says he knows of no person whose attendance can be procured at this term of the court by whom he can prove said facts; and this deponent further says, that he expects to be able to procure his attendance at the next term. And this application is not made for delay, but that justice may be done."

For other forms on which there was no direct ruling by the supreme court, but which were probably sufficient, see Fulton County *v.* Mississippi, etc., R. Co., 21 Ill. 349; Graff *v.* Brown, 85 Ill. 91; Schultz *v.* Plankinton Bank, 141 Ill. 118.

1. Who may Make Affidavit.—"The motion shall be grounded on the affidavit of the party so applying or his authorized agent." Starr & C. Anno. Stat. Ill. (1896), p. 3036, par. 43 (Prac. Act, c. 110, § 43).

The motion may be supported by the affidavit of the party's attorney. Lockhart *v.* Wolf, 82 Ill. 38, where the court said that McCreary *v.* Newberry, 25 Ill. 496, does not decide that the affidavit is objectionable if made by the attorney.

A motion supported only by the affidavit of one who is not a party to the suit nor his authorized agent will be overruled. School Dist. No. 2, etc., *v.* Hentz, 57 Ill. App 648.

2. Name and Residence of Witness.—The affidavit must state the place of residence of the witness, or if that is not known it must show that due diligence has been used to ascertain the same, and that if further time is given his place of residence can be ascertained. Starr & C. Anno. Stat. Ill.

rial witnesses for affiant on the trial of this cause, and who have each been duly subpœnaed to attend this court, as witnesses, for affiant in this case.[1] Affiant expects and believes he can prove by

(1896), p. 3036, par. 43 (Prac. Act, c. 110, § 43). Rev. Stat. Ill. of 1845, p. 415, § 13, required that the name of the witness should be stated as well as his residence.

The affidavit must state the residence of the witness either positively or by fair inference. "This is indispensable as connected with his identification and diligence in obtaining his attendance." Lee *v.* Quirk, 20 Ill. 395.

In Trask *v.* People, 151 Ill. 527, the court said: "The affidavit fails to state the residence of the witnesses, as required by statute, and on account of this defect, if for no other, the court was justified in overruling it."

In Searls *v.* Munson, 17 Ill. 558, the court said: "The name and residence of witness are given sufficiently, and the facts expected to be shown by him are material and important under the issues."

The motion is properly denied if the residence of the absent witness is unknown and there is no showing that if further time were given it could be ascertained. Heitschmidt *v.* McAlpine, 59 Ill. App. 232. See also Stevenson *v.* Sherwood, 22 Ill. 239, where sufficient diligence had not been used to ascertain the whereabouts of the absent witness, who lived in another state, so that his deposition could be taken.

An affidavit giving neither the name nor residence of the witness was held insufficient in Ilett *v.* Collins, 102 Ill. 405.

For a sufficient affidavit, where the name and residence were unknown, see Form No. 6286.

1. Averment of Diligence. — The affidavit must show "that due diligence has been used to obtain such testimony or the want of time to obtain it." Starr & C. Anno. Stat. Ill. (1896), p. 3036, par. 43 (Prac. Act, c. 110, § 43).

In the case which furnished the precedent in the text the court said: "We deem the diligence set forth sufficient. Affidavits should not be required to be burdensomely minute in anticipating and negativing every possible contingency."

What constitutes diligence necessarily depends on a variety of circumstances, which must be sufficient to satisfy the court that reasonable efforts have been used. Eames *v.* Hennessy, 22 Ill. 631; Shook *v.* Thomas, 21 Ill. 89, both cases holding also that "on a first application a less degree of diligence would satisfy the court than on a second or third application"; and in the report of the case last cited will be found the substance of an affidavit which failed to satisfy the legal requirements.

Where a party is sued without personal service of process and has no actual notice of the suit, the rule of diligence is materially relaxed. Lockhart *v.* Wolf, 82 Ill. 38, where the judgment was reversed for the denial of a continuance.

"It does not avail the party anything that the witnesses were written or telegraphed to be present at the trial. The law has provided a different mode for procuring their depositions or their attendance and it must be followed." Quincy Whig Co. *v.* Tillson, 67 Ill. 353.

In Trask *v.* People, 151 Ill. 527, the court said: "The affidavit fails to show any effort to subpœna the witness until the day before the cause was called for trial, and even then no subpœnas were taken out. This was not such diligence as required by the statute."

In Searls *v.* Munson, 17 Ill. 558, the court said: "It is true parties neglecting to subpœna witnesses do so at their risk of nonattendance. But when the witnesses actually attend upon request the party's diligence is as complete as if they attended upon subpœna. They may or may not be liable to attachment for not remaining, but no court would attach a witness leaving upon sudden sickness in his family, as is shown here, and so the party's certain and complete surprise is shown by the departure."

For the substance of an affidavit held to show sufficient diligence to procure the deposition of a witness residing in another state see Morgan *v.* Raymond, 38 Ill. 451.

For the form of an affidavit held sufficient in every particular, and especially on the point of materiality of the expected testimony and want of sufficient time to take the deposition of the witness, see Lee *v.* Bates, 2 Ill. 529.

Averments of diligence held insufficient are quoted verbatim in Cook *v.* Norwood, 106 Ill. 560.

said *Birkell*, that after the premises, for the rent of which the distress in this case was made, were leased to this affiant by said plaintiff, said plaintiff leased a room in said building to said *Birkell*, to be used as a place for the retailing of beer and spirituous liquor, commonly called a grocery. Affiant saith that the premises leased by said plaintiff to affiant, to recover the rent of which the distress in this case was made, were leased to affiant to be used as a hotel, and were so used by affiant. Affiant expects to prove by said *Birkell*, that the room leased to him for the purpose aforesaid, was in the same hotel building, occupied as aforesaid by affiant, and directly under the dining room of said hotel occupied by affiant. Affiant expects and believes that he can prove by said *Birkell*, that said room was rented to said *Birkell* by plaintiff, for the purpose aforesaid, contrary to the wish, and in despite of the remonstrance of affiant made to said plaintiff before said room was rented by said plaintiff to said *Birkell*, and that said *Birkell* occupied said room by the leave of the said plaintiff during the whole quarter in which the rent, now sought to be recovered by the plaintiff in this case, is alleged to have accrued. Affiant expects and believes that he can prove by said *John Hoffman*, *Henry Fessler*, and *C. A. Holmes*, each of them, that the use of said room, so rented and occupied by said *Birkell*, in said *City Hotel*, for the purpose of being used as a place for the retail of spirituous liquor and beer, commonly called a grocery, was necessarily, as said premises were situated, a very great injury to any person occupying the remainder of said premises for hotel purposes, or that part thereof occupied by affiant for a hotel, and that the value of said premises, occupied by affiant, was thereby depreciated, at least to the amount of *one hundred* dollars per quarter. Affiant saith, that under the lease upon which the rent accrued which the plaintiff now seeks to recover, affiant occupied said premises, mentioned in said lease, over *two* years as a hotel, and he expects to prove by said *Birkell*, that said *Birkell* occupied said room in said premises during said time, for at least *six* months, including the quarter for which rent is sought to be recovered in this suit; and by said *Hoffman*, *Fessler* and *Holmes*, that the use of said premises occupied by affiant was lessened in value at least *two hundred* dollars thereby; and he expects to prove by said last named witnesses, that the business of selling liquor and beer by retail, in that room, was necessarily very injurious to the business of hotel keeping carried on by affiant in his business of hotel keeping in said premises, by keeping customers away from affiant, and seriously lessening the profits of his said business. Affiant

For the form of an affidavit held insufficient for want of diligence to take the testimony of the absent witness by deposition, the witness residing out of the county, and a lack of ordinary effort to obtain his attendance, the cause having been once continued for absence of another witness, see McConnel *v.* Johnson, 3 Ill. 524.

For cases holding that there was an insufficient showing of diligence see Richards Iron Works *v.* Glennon, 71 Ill. 11; Birks *v.* Houston, 63 Ill. 77; Eames *v.* Hennessy, 22 Ill. 631; Cook *v.* Norwood, 106 Ill. 558; Walker *v.* Douglas, 70 Ill. 445; Fisher *v.* Greene, 95 Ill. 94; Quincy Whig Co. *v.* Tillson, 67 Ill. 351; Ide *v.* Gilbert, 62 Ill. App. 524; Anheuser-Busch Brewing Assoc. *v.* Hutmacher, 127 Ill. 652; Northwestern Benev., etc., Aid Assoc. *v.* Primm, 124 Ill. 100; Coffey *v.* Fosselman, 72 Ill. 69.

expects and believes that he can prove by said *T. D. Brewster*, that after affiant rented the said *City Hotel*, for which rent is now sought to be recovered by the plaintiff and while affiant occupied the said premises, said plaintiff authorized and permitted the *Chicago and Rock Island Railroad* to enter and take possession of a part of said premises, and received the sum of *four hundred* dollars for his damages therefor from said company; and that the said company, a few days previous to the commencement of the quarter for which rent is claimed in this case, did take possession of said portion of said premises, by virtue of an agreement with said plaintiff, and tore out one side of the stone barn belonging to the premises rented as aforesaid by affiant from plaintiff, and have since held permanently a portion of said premises, including a portion of the barn on said premises;[1] that he expects to prove by other wit-

1. Statement of Expected Testimony and Materiality Thereof.— The affidavit must show "what particular fact or facts the party expects to prove by such evidence." Starr & C. Anno. Stat. Ill. (1896), p. 3036, par. 43 (Practice Act, c. 110, § 43). Consult also annotations to Form No. 6272, *supra*.

"Should the court be satisfied that such evidence would not be material on the trial of the cause, * * * the case shall not be continued." Starr & C. Anno. Stat. Ill. (1896), p. 3040, par. 44 (Prac. Act, c. 110, § 44).

The affidavit must state the substance of the testimony sought. Ilett *v.* Collins, 102 Ill. 405.

The affidavit must state facts from which the court can determine whether the presence of the absent witness will be of any benefit to the party. A statement of mere conclusions is not enough. Willard *v.* Petitt, 54 Ill. App. 257, an action for malicious prosecution, wherein the defendant's affidavit merely stated that he expected to prove by the absent witness "that the grievances complained of * * * were justifiable and were committed, if at all, upon reasonable and justifiable grounds." See also Meyer *v.* People, 156 Ill. 126.

It cannot be assumed that the witness if present will testify to anything more than is stated in the affidavit, and it must be presumed that the statements in the affidavit are as favorable to the applicant as the real facts will warrant; and therefore, as in the case of a pleading, all intendments, so far as the affidavit is equivocal or uncertain, must be taken against it. Slate *v.* Eisenmeyer, 94 Ill. 101.

In Moody *v.* People, 20 Ill. 317, where the affidavit is set forth verbatim, the court said: "It is believed that, in our practice, the affidavit has always specifically stated the particular fact or facts which can be proven, and in what way they are material, and that, failing to do so, an affidavit was never held to be sufficient. Anything short of that degree of certainty would leave it to the affiant to determine what constitutes a defense, and not to the court, as it certainly should." Accordingly it was there held that the defendant's affidavit was insufficient which merely stated in effect that by the absent witnesses she could prove that she was not guilty without averring that such witnesses of their own knowledge could so state, or from information could state material circumstances. To the same point see Steele *v.* People, 45 Ill. 152, where the insufficient affidavit is printed in full.

"To entitle a party to a continuance under the statute, the facts expected to be proved by the absent witnesses should be set forth with such certainty that the opposite party can, if he thinks proper, admit them, and go to trial." Allen *v.* Scott, 13 Ill. 80. Hence, as was held in the case last cited, an affidavit by defendant that he expected to prove by the absent witness "that he had paid the whole or some part of the said sum of money in the said plaintiff's declaration mentioned" was bad for indefiniteness, because it was left wholly uncertain how much or what part the defendant expected to prove had been paid, and consequently put it out of the power of the plaintiff to avoid a continuance by admitting the amount.

"An affidavit for continuance on account of the absence of a witness must

nesses that the use of the premises, occupied by affiant as aforesaid, was lessened in value for the quarter for which the said plaintiff seeks to recover rent in this case, by reason of the possession taken as aforesaid by said company, in, at least, the sum of *one hundred and sixty* dollars; and that he knows of no other witnesses by whom he can so fully prove the same facts.[1] Affiant saith that during the time he so occupied said *City Hotel*, as lessee of the plaintiff, the plaintiff, after the lease to affiant upon which rent is sought to be recovered in this cause, said plaintiff leased one room in said *City Hotel* to one *Storey*, whose first name affiant does not know, to be used as a shop for the manufacture of tin and sheet-iron ware, and another room in the same building to *Owen Judge*, for a bake shop for the manufacture of bread and crackers, etc.; and said rooms were immediately under two sitting rooms in said hotel. And affiant expects to prove by said *Hoffman* and *Holmes*, that said business of making tin and sheet-iron ware, and the business of a bake shop was improper business to be carried on in said building, while the hotel was kept in the same, and necessarily greatly injured affiant in his said business; and that said business of manufacturing tin and sheet-iron ware was carried on, and the said bake shop was in operation, during some five or six weeks, during the tenancy of affiant aforesaid, and the bake shop was continued for about one year, and during the whole quarter in which the rent, sought to be recovered in this case, accrued.

[Affiant says that all the facts which he expects to prove as aforesaid by all of said witnesses are true,[2] that he expects to procure

not only show the facts which can be proved by the witness, but how such facts will be material to the issue about to be tried." Long *v.* People, 135 Ill. 435, a prosecution for assault with a deadly weapon, where the defendant's affidavit stated that he expected to prove by the absent witness that the prosecuting witness had threatened to kill one of the defendants. It was held insufficient because it failed to show that there was any attempt to execute the alleged threat at the time of the assault charged. See also to the same point School Dist. No. 2, etc., *v.* Hentz, 57 Ill. App. 648.

"Where testimony is important only in connection with certain facts, those facts should be set forth or referred to, so that the materiality of the evidence may be apparent to the court." Bailey *v.* Hardy, 12 Ill. 459. See also Steele *v.* People, 45 Ill. 143, and *supra*, note 7, p. 338.

The affidavit was held insufficient in McCreary *v.* Newberry, 25 Ill. 496, for the sole reason that there was no issue to which the expected testimony, as set forth, would have been pertinent. Slate *v.* Eisenmeyer, 94 Ill. 100, because the facts which it was alleged the witness would prove were inadmissible as evidence under the issues.

For other cases where the evidence was held to be immaterial see West Chicago Park Com'rs *v.* Barber, 62 Ill. App. 108; Chambers *v.* Beahan, 57 Ill. App. 285.

1. No Other Witness to Same Facts. — This averment is not required by the statute, but in Shook *v.* Thomas, 21 Ill. 90, the court said: "The affidavit should also state that the party has no other witness by whom the same facts can be proven, or if the point is disputed and numerous witnesses are to be examined, show that fact, or that it is a question of identity upon which there will be a contrariety of evidence. This is necessary to show its materiality." See also *supra*, note 2, p. 343; Hodges *v.* Nash, 43 Ill. App. 638; Eames *v.* Hennessy, 22 Ill. 631; Jarvis *v.* Shacklock, 60 Ill. 378. And to the point that if the affidavit shows that there will be a controversy in the evidence it need not state that there is no other witness by whom the same fact can be proved, see North *v.* People, 139 Ill. 98, and Form No. 6286, *infra*.

2. Belief that Testimony Sought is True. — This averment is not required by the

their testimony by the next term of this court,[1] and that neither of them is absent by the permission or consent of the affiant, directly or indirectly given.[2]

Thomas J. Wade.]

Subscribed and sworn to before me this *twenty-ninth* day of *May*, A. D. 1854.

P. Lindly.

Form No. 6286.[3]

(Precedent in North *v.* People, 139 Ill. 91.)[4]

(*Title of court and cause, and venue as in Form No. 6285.*)

Daniel North deposes that he has been in jail ever since the time of

statute, but in Wilhelm *v.* People, 72 Ill. 468, the affidavit was held insufficient because it was not stated that the facts expected to be proved by the absent witness were true, or that he was actually present at the time, but merely that the applicant expected to prove by him that he was present, etc. See also *supra*, note 2, p. 342.

The affidavit need not directly state that the facts proposed to be proved by the absent witness are true, if it shows that in the belief of the affiant the facts are in substance as it is said the absent witness will testify. North *v.* People, 139 Ill. 99.

1. Expectation of Procuring Testimony. — This averment is not required by the statute, but was held necessary in Shook *v.* Thomas, 21 Ill. 90; Eames *v.* Hennessy, 22 Ill. 631. See also *supra*, note 8, p. 345.

Where the absent witness is a non-resident, it is indispensable that the affidavit shall state facts showing the reasonableness of the applicant's expectation that he will be present at the time to which it is proposed to continue the cause. Wilhelm *v.* People, 72 Ill. 471, where the affidavit held insufficient is given verbatim.

2. Witness Not Absent by Procurement or Consent. — "The affidavit should state that the witness is not absent by the permission and consent of the party." Shook *v.* Thomas, 21 Ill. 90. See also North Chicago City R. Co. *v.* Gastka, 128 Ill. 613. The averment is not required by the statute, but see *supra*, note 5, p. 345.

3. Affidavits in Criminal Cases. — The section upon which the preceding forms were based, Starr & C. Anno. Stat. Ill. (1896), p. 3036, par. 43, is a part of the Practice Act, c. 110, § 43, and is the only provision relating to the contents of affidavits for continuances in courts of record. Prefixed to the Practice Act in Starr & C. Anno. Stat. Ill. (1896), p. 2977, is the following note by the editors: "This act governs civil suits on the law side in trial courts. * * * It does not in general govern chancery or criminal suits in trial courts unless such suits are expressly mentioned." And in Baxter *v.* People, 8 Ill. 372, it was expressly held upon much consideration that the Practice Act of 1827, whereby a party was entitled to a continuance upon filing an affidavit of certain facts, "only applies to civil proceedings and has never been held or supposed to apply to criminal cases. Had the courts in all criminal cases required affidavits for continuances to be as full as required under the statute, it might and would frequently have operated most oppressively upon prisoners." But in Trask *v.* People, 151 Ill. 527, where an affidavit for a continuance by the defendant in a criminal case was held insufficient, the court quoted the section above mentioned, viz., Practice Act, c. 110, § 43, and proceeded to exact compliance with its requirements seriatim. The *Illinois* decisions relating to the sufficiency of affidavits in both criminal and civil cases are cited in the notes to Form No. 6285, *supra*.

"**The essential requisites of the affidavit** are these: First — The name and residence of the witness; that he is really material and shown to the court by the affidavit to be so. Second — That the party who applies has been guilty of no neglect, or, in other words, shows the exercise of proper diligence. Third — That the witness can be had at the time to which it is sought to have the trial of the cause deferred." Shirwin *v.* People, 69 Ill. 58, holding that the affidavit therein presented was sufficient, and adjudging it manifest error to overrule the motion for continuance.

4. It was held reversible error to re-

the alleged homicide,—*July 21*, 1890; that he was *twenty-six* years of age *November 30*, 1890, and is a farmer and ditcher by occupation; that, as set forth in former affidavit, he has been unable to procure counsel to advise him as to his rights, and unable, for want of means, to hunt up and ascertain material witnesses in his behalf, and has been unable, for want of means, to have anything done in the preparation of his defense until *November 7*, 1890, when *Strawn & Norton* were appointed by the court to defend him; that since that time he and his attorneys have worked diligently and industriously, as circumstances would permit, to ascertain the facts in the case, and learn the names and whereabouts of such persons as may have witnessed the facts and circumstances leading up to the alleged shooting, but they have been unable to be ready for trial at this time, as hereinafter shown; that, imprisoned, defendant has been able to do but very little to assist his attorneys in the premises; that he is informed and believes that the witnesses for the prosecution will fix the time of the alleged shooting at or between *nine* and *ten* o'clock in the *fore*noon of *July 21*, 1890, and the place as near the *Smith House*, in *Pontiac*, in a populous part and near the business center of the city, and defendant is sure and certain that some person or persons not yet known must have been eye-witnesses to the facts which led up to and caused the alleged shooting; that defendant had not the slightest intention of assaulting *Hodge* or other person, and did not do so except in his necessary self-defense; that though affiant was much intoxicated at the time, as shown in his affidavit of *November 6*, 1890, made part hereof by reference, he believes that *Hodge* came upon him in a very threatening manner and demanded defendant's revolver, and that he refused to give it to him, and defendant tried to go away from him, but *Hodge* followed him up and struck him

fuse a motion for continuance upon this affidavit.

Pertinent Facts in the History of the Case. — The defendant was prosecuted for the murder, on July 21, 1890, of William Hodge, a city marshal of Pontiac. On the 7th of November, 1890, the case was called for trial, and North then entered his motion to continue the cause, and in support of his motion he read his own affidavit, in which he stated, among other things, that he had been unable to prepare his defense by reason of being in jail and of his having no means wherewith to employ counsel; that he wished Messrs. Strawn & Norton to defend him, and had a conditional contract with them to that effect, but that they will do nothing until the amount of their stipulated compensation is raised, which he had been unable to have done; that he has had communication with his father, who is now taking steps to raise the requisite means as rapidly as possible, and that he expects soon to have them; and he also read the affidavit of one of the counsel named, in corroboration of his affidavit. But the court overruled the motion, and thereupon Messrs. Strawn & Norton, who had acted as counsel for North when he was arraigned and in making this motion for continuance, withdrew from the case and declined to voluntarily act further as his counsel. The court thereupon appointed Messrs. Strawn & Norton as counsel to defend North, and also ordered the case to be set down for hearing on the 17th of November. Thereupon, on the last named date, North, by his counsel, applied for a change of venue on account of the prejudice of the presiding judge, which was allowed, and another judge was immediately called in to preside, and did thereafter preside in the court, and the cause was by that judge set down for hearing on that day — the 18th of November. On that day North made a second application for continuance of the cause and supported it by the affidavit here printed.

several heavy blows on the head with a club or some other heavy weapon, and so dazed and stunned him that he has little or no knowledge of what subsequently occurred, except as he has it from hearsay; that since a knowledge of the facts as now claimed by the prosecution came to him since his imprisonment, he has as diligently as his imprisonment would permit endeavored to ascertain the names of eye-witnesses of what occurred between defendant and *Hodge* leading up to the alleged shooting, and other facts and circumstances attending the same, but has been unable to do so until about the hour of *seven* o'clock last evening, *November 17, 1890*, when he learned for the first time of the facts stated in the affidavit of *Charles Lake*, filed herewith;[1] that defendant has every reason to believe, and does believe, that the facts stated in said affidavit of *Lake* are true, and that the "runner" therein mentioned was an eye-witness to the matters and things related to said *Lake*, as stated in said affidavit; that if this cause shall be continued to the next term of this court, defendant has no doubt but that his attorneys and friends will be able to trace and ascertain the name and whereabouts of said runner, from the hotel register in *Pontiac*, where said runner put up on the day of the alleged shooting, and have him in attendance upon this trial as a witness in defendant's behalf; that he is informed and believes that runners upon the road are most generally acquainted with each other, and by taking all of the names from the hotel registers in this city for the day in question, he verily believes he will be able to ascertain the whereabouts of some of them, and that by conferring with them he will be able to trace up all of them, including said runner referred to in said *Lake's* affidavit; that it is reasonable to suppose, and he verily believes, that other persons yet unknown were eye-witnesses to said facts and circumstances, and now

1. **The Additional Affidavits.** — Omitting the caption and signature, Charles Lake's deposition was as follows:

"He is a painter by trade, and has resided in Pontiac for the past twenty-nine years; that since the alleged shooting, and he thinks it was the next day after, he was going on a Wabash train from Pontiac to Saunemin, where he was doing a job of painting for Holdridge, and that in said train he got into conversation with a man whom he understood to be a runner for a wholesale house, and that the shooting of Hodge came up, and said runner told him that he saw the whole thing from the west end of the porch of the Smith House, where he was standing at the time, and that he did not think North was to blame in the matter, because the policeman (meaning Hodge) rushed upon him in a violent and threatening manner and demanded that he give him his revolver, which North refused to do, and started to go away toward the north, and thereupon the policeman followed him, and violently seized him with one hand and commenced beating him over the head with a club, or policeman's 'billy,' which he held in the other hand, and then a scuffle ensued between the two men, and in the scuffle (Hodge still beating him with the club) North went down, and he heard shots fired after the scuffle commenced, but could not tell which of the men fired the shots, and that North seemed very much intoxicated; that said runner had a brown mustache and he thinks he would be able to identify him, and he inferred from the conversation that said man was a runner for a Chicago wholesale house; that he got out of the train at Forrest and ate a lunch at the counter at the station, and affiant understood from him that he was then on his way to Chicago; that affiant made the foregoing facts known to Mr. C. C. Strawn for the first time about half-past six o'clock last evening, November 17, 1890."

that he has attorneys to look after and manage his defense he will be able to ascertain their names, and have them present at the next term of this court to testify in his behalf; that *Pontiac* is a city of about *3,000* inhabitants, and there are only two or three hotels of any importance in the city, and it will not be difficult to trace up the transients stopping at them on a given day; that this is the first term of court since the alleged shooting, and under the unfortunate circumstances of the case it would be most unjust and unnecessary to compel defendant to submit to trial at this time; that the materiality of said runner, and of other witnesses defendant believes he will be able to produce by the next term of court, consists in this: that it will show that *Hodge* violently assaulted affiant in such manner as to cause a reasonable man to believe that his life was in danger; that affiant knows of no other witness or witnesses by whom he can prove said facts; that it is wrongfully and mistakenly claimed by the People, based upon the testimony of some witness or witnesses, as defendant is informed and believes, that affiant was the aggressor, and fired the alleged shot or shots without provocation and under circumstances not called for in his necessary self-defense, and it is therefore indispensable to justice and defendant's defense that he should have the testimony of said runner, and others whom he believes he will be able to discover by the next term of this court; that defendant's want of readiness for trial is not through any fraud, collusion or procurement, but he has good reason to believe, and does believe, that he will be able to find said runner and others to establish the facts set up in the affidavit of said *Lake*, and have them present at the next term of this court; that since said affidavit of *November 6*, 1*890*, his friends have furnished him with some money for his counsel, and to pay necessary expenses of hunting up and procuring the attendance of such material witnesses as he believes he will be able to discover by the next term of court, and he knows of no reason why he may not be fully ready for trial at that time; that defendant is entirely ignorant of court proceedings, and being delayed and disappointed in the procurement of counsel, as shown in said affidavit of *November 6*, 1*890*, he was prevented from having anything done in the preparation of his defense until said *7th* day of the present month, when *Strawn & Norton* were appointed to defend him; that, imprisoned as he was, he could hear or learn but little of what was claimed against him as to the facts and circumstances of the case, and being entirely unacquainted with such matters he did not know what to do, and bent all his efforts to have his friends raise money to employ counsel, but was not able to do so in time for this court; (defendant makes affidavit of *C. C. Strawn*, filed *November 7*, 1*890*, part of this affidavit by reference;)[1] that he is informed and

1. Omitting the caption and signature, C. C. Strawn's affidavit was as follows:

"He is of counsel appointed to defend accused November 7, 1890; that since said appointment of the firm of Strawn and Norton they have put forth every effort in their power to be ready for trial at this time, consistent with their duties to other clients having causes in this term of court; that on Monday, November 10, 1890, the case of Heisner *v.* Illinois Central Railroad Co., involving very complicated ques-

believes that the matters concerning which said runner and other witnesses will testify are material, and that there will be a conflict of testimony thereon, and that the testimony of said witnesses will be absolutely necessary to establish a reasonable doubt in the minds of the jury of the guilt in the premises; that said runner, and other persons expected to be procured by next term of court, are not absent by the permission or consent of defendant;[1] that he expects to procure their testimony by the next term of court, and that this application is not made for delay, but that justice may be done. (*Signature and jurat as in Form No. 6285.*)

Form No. 6287.[2]

Thomas Nave against *Patrick C. Leary.* } In the *Marion Circuit* Court, *February* Term, 1877.

State of *Indiana*, *Marion* County. } ss.

Patrick C. Leary, being duly sworn, upon his oath says that he is

tions of law and fact under the drainage laws, came on for trial, and was submitted to the jury at the adjournment of court on the following Thursday evening, the jury returning a verdict the next morning, and Strawn and Norton conducted the defense for said company, and the cause was very hotly contested, and during the trial thereof they were wholly unable to give any substantial attention to the case of the defendant North in this indictment; that on Friday, November 14, 1890, after the verdict in said railroad case, the case of Filbert *v.* Lynch et al., under the Dram-shop act, for loss of support by the drunkenness of her father, came on for trial, and Strawn and Norton were of counsel for defendants in that suit, which continued until the forenoon of the next day, Saturday, November 15, 1890; that the engagements of Strawn and Norton in said causes were long prior to the present term of this court and their appointment to defend accused in this indictment, and they were the only counsel for the company in said railroad case, and they could not put those cases aside for this cause; that in the limited time allotted to them, under the circumstances, to inquire into the law and facts and circumstances of this case, they have found that there are several very close and vital questions of law and fact, and the charge being a capital one, they are not prepared to properly conduct the defense at this term, and could not do the defendant justice for want of sufficient time to become acquainted with said law and facts, and considering the fatal result that may befall the defendant by reason of such want of necessary preparation, affiant, in behalf of his said firm, must beg of this court to be relieved of the responsibilities of the case, unless further and sufficient time for said necessary preparations be granted; and Charles Lake informed affiant of the facts set forth in his affidavit filed herewith, for the first time last evening, November 17, 1890, about half-past six o'clock, and affiant immediately communicated such facts to defendant; that he and his partner (Norton) have worked as diligently as the circumstances above related would permit, to be ready for this trial, but have been unable to do so, and affiant states that this application is not made for delay, but that justice may be done."

1. The court said: "It is impossible to discover any negligence in North in not sooner having ascertained the existence of this witness, and it appears that after the information in regard to such witness was communicated to him there was not time for his attorneys to find the witness. It has never been regarded necessary for the defendant to show the same degree of promptness and diligence in preparing for trial at the term at which the indictment is returned as at subsequent terms."

2. In Leary *v.* Nave, 66 Ind. 221, defendant's affidavit, which is therein set

the defendant in the above entitled cause;[1] that he cannot safely go into the trial of said cause in this court on this day by reason of the absence of one *Edward Connelly*,[2] who is a competent, proper and material witness for him upon the trial of this cause;[3] that he be-

forth, was held insufficient in respect of the diligence shown. Some parts of that affidavit that were apparently unobjectionable are reproduced in this form for the sake of verisimilitude.

Necessity of Affidavit. — Horner's Stat. Ind. (1896), §§ 410, 1781, provide that a motion to postpone the trial on account of the absence of evidence can be made "only upon affidavit showing," etc. The statute applies to temporary postponements as well as to continuances for the term. Morris *v.* State, 104 Ind. 457, holding that a motion to postpone a trial until the next day, if not supported by affidavit or other affirmative showing, is properly overruled.

Second Application for Same Cause. — One application for a continuance on account of an absent witness having been refused, the affidavit on a second application at the same term on account of the absence of other witnesses should contain a reasonable excuse for the failure of the applicant to avail himself of the last ground in his first application. Shattuck *v.* Myers, 13 Ind. 46.

It is error to refuse a continuance when the affidavit shows everything required by the statute. Cutler *v.* State, 42 Ind. 244; Jenks *v.* State, 39 Ind. 4.

1. Who may Make Affidavit. — The statute does not designate who shall make the affidavit. It may be made by an agent of the party, without accounting for the absence of the principal or giving any other reason why it was not made by him. "That the agent is a stranger to the record can make no difference. Nay, for that very reason his statements under oath are entitled to greater consideration than if made by the interested party himself." Espy *v.* State Bank, 5 Ind. 274 (where the substance of the affidavit is given), *cited* with approval in Abbott *v.* Zeigler, 9 Ind. 511, holding that an attorney might make an affidavit for a change of venue on behalf of his client. See also Form No. 6288, *infra*.

The sickness of a witness preventing him from attending court may be shown by the affidavit of any person who knows the fact. "We know of no principle of law or rule of practice," said the court, "which requires the affidavit of a physician to show the sickness of a witness." Cutler *v.* State, 42 Ind. 247. But see notes to Form No. 6305.

2. Name of Witness. — The affidavit must show the name of the witness if known. Horner's Stat. Ind. (1896), §§ 410, 1781. See also *supra*, note 1, p. 334. If unknown, diligence to ascertain it must be shown. Post *v.* State, 14 Ind. App. 452. See also the following note, and for an affidavit showing sufficient diligence in this behalf see Form No. 6286.

3. Expected Testimony and Materiality Thereof. — The affidavit must show "the materiality of the evidence expected to be obtained" and "what facts he believes the witness will testify to." Horner's Stat. Ind. (1896), §§ 410, 1781. See also *supra*, note 7, p. 335 *et seq.*

Materiality and Competency. — The affidavit must show that the absent testimony is material and competent. French *v.* Blanchard, 16 Ind. 146. See also Benson *v.* McFadden, 50 Ind. 431.

A statement that a nonexpert witness will testify that the party was of unsound mind is insufficient, because such testimony would not be competent evidence. That the witness will testify to certain specified facts must be alleged. Warner *v.* State, 114 Ind. 137.

In Beavers *v.* State, 58 Ind. 530, it was held that an affidavit in a criminal case stating that the absent testimony will prove an alibi must show that the proposed alibi will cover the whole time when the crime is alleged to have been committed.

Statement of Facts. — The affidavit should state specifically the facts, and not merely legal conclusions, to which the absent witness will testify. Warner *v.* State, 114 Ind. 137, holding that the facts should be so stated that the opposite party may admit them and thus avoid a continuance. In the same case it was held that if the affidavit states that the absent party will testify to threats the language used should be stated. See also Miller *v.* Harker, 96 Ind. 234.

In French *v.* Blanchard, 16 Ind. 146, the affidavit was held insufficient where it averred merely that affiant expected

lieves said witness, if present, would testify on the trial of this cause that (*Here state the facts to which it is believed that he will testify*). Affiant further says that he believes said facts to be true;[1] that he is unable to prove said facts by any other witness whose testimony can be as readily procured.[2]

Affiant further says that said witness now is, and continually for more than *five* years last past hath been, a resident of the city of *Indianapolis*, *Marion* county, *Indiana*;[3] that on the *13th* day of *Febru-*

to prove by the absent witness "all the material allegations in the second, third and fourth paragraphs of his answer."

"The material facts which the statute requires to be set forth in an affidavit for a continuance cannot be supplied by merely attaching to the one presented an old affidavit, however formal, which has served its purpose at a previous term. The affidavit must set out and aver all the facts as they then exist which are essential to support the application." Sutherlin *v.* State, 108 Ind. 390, holding that an affidavit in the following language was insufficient: "Comes now the defendant, who being duly sworn says that the witness John Porter, referred to in his affidavit hereto attached and made part hereof, which was made at the last court, as to what said Porter would swear to and which by agreement is made part hereof, is, as he now learns for the first time," etc., "that the evidence of said Porter is very material as the court will see by the affidavit hereto attached."

Approved Form. — The following is an extract from an affidavit by the defendant in a criminal case which was held sufficient in Gross *v.* State, 2 Ind. 136: "William Gross, the defendant in this case, makes oath that he is informed and believes that the prosecuting attorney intends to produce as a witness against this affiant one John C. Stewart, for the purpose of proving that this affiant made certain admissions of his guilt with respect to the crime with which he is charged in the indictment. This affiant further says, that such admissions as he did make to said Stewart were induced by raising the hopes of this affiant if he should confess his guilt, and by exciting his fears if he should not confess. That he expects to prove by one Andrew Wanchop, who was present when this affiant made the admissions alluded to, that to induce him to confess, said Stewart told this affiant that he would in about half an hour be taken out of jail, be tried, and probably be hung unless he confessed his guilt; but if he did so confess, it would be better for him, and he might be cleared. * * * That as he is informed and believes, said Stewart denies having held out inducements for him to confess; and there was no one person who was present during all the conversation between this affiant and the said Stewart but themselves. The confessions made to said Stewart were the first confessions made by this affiant in respect to the charge made against him in this cause, and would not have been made but for the inducements aforesaid."

1. Truth of Expected Testimony. — The affidavit must state that the affiant believes the facts, to which it is alleged the absent witness will testify, to be true. Horner's Stat. Ind. (1896), §§ 410, 1781. See also *supra*, note 2, p. 342.

2. Unable to Prove Facts by Other Witnesses. — The party making the affidavit must state that "he is unable to prove such facts by any other witness whose testimony can be as readily procured." Horner's Stat. Ind. (1896), §§ 410, 1781. See also *supra*, note 2, p. 343. For cases enforcing this requirement see Miller *v.* Harker, 96 Ind. 234; Sutherlin *v.* State, 108 Ind. 390; French *v.* Blanchard, 16 Ind. 146. But the statute does not mean that a party shall be compelled to resort to his own testimony where he knows the facts as well as the absent witness. Ransbottom *v.* State, 144 Ind. 250; Fox *v.* Reynolds, 24 Ind. 46.

3. Residence of Witness. — The affidavit must show the "residence of the witness, if known." Horner's Stat. Ind. (1896), §§ 410, 1781. See also *supra*, note 1, p. 334. Merely stating that a subpœna for the witness was issued to the sheriff of a certain county is not a sufficient averment of residence. Beavers *v.* State, 58 Ind. 530, where the report contained extracts from the affidavit. If the residence of the witness is unknown, the affidavit must show that

ary, 1877, he caused a subpœna to issue out of the office of the clerk of this court, directing and commanding said witness to appear and testify as a witness for this affiant upon the trial of said cause; that said subpœna was on said day placed in the hands of the sheriff of said *Marion* county to be served, and that said sheriff on the *19th* day of *February*, 1877, returned said subpœna not found; that said witness is absent from this court, and, as affiant is informed and believes, is now in the city of *Lafayette* temporarily; that affiant was ignorant of the fact that said witness was absent from *Indianapolis* until the return of the subpœna as above mentioned, and it was then too late to procure the attendance of said witness or his deposition upon this trial;[1] that affiant believes the testimony of said witness can be procured within a reasonable time;[2] that the absence of said witness has not been procured by the act or connivance of the affiant, nor by any other person or persons at his request, nor with his knowledge and consent.[3]

Patrick C. Leary.

Subscribed and sworn to before me this *20th* day of *February*, 1877.

Charles Porter, Clerk.

Form No. 6288.[4]

sufficient diligence has been used to ascertain his whereabouts. Wolcott *v.* Mack, 53 Ind. 269, where the affidavit held insufficient is set forth in full. McKinlay *v.* Shank, 24 Ind. 258, where the substance of the affidavit is given. Post *v.* State, 14 Ind. App. 452.

1. Diligence to Obtain Testimony.— The affidavit must show "that due diligence has been used to obtain" the absent testimony. Horner's Stat. Ind. (1896), §§ 410, 1781. See also *supra*, note 5, p. 339. For cases showing insufficient diligence to obtain the attendance of the absent witness or his deposition see McDermott *v.* State, 89 Ind. 187, where the witness resided out of the state. Robinson *v.* Glass, 94 Ind. 211; Mugg *v.* Graves, 22 Ind. 236; State *v.* Place, 127 Ind. 194; Leary *v.* Nave, 66 Ind. 221, where a subpœna was not issued until the day set for trial, on which point see also Merrick *v.* State, 63 Ind. 330; Ransbottom *v.* State, 144 Ind. 250.

The affidavit must show that the applicant personally has used due diligence. It does not show a sufficient excuse by averring that his adversary had summoned the witness. Hutts *v.* Shoaf, 88 Ind. 395.

A mere averment of due diligence is insufficient. Pence *v.* Christman, 15 Ind. 259, holding that an allegation that the party "has used due diligence to obtain the evidence of said [witness], having a subpœna issued to the sheriff of said county, and by said sheriff returned not found," was not sufficient, because, as the court said, "it does not appear when the subpœna issued or when it was returned."

2. Probability of Procuring Testimony. — The affidavit must show "the probability of procuring the testimony within a reasonable time." Horner's Stat. Ind. (1896), §§ 410, 1781. See also *supra*, note 3, p. 347. It is not sufficient for the applicant to state that he believes the testimony of the witness can be procured within a reasonable time, where he gives no facts upon which such belief is based, nor where the facts stated do not warrant such belief. Post *v.* State, 14 Ind. App. 452; Ohio, etc., R. Co. *v.* Dickerson, 59 Ind. 317; Robinson *v.* Glass, 94 Ind. 211. See also Merrick *v.* State, 63 Ind. 330.

3. Not Absent by Connivance.— "The affidavit must further show that the absence of such witness has not been procured by the act or connivance of the [*party* in a civil case; *defendant* in a criminal case], nor by others at his request, nor with his knowledge and consent." Horner's Stat. Ind. (1896), §§ 410, 1781. See also *supra*, note 5, p. 345.

4. The Statutory Requirements. — The requisites of an affidavit for continuance by the defendant in a criminal case are prescribed by Horner's Stat. Ind. (1896), § 1781. This provision is nearly iden-

(Precedent in Jenks *v.* State, 39 Ind. 4.)[1]

State of Indiana v. *Stephen Jenks.* } In the *La Grange Circuit* Court, *November* Sp. Term, 1870.

Personally came into open court *Mary Jenks*, who, upon her oath, says that she is the sister of the defendant; that *George Rockwell* is, as she believes, a material witness for the defense; that he is a physician who has resided in *Ontario*, in said county of *La Grange*, where the deceased *Mallow* and the defendant resided, and where the shooting took place; that he was well and intimately acquainted with the

tical with Horner's Stat. Ind. (1896), § 410, which governs applications for continuances in civil cases.

Application by Prosecuting Attorney. — Horner's Stat. Ind. (1896), § 1782, provides that "whenever the prosecuting attorney desires to obtain a postponement of the trial of a criminal cause on account of the absence of any witness whose name is indorsed on the indictment, such continuance shall be granted on his official statement in manner and form as specified in the preceding section," which is quoted above in this note; "but the defendant may require the same to be in writing."

1. For a case holding that the prosecuting attorney's affidavit made an insufficient showing of diligence to secure the testimony of the absent witness, see State *v.* Place, 127 Ind. 194.

The defendant was prosecuted for murder and convicted, and a new trial was granted because of a refusal to allow a postponement on this affidavit. The witness was in good health when the trial commenced and had promised to attend, but was suddenly taken sick so that he was unable to attend.

For a form of an affidavit held sufficient, but which would now be defective for omitting some of the formal averments required by the statute now in force and cited in the preceding note, see Gross *v.* State, 2 Ind. 136.

Accompanying Affidavits. — Accompanying the foregoing affidavit were the three following affidavits. They seem to have had no weight, however, in the determination of the case by the supreme court:

"State of Indiana *v.* Stephen Jenks. In the La Grange Circuit Court, Special December Term, 1870.

Personally appeared in open court Avery A. Shelden, and upon his oath says, that George Rockwell, mentioned in the affidavit of Mary Jenks, is, he believes, unable to attend this court; that he went for him today with a suitable conveyance; that said Rockwell, being a physician, says that he is willing to attend this court, but is, from sickness, unable to attend court without endangering his life.

A. Shelden.

Subscribed and sworn to before me in open court this 26th day of December, 1870. John H. Rerick, Clerk."

"State of Indiana *v.* Stephen Jenks. In the La Grange Circuit Court, November Special Term, 1870.

Personally appeared in open court, Joseph D. Farrall, and upon oath says that he and John Morris are the attorneys of the defendant; that at the time the trial of this cause was commenced he was informed and believed that George Rockwell, the person mentioned in the affidavit of Mary Jenks, was then in usual health; that he knew he was a material witness for the defendant, and had him duly subpœnaed; that since the trial began, as he is informed and believes, the said Rockwell was suddenly taken ill, and has been ever since confined to his house; that he cannot, without imminent danger, leave his house or attend this court as a witness; that this affiant, from personal conversation with said Rockwell, believes that the facts as set forth in the affidavit of said Mary Jenks can be proven by said Rockwell.

J. D. Farrall.

Subscribed and sworn to in open court, this 26th day of December, 1870.

Jno. H. Rerick, Clerk."

"State of Indiana *v.* Stephen Jenks. In the La Grange Circuit Court, November Special Term, 1870.

Personally appeared in open court John Morris, one of the attorneys for said defendant, who upon his oath says that at the commencement of this trial he was informed that George Rockwell, the person mentioned in the affidavit of Mary Jenks, would be present during

defendant at the time of said shooting, and had been so acquainted with him for some *three* years prior thereto; that he had been, for more than *two* years prior to said shooting, the physician of the defendant, and as such had prescribed from time to time for the defendant during said period; that said *Rockwell* has told on two occasions, once in *August*, 1870, and again about the *19th* inst. (*November*) that the defendant had been, in the opinion of said *Rockwell*, ever since he, the said *Rockwell*, had lived in *Ontario*, insane; that she believes said fact can be proven by the said *Rockwell*. She further says that she believes that it can be proven by said *Rockwell* that the defendant, for a period of more than *two* years, was suffering at times from severe headache; that he frequently complained of a pain in his forehead; that he was, during said period, moody and depressed; that he believed, without cause, that his neighbors and others, such men as *John B. Howe*, *Samuel P. Williams*, and others, who did not know him, were combined against him for the purpose of injuring him; that the belief as to said conspiring was false, and not founded upon any process of reasoning; that he also believed that he was enabled by superhuman power to read men's thoughts; that he, defendant, stated to *Rockwell* on the day of the shooting and within *twenty-five* minutes of the time at which *Mallow* was killed, that he shot him because he was compelled to shoot him; that God had required him to do it. Said affiant further says that she believes said facts to be true; that the said *Rockwell* has, as she believes, been duly subpœnaed to attend this court as a witness; that he is not now in attendance; but is, and has been, ever since the defense began, confined to his house by sickness; that he cannot now leave his house without danger. She further states that she is informed and believes that the said *Rockwell* will be able in the course of five or six days to be present in court, and testify. She further says that she has personally seen and talked with said witness, and knows that he is not absent through the advice, consent or connivance of the defendant, nor through the advice and consent of others with the defendant's knowledge, or by his consent. She further says that she believes the defendant to be now insane, and therefore she makes this affidavit on his behalf.

Mary Jenks.

Subscribed and sworn to in open court this *26th* day of *December*, 1870.

Jno. H. Rerick, Clerk.

Form No. 6289.[1]

the trial of said cause as a witness for and on behalf of the defendant; that he understood he had been duly subpœnaed as a witness, and that, as he was then informed, he was well and able to attend; that had he known that said Rockwell would not be able to attend as a witness, he would not have consented to go into the trial of said cause; that from the information which affiant has obtained from others, he believes that the facts as set forth in the affidavit of Mary Jenks can be proven by said Rockwell; that they are material, and that some of the facts cannot be proven by any other witness as fully as by said Rockwell.

[John Morris.]

Sworn to in open court, November 26, 1870.

John H. Rerick, Clerk."

1. The form given in the text combines the two affidavits for a continuance filed by the defendant in State *v.*

State of *Iowa*, }
Marshall County. } ss.

I, *John N. Dakin*, being sworn, say that I am defendant;[1] that I cannot safely proceed to trial at the present term by reason of the absence of material witnesses; that the names of said witnesses are *Joseph Dakin*, *Harriet Dakin*, *Edward Dakin* and *Andrew Dakin*;[2] that their present whereabouts are unknown to me; that they resided until very recently in *Liberty* township, *Marshall* county, *Iowa*, and had resided in said township nearly *two* years, and in said county nearly *twenty* years; that said *Harriet Dakin* is wife of said *Joseph Dakin* and said *Edward* and *Andrew* are their sons, and residing all in one family; that they removed from said *Liberty* township on or about the *fourteenth* day of *October*, 1878, with the intention, as I am informed and believe, to go to *Jewell* county, *Kansas*;[2] that their intention to so remove before the present term of this court was not known to me; that I did not learn or know or have any information of their departure or intention to depart before the present term of this court until the morning of *Saturday*, the *twenty-sixth* day of *October*, 1878, when I first learned that they had gone; that I saw and conversed for a moment with said *Joseph* a short time before he went away, in the presence of several parties, at the door of the jail in this county, through the wicket; that I had opportunity to do no more than barely speak to him, and told him I would want him as a witness on the trial of the case; he replied that the case would not be tried here, and that he would not be needed at the next term of this court; that it was then my intention, and I believe he knew of it, to apply for a change of venue; that I did not then know whether my trial would come at this term of the court and did not know or expect he intended to leave here immediately and before this court would convene; that I did not have said witness subpœnaed because I did not then know whether said cause would be tried at this term of court or when it would be tried, and because I supposed that as they resided in the county I could procure their attendance upon a few hours' notice, and because I expected my application for a change of venue would be granted; that I was surprised my application for said change of venue was

Dakin, 52 Iowa 395, where it was held reversible error to deny the application for a continuance. The defendant was indicted for a murder alleged to have been committed on March 27th, 1878. He was brought to trial at the October term, 1878, and on October 28th he filed his motion for continuance, supported by affidavit, and on the following day filed an additional affidavit, which, as above stated, is substantially incorporated herein.

For other cases in which it was held that the showing for a continuance on the ground of absent witnesses was sufficient to constitute it reversible error to overrule the motion, see Welsh *v.* Savery, 4 Iowa 241; State *v.* Nash, 7 Iowa 347; State *v.* Barrett, 8 Iowa 536; State *v.* Farr, 33 Iowa 553.

1. **Who may Make Affidavit.** — The motion "must be founded on the affidavit of the party, his agent, or attorney." Miller's Anno. Code Iowa (1890), § 2750.

2. **Names and Residences.** — The affidavit must state the name and residence of the witness, "or if that be not known, a sufficient reason why not known." Miller's Anno. Code Iowa (1890), § 2750, subd. 1; State *v.* Tilghman, 6 Iowa 496. See also *supra*, note 1, p. 334.

refused by the court, and that my trial would come on this term, and because of all said matters I did not have subpœnas issued for said witnesses.[1] That I expect to prove by said witnesses *Edward* and *Andrew* the following facts:[2] On the evening of the alleged murder of *John K. Stough* they were at my barn looking for a horse that had formerly been owned by me, and which they expected to find at my barn, and that on their return I accompanied them together to their father's house, a distance of about five miles from my residence, and from the place where the body of *John K. Stough* was found the next morning; that in company with them I started on horseback — all on horseback — from my barn early in the evening, at or before *eight* o'clock; that we went out directly to their father's, *Joseph Dakin's* house; that I remained there a few minutes for the purpose of seeing

1. Diligence to Obtain Testimony. — The affidavit must state "efforts, constituting due diligence, which have been used to obtain such witness or his testimony." Miller's Anno. Code Iowa (1890), § 2750, subd. 2, and "a continuance shall not be granted for any cause growing out of the fault or negligence of the party applying therefor." Miller's Anno. Code Iowa (1890), § 2749.

"It is not sufficient to state generally that due diligence has been used; but the affiant should set forth and specify what has been done, that the court may judge of the diligence." Brady *v.* Malone, 4 Iowa 149. See also State *v.* McDonough, (Iowa, 1897) 73 N. W. Rep. 357, and *supra*, note 5, p. 339.

"A party is held to more care and diligence to procure by deposition the testimony of a witness who is a non-resident and beyond the process of the court than he is required to employ in the case of a resident witness who is not likely to be beyond the process of the court." Peck *v.* Parchen, 52 Iowa 46, where the averments of the affidavit in respect to diligence, which were held insufficient, are set forth at length; Friske *v.* Berryhill, 10 Iowa 203.

If the affidavit states that the absent witness is sick, it should also appear that his sickness was not known to the party in time to take his deposition. Adams *v.* Peck, 4 Iowa 551.

An affidavit stating that a subpœna has been issued should also state the date when it was issued. State *v.* Farrington, 90 Iowa 673.

For other cases where it was held that sufficient diligence was not shown see Hardin *v.* Iowa R., etc., Co., 78 Iowa 726; Foster *v.* Hinson, 76 Iowa 714; George *v.* Swafford, 75 Iowa 491; Argall *v.* Pugh, 56 Iowa 308; State *v.* Bell, 49 Iowa 440; State *v.* Hayden, 45 Iowa 11; State *v.* Spurbeck, 44 Iowa 667; Chicago, etc., R. Co. *v.* Heard, 44 Iowa 358; Finch *v.* Billings, 22 Iowa 228; State *v.* Cross, 12 Iowa 66; Thurston *v.* Cavenor, 8 Iowa 155; Widner *v.* Hunt, 4 Iowa 355; State *v.* Belvel, 89 Iowa 405.

2. Facts and Materiality. — The affidavit must state "what particular fact, as distinguished from legal conclusions, the affiant believes the witness will prove." Miller's Anno. Code Iowa (1890), § 2750, subd. 3; Chicago, etc., R. Co. *v.* Heard, 44 Iowa 358; State *v.* Tilghman, 6 Iowa 496. See also *supra*, note, 7, p. 335 *et seq.*

The facts expected to be proved must be stated with such certainty and distinctness that the opposite party, by admitting that the witness will so testify, may avoid a continuance of the case. A statement that the party expects to prove all the allegations in his pleading is too general. Olds *v.* Glaze, 7 Iowa 86; Jackson *v.* Boyles, 64 Iowa 428.

Materiality. — The affidavit must show that the facts are material and relevant. State *v.* Falconer, 70 Iowa 416; Finch *v.* Billings, 22 Iowa 228; State *v.* Bennett, 52 Iowa 724.

Thus, in State *v.* Williams, 8 Iowa 533, the court said, in commenting adversely on the defendant's affidavit: "It was necessary for the defendant to connect the testimony expected to be given by the absent witness with the offense with which the defendant was charged."

The court will not presume that the testimony will have any more relevancy to the issue than is shown by the facts stated in the affidavit. State *v.* Falconer, 70 Iowa 416; State *v.* Clark, 69 Iowa 196.

if I could purchase a horse from *Joseph*, and between *eight* or *nine* o'clock — *nine* probably — near *nine*, I left his house; that when they came to my barn I was there at the barn and was preparing to go to *Joseph Dakin's*, getting my horse ready for that purpose, and that my wife was there with me at the time; that I also expect to prove by said *Andrew* and *Edward Dakin* that as they were approaching my residence on the evening referred to they met the deceased (*Stough*) only a short distance from my residence; that said *Stough* was on foot going in a direction from my residence, and in the direction in which the body was found the next morning; that I expect to prove said facts by each of said witnesses and do not know of any other witness or witnesses by whom I can prove the same facts,[1] except that I can prove by my wife that I was at the barn when they came, and by *Joseph Dakin* and his wife that I was at their house; that I expect to prove by *Joseph Dakin* that between the hours of *eight* and *nine* o'clock of the evening of the night on which *John K. Stough* was killed, I was at his house; that he and his wife had retired to bed before I arrived there; that I called him up and I conversed with him a few minutes about purchasing a horse from him, and then left about *nine* o'clock or before. That I expect to prove by said *Harriet Dakin* that she knew my voice and heard me call, and heard me speaking with her husband, who stood in the door with the door open; that I also stood near the door; that it was about *nine P.* M.

That I am advised by counsel said facts are material; that said facts are true,[2] and I do not know of any other witnesses by whom all of said facts can be proved; that this application is not made for delay merely, but that justice may be done; that I expect to be fully able to procure the testimony of said witnesses by their personal attendance or by their depositions by the next term of this court;[3] that it has been impossible for me since I learned that they had left the county to procure their depositions, and that I do not know at present where their depositions could be conveniently taken, nor that they could be taken at all before their arrival in *Kansas*; nor am I certainly advised as to the particular locality where they will go, except that it is understood by their friends that they have gone to *Jewell* county, *Kansas*.

1. No Other Witness to Prove Same Facts. — The affidavit must state that the affiant "knows of no other witness by whom such facts can be fully proved." Miller's Anno. Code Iowa (1890), § 2750, subd. 3; Thompson *v.* Abbott, 11 Iowa 193; State *v.* Williams, 8 Iowa 533. See also *supra*, note 2, p. 343.

In Welsh *v.* Savery, 4 Iowa 241, it was held (Stockton, J., dissenting) that an affidavit concluding with the statement that affiant knows of no person by whom such facts can be "*as* fully proved" was a sufficient compliance with the statute.

2. Testimony Believed to be True. — The affidavit must state that the affiant believes the facts to be true to which it is alleged the absent witness will testify. Miller's Anno. Code Iowa (1890), § 2750, subd. 3. See also *supra*, note 2, p. 342.

3. Belief that Testimony can be Procured. — The affidavit must state "facts showing reasonable grounds of belief that his attendance or testimony will be procured at the next term." Miller's Anno. Code Iowa (1890), § 2750, subd. 1; State *v.* Farrington, 90 Iowa 673. See also *supra*, note 3, p. 347.

A mere statement of belief without showing facts to warrant it is insufficient. State *v.* Rorabacher, 19 Iowa 154.

That I did not make this application for continuance on the second day of the term because[1] it was not then certain that the cause would be tried at this term, and for the reason that I did not then know of the absence or intention to be absent, of the four witnesses named in my original affidavit; that after the determination of the motion for a change of venue, on *Saturday*, the *sixth* day of the term, I sent for my attorneys to consult with them in reference to the matter of asking for a continuance on account of the absence of said witnesses and other matters pertaining to my defense, when I learned that *H. C. Henderson* and *James Allison*, my attorneys, who have had principal charge of my defense, were absent, Mr. *Allison* procuring affidavits to support the change of venue, and Mr. *Henderson* in attendance at the *U. S. Circuit* Court at *Des Moines*, and Mr. *Merriman*, my other attorney, who has had very little to do with my defense in this case, was engaged in the trial of a cause in this court, and was unable to give any attention to my case. I had no other attorneys employed in the case, and was unable to procure the preparation of a motion and affidavit for continuance until the date hereof, and that I have caused said application to be made as soon as practicable after I learned that it would be necessary to make the same; that I sent for my attorneys early this morning and informed Mr. *Henderson*, who came to the jail to see me, of the absence of said witnesses, and the necessity of making an application for a continuance, and the same was thereafter made as soon as practicable.

[*John N. Dakin.*

Sworn to before me and subscribed in my presence by *John N. Dakin*, this *28th* day of *October*, 1878.

George Jones, Clerk of *District* Court.]

Form No. 6290.[2]

(Precedent in State *v.* Painter, 40 Iowa 298.)[3]

1. Excuse for Delay in Filing Motion. — "The motion must be filed on the second day of the term if it is then certain that it will have to be made before the trial, and as soon thereafter as it becomes certain that it will so need to be made, and shall not be allowed to be made when the cause is called for trial, except for cause which could not, by reasonable diligence, have been before that time discovered; and if made after the second day of the term the affidavit must state facts constituting an excuse for the delay in making it." Miller's Anno. Code Iowa (1890), § 2752.

For cases where an affidavit filed after the second day of the term was held defective for not alleging an excuse for the delay see State *v.* McDonough, (Iowa, 1897) 73 N. W. Rep. 357; Bell *v.* Chicago, etc., R. Co., 64 Iowa 321; Randall *v.* Fockler, 52 Iowa 618; Bays *v.* Herring, 51 Iowa 286; Chicago, etc., R. Co. *v.* Heard, 44 Iowa 358; Luças *v.* Casady, 12 Iowa 567, holding it reversible error to continue a case on an affidavit defective in this particular.

If the motion is filed during the term and it does not appear by the record on what day of the term it was filed, it will be presumed on appeal in favor of the ruling of the court denying a continuance that it was not filed in time where the affidavit alleges no excuse for delay. Woolheather *v.* Risley, 38 Iowa 486.

2. See the notes to Form 6289, *supra*.

State *v.* Miller, 65 Iowa 60, is a case where an affidavit for a continuance was filed by the prosecuting attorney and the motion properly sustained.

3. On appeal by the state it was held to be error to refuse a continuance until the next day on this affidavit.

State of *Iowa*, }
Monona County. } ss.

I, *C. H. Lewis*, on oath, depose and say that I am District Attorney, *4th* Judicial District, *Iowa*, and the attorney for the State in each of the above entitled actions. That *J. C. Hollister* and *John Fowler* are material witnesses on the part of the State, without whose testimony I cannot safely proceed to trial in said actions, or either of them.

That after the indictments in these cases, and on the *18th* day of *July*, 1874, I procured a subpœna to be issued from the office of the Clerk of this Court for said witnesses in each of said cases. And that on the *18th* day of *July*, 1874, the said subpœnas were duly and legally served upon each of the witnesses, *Hollister* and *Fowler*, at *Harrison* county, *Iowa*, as will more fully appear by reference to the returns on the subpœnas filed in this court in the above entitled cases, to which reference is here made.

That said witnesses, and each of them, have failed to attend upon this court, in obedience to said subpœnas. That said witnesses, and each of them, now reside at *Missouri Valley*, *Harrison* county, *Iowa*, distant about *forty* miles, and that said witnesses are at home, as this affiant is informed and believes. And that their attendance can, as I believe, be had at this term of court, and on tomorrow morning, by attachment. Though I have no positive assurance that said witnesses will be present on tomorrow, or at this term of this court.

And I further depose and say that said witnesses can be held to testify in each of said cases at the next term of this court.

And I further state that I expect to prove by the witness *John Fowler* that he purchased of the defendant, *Ed. Lindley*, the property described in the indictments herein. That he purchased the said property on the day after the same was stolen. That said property when purchased was in the possession of the defendant *Lindley*, and the other defendants herein. That this defendant *Lindley* had secreted the property after he arrived at the town of *Missouri Valley*, in *Harrison* county, where said *Fowler* then resided and was engaged in the butcher business. And that said *Lindley* moved the cattle from the place where he stole the same to the town of *Missouri Valley* in the night-time, and in a secret manner.

And I further state that I expect to prove by the witness *J. C. Hollister* that he came by purchase into the possession of an animal stolen by defendant at the time the cattle described in these indictments were stolen. And that said witness will identify said defendant as the party who had said animal on the day, or soon after, said property was taken.

And I further state that I believe all of the above stated facts to be true. And that I know of no other witness by whom the same can be fully proved.

C. H. Lewis.

Sworn to before me and subscribed in my presence by *C. H. Lewis*, this *21st* day of *July*, 1874.

John K. McKaskey, Clerk of *District* Court.

Form No. 6291.[1]

(Precedent in State *v.* Maddox, 117 Mo. 670.)[2]

In the *Circuit* Court of *Shelby* county, *Missouri*, *April* term, 1892.

1. Necessity of Oath or Affidavit. — A motion to continue a cause on the part of the defendant on account of the absence of evidence must be supported by oath or affidavit. Mo. Rev. Stat. (1889), § 4181.

As to the necessity of an affidavit unless the state consents that the statement may be upon oath orally see State *v.* Reilly, 4 Mo. App. 394.

By Prosecuting Attorney in Behalf of State.—"If the application for a continuance is by the state, the prosecuting attorney shall state in writing, under his oath of office, and according to his best information and belief, the same facts required to be stated in the affidavit of the defendant." Mo. Rev. Stat. (1889), § 4182.

For the substance of an affidavit by the prosecuting attorney, which was held to be insufficient in its statement of what the absent witness would testify to, see State *v.* Pinnell, 93 Mo. 480.

2. The defendant in this case was indicted for robbery in the first degree and convicted. A new trial was granted for refusing a continuance, the court remarking that "the defendant's affidavit meets every requirement of section 4181, Revised Statutes 1889." This section contains almost the same provisions as the section prescribing the requirements of affidavits for continuances in civil cases. See notes to Form No. 6272, *supra*.

Other Approved Forms. — In State *v.* Farrow, 74 Mo. 532, the defendant was indicted for robbery, and it was held reversible error to refuse his application for a continuance on November 14th, 1881, which was supported by an affidavit, omitting caption, signature and jurat, as follows:

"That he cannot safely proceed in the trial of said cause in the absence of the following witnesses, who are absent without connivance, knowledge or consent, to wit: Henry Baysinger, Mrs. Henry Baysinger, Buck Dareaux, and Caleb Berry; that Buck Dareaux resides in Montgomery county, Caleb Berry in Audrain county, and the others in Callaway county, Missouri; that the indictment in said cause was only filed herein on the 12th of this month and found at present term of this court; that he had a subpœna for the witnesses in this county issued and delivered to the sheriff; that he has not had time since the filing of said indictment to get said witnesses from Audrain and Montgomery county here; that he believes he would prove by said absent witnesses that defendant was at Joseph Farrow's, three or four miles off, when the alleged offense was committed; and he further says that such statements are true; that he has no witness present, nor does he know of any other witness or witnesses by whom he can prove the same facts; that he has not had time to procure the attendance of said absent witnesses; that he expects to have them present at the next term of this court; that the continuance is not asked for vexation or delay merely, but in order that a fair trial may be had, and complete and substantial justice done; that the evidence of said witnesses is material; that he cannot prove the same facts by any other witness whose testimony can be procured at this term of court."

In State *v.* Bradley, 90 Mo. 160, the defendant was charged with assaulting and cutting one Petty with a knife. A new trial was granted because of a refusal of continuance on his affidavit, omitting caption, signature and jurat, as follows:

"Thomas Bradley, being sworn, states that he cannot safely go to trial at this term of court for the want of material testimony that is absent without his connivance, or approval, and that this application is not made for vexation or delay, but for the purposes of justice, and that if a continuance be granted him he can, as he verily believes, procure said testimony by the next term of this court. The name of the absent witness is Walter Billings, who has, up to within two months, lived in Greene county, near this affiant; at that time he moved into the city of Springfield, and affiant has been under the impression all the time that he still lived in said city. Affiant caused a subpœna to be issued for him a few days ago, and placed same in the hands of the sheriff of Greene county, and verily believed that the sheriff would find and serve him immediately with said subpœna,

The defendant, *Morgan Maddox*,[1] comes and moves the court to grant him a continuance in this cause to the next term of this court, and as grounds of this motion states the following: * * *[2]

The defendant states that *Malinda Maddox*,[3] the wife of the defendant, *Morgan Maddox*, is a material witness on behalf of the defendant, *Morgan Maddox*, in this cause. That her residence is at the town of *Huntington* in *Ralls* county, *Missouri*, where she now is.[3] That on the night of the *twenty-fifth* day of *August*, 1892, the said *Malinda Maddox* had an abortion or miscarriage about *twelve* o'clock on said night. She then had a severe chill and her temperature arose to *one hundred and five* degrees, her pulse was *one hundred and fifty*, she showing and having all the symptoms of septicæmia, resulting from the absorption of a putrid fœtus and its membranes. She is now confined to her room, and nearly all the time in her bed, under the order of her physician, and it is the opinion of her physician, *S. Mattox*,[4] a regular registered and practicing physician, who is now attending her, and who has been attending her since the

but on yesterday evening affiant was informed by the sheriff that he could not find said Walter Billings. That if the said witness was here he would testify as follows: 'My name is Walter Billings. I know Arch Petty and the defendant. That on or about the 8th of September, 1883, I was present at the barn of defendant when defendant and Petty had a difficulty. I was standing near them. They came walking through the barn; the defendant was whittling with his knife on a small stick; when they got near the front part of the barn, I learned from their conversation that they were quarrelling about a bill, Petty claiming that defendant owed him five dollars for removing a dead horse — defendant claiming that the contract price was two and one-half dollars. Petty got very angry and finally caught hold of defendant and threw him around against the side of the barn, and held him there with his left hand, which was on defendant's coat collar, or hold of his throat, and with his right hand he reached back to his hip pocket as though he was reaching for a pistol. Defendant had told Petty to let him go, and defendant then, with his knife that was still open, reached round and under and cut Petty on his right arm.' Affiant knows that said absent witness will so testify, because said witness has so informed affiant. Affiant knows of no witness that he can so well prove the facts above set forth as he can by the said Billings, and that affiant believes said testimony to be true."

For the substance of another form held good see State *v.* Lewis, 74 Mo. 225.

The affidavit which was set forth and approved in State *v.* Maguire, 69 Mo. 197, was drawn under a statute differing in some particulars from the statute now in force, and omitted some of the averments which would now be necessary.

1. Who may Make Affidavit. — An "oath or affidavit of the defendant or some reputable person in his behalf" is required. Mo. Rev. Stat. (1889), § 4181.

2. Here followed a statement as a first ground for continuance that one of the defendant's counsel could not be present at this term of court, etc., as shown in Form No. 6262.

3. Name and Residence of Witness. — The affidavit must give the name of the witness and "where he resides or may be." Mo. Rev. Stat. (1889), § 4181. See also *supra*, note 1, p. 334. In Stall *v.* Mitchell, 98 Mo. 657, the affidavit was criticised because it did not give the name of the witness, although it stated that his name was unknown. And in State *v.* Underwood, 76 Mo. 630, it was held defective because, although it disclosed that the defendant knew the names of the witnesses, it failed to give the name of any of them, and because it did not state the residence of the witnesses or that their residence was unknown.

4. The affidavit was accompanied by a certificate of this physician, which will be found in Form No. 6305. That sickness is best established by the affidavit of a physician see Smith *v.* Smith, 132 Mo. 686.

time of the said abortion, that it would not be safe for her, under the most favorable circumstances, to leave her home under *six* weeks from the time said abortion took place. And this affiant says her condition is such that it would not be safe, under the most favorable circumstances, for her to leave her home and be present at the trial of this cause under *six* weeks from the time said abortion took place.

This affiant further says that said *Malinda Maddox* has been so ill ever since said abortion that she could not give her deposition in this cause without endangering her life. That this cause was set for trial in this court in *November*, 1891, at the *October* term, 1891, of this court, on the *twenty-third* day of *November*, 1891.

That this defendant caused a subpœna to be issued from the office of the clerk of this court on the *thirteenth* day of *November*, 1891, for said *Malinda Maddox*, and placed said subpœna in the hands of the sheriff of *Ralls* county, *Missouri*, for service on said witness.

That said subpœna was duly served on said *Malinda Maddox*, during said trial, by the said sheriff on the *twenty-fifth* day of *November*, 1891, in *Ralls* county, *Missouri*, and that said *Malinda Maddox* obeyed said subpœna and appeared in this court at said time in this cause, and after a severance as to the defendants, *Maddox* and *Whitecotten*, testified on behalf of the co-defendant, *Frank Whitecotten*, on his trial at said term of this court, and that the trial of this cause had been by this court regularly continued from the said last mentioned term until this time, and it was the duty of said witness under the statute to attend as a witness on behalf of this defendant on the trial of this cause at the time without further subpœna.[1]

1. Diligence to Obtain Testimony.—The affidavit must show due diligence, and state what diligence has been used to obtain the testimony. Mo. Rev. Stat. (1889), § 4181. See *supra*, note 5, p. 339.

The averments of the affidavit must be construed most strictly against the affiant. Langener *v.* Phelps, 74 Mo. 190, where the affidavit, pronounced insufficient, was given in full, the court saying: "Not a particle of diligence was used by the plaintiff (applicant). The witness lived in a foreign jurisdiction, yet no effort was made to be ready for trial by taking his deposition; nor when he came within the jurisdiction of the court was any subpœna served upon him."

For civil cases where sufficient diligence was wanting see English *v.* Mullanphy, 1 Mo. 780; Hamiltons *v.* Moody, 21 Mo. 79; Cline *v.* Brainard, 28 Mo. 341; State *v.* Bennett, 31 Mo. 462; Harris *v.* Powell, 56 Mo. App. 24; Schultz *v.* Moon, 33 Mo. App. 329; Pier *v.* Heinrichoffen, 52 Mo. 333; Wood *v.* St. Louis, etc., R. Co., 58 Mo. 109, where the affidavit is given in full. Leabo *v.* Goode, 67 Mo. 126; Blair *v.* Chicago, etc., R. Co., 89 Mo. 383.

For criminal cases where the application was properly denied for want of sufficient diligence see State *v.* Howell, 117 Mo. 307, where the affidavit is given substantially in full; State *v.* Tatlow, 136 Mo. 682; State *v.* Murphy, 46 Mo. 430; State *v.* Mitchell, 98 Mo. 657, where the affidavit is given in full; State *v.* Hays, 24 Mo. 369; State *v.* Carter, 98 Mo. 176; State *v.* Banks, 118 Mo. 117; State *v.* Dusenberry, 112 Mo. 277; State *v.* Burns, 54 Mo. 274; State *v.* Bryant, 93 Mo. 273; State *v.* Lange, 59 Mo. 418, where the affidavit is given in full; State *v.* Lawther, 65 Mo. 454; State *v.* Whitton, 68 Mo. 91; State *v.* Kring, 74 Mo. 612; State *v.* Emory, 79 Mo. 461; State *v.* Wilson, 85 Mo. 134; State *v.* Good, 132 Mo. 114; State *v.* Pagels, 92 Mo. 300; State *v.* White, 126 Mo. 591, where the affidavit stated that a subpœna was served on the "—— day of April." "For aught that appears," said the court, "it may have been on the very day of the trial or the day before."

For a case where the affidavit disclosed sufficient diligence see State *v.* Walker, 60 Mo. 274.

On a second application, on account

That said *Malinda Maddox* will testify on the trial of this cause, if present, as follows:[1] "I am the wife of the defendant *Morgan Maddox*, and was his wife on the *twenty-first* day of *December*, 1890, at the time of the alleged robbery of *Leland McElroy*, and was living with said *Maddox* as his wife at his home in the town of *Huntington, Mo.*, about one and a half miles from the place of said alleged robbery."

That she was at home all of the afternoon and evening and night of said *December 21*, 1890.

That this defendant, at the hour of *six* o'clock in the evening of said *December 21*, 1890, was present at his and her home in said town of *Huntington*, and took supper there shortly after said hour, and that said *Morgan Maddox* remained at their said home from said hour of *six* o'clock on said evening until the hour of *eight* o'clock on the night of said *December 21*, 1890, at which last mentioned time *Maje Maddox* announced to the witness and said *Morgan Maddox*, at their said home, that *Leland McElroy* had been robbed on said night, except for a space of time not exceeding *twenty* minutes, and that during said *twenty* minutes, said *Morgan Maddox* was going to attend to their horses.

That said *Morgan Maddox* was not absent from said house longer than said space of *twenty* minutes from said hour of *six* o'clock until after said *Morgan Maddox* was notified at his home of said robbery.

That the testimony of *Leland McElroy* and *Mary McElroy*, who are in attendance on this court as witnesses for the prosecution in this cause, will be that said robbery of said *Leland McElroy*, with which said defendant stands charged, occurred between the hour of *six* o'clock and *eight* o'clock on said *December 21*, 1890, in the evening of said day, about one and a half miles from the said home of the said defendant.

That the testimony of said *Malinda Maddox*, as above set forth, tends to prove and does prove a complete alibi for this defendant as to said robbery.

of the continued absence of a witness who had been subpœnaed prior to the first application, the affidavit ought to show that the applicant has applied for an attachment to compel the attendance of the witness. State *v.* Andrews, 76 Mo. 101.

1. **Statement of Expected Testimony and Materiality Thereof.** — The affidavit must show the materiality of the expected testimony and what facts the applicant believes the witness will prove. Mo. Rev. Stat. (1889), § 4181. See also *supra*, note 7, p. 335 *et seq.*

"Such an application must be drawn more carefully than a pleading and must state the facts relied on specifically and not mere conclusions of law." State *v.* Good, 132 Mo. 114. See also State *v.* Hilsabeck, 132 Mo. 357, and particularly State *v.* Pinnell, 93 Mo. 480. It must state the facts with the same particularity as was necessary before the supreme court ruled that the state could not deprive the defendant of a continuance by admitting what the absent witness will testify to. State *v.* Strattman, 100 Mo. 540, where the substance of the insufficient affidavit is set forth.

A mere statement that the evidence is material is insufficient. State *v.* Strattman, 100 Mo. 540; State *v.* Pagels, 92 Mo. 300.

If the evidence will not be relevant except on the issue of insanity, the affidavit must state that insanity is a proposed defense. State *v.* Pagels, 92 Mo. 300; State *v.* Bryant, 93 Mo. 273; State *v.* Mitchell, 98 Mo. 657.

If the facts stated show that the evidence would be immaterial or irrelevant, the application will be denied. State *v.* Dale, 89 Mo. 579.

That the testimony of said *Leland McElroy*, as the prosecuting witness in this cause, will be that said *Morgan Maddox* was present at the time and place of said robbery, participating therein

That the testimony of *Malinda Maddox*, as above set forth, is material to the issue of this cause on behalf of the defendant, *Morgan Maddox*.

That this defendant has used due diligence to obtain the testimony of said *Malinda Maddox*, on this trial of this cause. That the testimony of said witness can be procured on the trial of this cause by and at the next term of this court,[1] and that said *Malinda Maddox* will prove facts as above set forth, and this defendant believes said facts, as above set forth, as said witness's testimony are true,[2] and that this defendant is unable to prove said facts by any other witness whose testimony can be as readily procured,[3] and that said witness, *Malinda Maddox*, is not absent by the connivance, procurement or consent of this defendant,[4] and that said *Malinda Maddox* is absent from this trial solely because said witness, *Malinda Maddox*, is sick and unable to attend at the trial of this cause, and that this application for continuance is not made for vexation or delay merely, but to obtain substantial justice on the trial of this cause.[5]

Morgan Maddox.

State of *Missouri*, }
County of *Shelby*. } ss.

Morgan Maddox, the above named defendant, being duly sworn, on

1. Probability of Procuring Testimony. — The affidavit must show "the probability of procuring his testimony and within what time." Mo. Rev. Stat. (1889), § 4181. See also *supra*, note 3, p. 347. This requirement was enforced in State *v.* Wilson, 85 Mo. 134, and State *v.* Alred, 115 Mo. 471.

An affidavit stating that the witness was "late of this state, and now out of the state, and will in all probability be back," was insufficient. Freligh *v.* Ames, 31 Mo. 253.

2. Belief that Testimony is True. — The affidavit must state that the applicant believes the facts to which the absent witness will testify are true. Mo. Rev. Stat. (1889), § 4181. See also *supra*, note 2, p. 342. For want of this averment affidavits were held defective in State *v.* Dusenberry, 112 Mo. 277; State *v.* Bryant, 93 Mo. 273; State *v.* Alred, 115 Mo. 471; State *v.* Underwood, 76 Mo. 630. State *v.* Maguire, 69 Mo. 198, holding that this averment was unnecessary where the defendant had pleaded not guilty, was decided before the enactment of the provision above cited.

3. Unable to Prove Same Facts by Others. — The affidavit must state that the defendant "is unable to prove such facts by any other witness whose testimony can be as readily procured." Mo. Rev. Stat. (1889), § 4181. State *v.* Alred, 115 Mo. 471; State *v.* Lett, 85 Mo. 52; State *v.* Heinze, 45 Mo. App. 403. See also *supra*, note 2, p. 343.

In Freleigh *v.* State, 8 Mo. 606, the affidavit stated that there was no other witness in attendance by whom the same facts could be established, and was held insufficient for omitting to aver that the facts could not be proved by any other person whose attendance could have been procured.

4. Witness Not Absent by Connivance, etc. — The affidavit must state "that the witness is not absent by the connivance, procurement or consent of the defendant." Mo. Rev. Stat. (1889), § 4181; State *v.* Bryant, 93 Mo. 273. See also *supra*, note 5, p. 345.

5. Application Not Made for Delay, etc. — The affidavit must state "that the application is not made for vexation or delay merely, but to obtain substantial justice." Mo. Rev. Stat. (1889), § 4181; State *v.* Heinze, 45 Mo. App. 403. Barker *v.* Patchin, 56 Mo. 241, where the court said: "An affidavit for continuance ought positively to negative an inference that it is made for vexation or delay." See also *supra*, note 7, p. 347.

his oath states that the facts stated in the foregoing application for a continuance are true.

Morgan Maddox.

Subscribed and sworn to before me this *September 5*, 1892.

Frank Dimmitt, Clerk.

Form No. 6292.[1]

(Precedent in State *v.* Metcalf, 17 Mont. 420.)[2]

[State of *Montana*, }
County of *Beaverhead.* }

State of Montana, plaintiff, } *District* Court,
against } *Fifth* Judicial District.]
Paul Metcalf, defendant. }

Paul Metcalf, being first duly sworn, on oath deposes and says: That he is the defendant in the above entitled cause. That the information in said cause was filed in this court charging affiant with the crime of *murder* on the *23d* day of *February*, 1895, and that affiant was arrested in the state of *Missouri* on the *27th* day of *December*, 1895, and was brought to *Beaverhead* county, *Montana*, immediately thereafter and lodged in the county jail of said county, where he has ever since been, and is now, confined. That ever since affiant's incarceration in jail, through the efforts of his counsel and friends, he has been preparing for this trial, as hereinafter detailed. That notwithstanding the efforts of defendant and his friends to be prepared for said trial, he cannot safely go to trial at this term for the following reasons, to wit, the absence of witnesses and evidence material to defendant, and which defendant has been unable to procure at this term of the court. That *Alden Harness* is a witness material to defendant. That defendant could prove by said *Harness*, if present as a witness, that the deceased, *Frank Hunter*, was killed at his saloon, at *Medicine Lodge*, in *Beaverhead* county, on the after-

1. **In Civil Cases.** — Mont. Code Civ. Proc. (1895), § 1039, reads in part as follows: "A motion to postpone a trial on grounds of the absence of evidence shall only be made upon affidavit showing materiality of the evidence expected to be obtained and that due diligence has been used to procure it. The court may also require the moving party to state upon affidavit the evidence which he expects to obtain" Rule No. 12 of the district court (4th Jud. Dist.) provides that "the party applying for a continuance shall state in the affidavit the names of the witnesses and the evidence he expects to obtain, otherwise the affidavit and motion shall be overruled."

In Criminal Cases — *By the Accused.* — Mont. Pen. Code (1895), § 2010, provides for continuances by the defendant filing his affidavit "showing good cause therefor." Section 2011 provides that "any cause which would be considered a good one for a postponement in a civil case is sufficient in a criminal case."

By the State. — Section 2012, Mont. Pen. Code (1895), provides that "the state may obtain a postponement for the same reasons * * * as the defendant and be subject to the same restrictions; the county attorney, or any one acquainted with the facts, may make the proper affidavit."

2. It was held that the showing made by the following affidavit entitled the defendant to a continuance, and the order of the court denying his application therefor was error. For the requisites of affidavits generally and cross-references to proper forms of affidavits under various circumstances see the notes to Form No. 6272, *supra*.

noon of *August 12*, 1894, by affiant. That affiant and said *Harness* earlier in the day had been to said saloon, and in company with other persons there present had taken several drinks of whisky or other liquor. That this affiant and said *Harness* had left the saloon together, and parted from said *Hunter* without any difficulty. That after affiant and said *Harness* had been gone some time, affiant discovered that he had left his gloves at said saloon, and proposed to return and get them. That said *Harness* and this affiant, in company, and on horseback, returned to said saloon, and dismounted and entered the same. That *Metcalf* was a little in advance of and to the right of said *Harness* as they entered into said saloon, and that they passed one person, called "*Irish Jack*," sitting on or near the saloon doorsteps. That no one was in the saloon when said *Metcalf* and *Harness* entered except *Hunter*. That upon said *Hunter* seeing *Metcalf* enter, and when said *Metcalf* was a few feet within said saloon, and three or four feet from the front door, *Hunter* said to *Metcalf*, "Get out of my saloon, or I will kill you, you son of a bitch;" to which *Metcalf* answered and said, "I want my gloves; that is all I want." That as *Hunter* spoke to *Metcalf*, *Hunter* started to go behind the bar in said saloon, and in doing so was facing rather towards *Metcalf* and the front of the building. That *Hunter* spoke in a loud, angry and very threatening manner to *Metcalf*, and was in the act of reaching under the bar, where he always kept a revolver or pistol, and at the same time was watching said *Metcalf*, and was slightly stooping, and watching *Metcalf*, with his head above the counter. That *Hunter's* manner was extremely threatening and menacing; and that while said *Hunter* was advancing towards said *Metcalf*, and reaching in the direction of his pistol, said *Metcalf* fired, hitting said *Hunter*. That no other person was in said saloon, or within sight of the act, or saw the shooting, than said *Harness* and the affiant, during all of this time. That said *Harness* would swear he was near *Metcalf*, a little to *Metcalf's* left and rear, but in full view of both *Hunter* and *Metcalf*. That said *Harness* would swear that he and this affiant both knew *Hunter* kept a pistol at the place under the bar to which *Hunter* was advancing, and for which he was reaching when he was shot. That said *Harness* would further swear that he knew the character of *Hunter* for peace and quiet, and that he was a bad character; very quarrelsome and dangerous. That said *Harness* would further swear that *Hunter* began the difficulty with *Metcalf* and was distant from him only *14* to *16* feet when he was shot by *Metcalf*, and was advancing towards *Metcalf* and towards his (*Hunter's*) pistol. That said *Harness* would further swear that he had known *Hunter* for some considerable time prior to the shooting. That said *Hunter* was unfriendly towards affiant, and that on several occasions said *Hunter* had said to *Harness* that he (*Hunter*) would kill *Metcalf*, and that prior to the shooting of said *Hunter* said *Harness* had communicated to this affiant the threats *Hunter* had made to kill affiant. That after the said shooting the said *Harness* left *Montana* with affiant and was present with affiant at *Metlin's* ranch a short time after the killing, and affiant says he cannot prove the foregoing by any other witness. That on the night after the killing

said *Harness* and this affiant left the state of *Montana*. That as soon as affiant was charged and arraigned for the killing of *Hunter*, through the aid of affiant's brothers and his attorneys, he began inquiries to ascertain the whereabouts of said *Harness*, and on or about *May 25th* this affiant, through his brother *Theodore Metcalf*, learned for the first time that said *Alden Harness* was in or near the town of *Horton*, *Brown* county, state of *Kansas*, and that said *Harness's* deposition could be taken in said town and county; and relying upon said statement and information, the facts were given to affiant's counsel and steps were taken to procure the deposition of said *Harness* before the clerk of the *District* Court of *Brown* county, state of *Kansas*, and on the *28th* day of *May*, 1895, notice to take said deposition was served on the county attorney of *Beaverhead* county, *Montana*, with interrogatories attached thereto. A copy of same is hereto attached and made a part of this affidavit. That said notice provided for the taking of said deposition on the *8th* day of *June*, 1895. That said deposition has not as yet arrived, and that affiant cannot state positively whether said deposition has been taken, but affiant has expected the same to arrive in time for this trial, but whether it has been taken or will arrive in time for trial at this term affiant cannot state. The last information had from the officer designated to take said deposition was that the witness *Harness* had not been found by said officer, so that his deposition could not be taken, but affiant says that if this cause is continued to the next term of this court affiant verily believes that he can have the deposition of said *Harness*, or have him present in person as a witness. That affiant also secured a subpœna for said *Harness* to be placed in the hands of the sheriff of *Beaverhead* county for service if said *Harness* should return or be found in this county, and the same has been returned "not found." That this affidavit is not made for delay merely, but is made in good faith, that affiant may have a fair trial and that justice may be done.

[*Paul Metcalf.*

Subscribed and sworn to before me this ——— day of ———, 18—.

Calvin Clark, Clerk of the *District* Court.]

Form No. 6293.

(Precedent in Beatrice Sewer Pipe Co. *v.* Erwin, 30 Neb. 87.)[1]

[State of *Nebraska*, } ss.
County of *Gage*. }

Thomas Erwin, plaintiff,
against
Beatrice Sewer Pipe Company, defendant. } Affidavit for Continuance.

State of *Nebraska*, } ss.]
County of *Gage*. }

R. S. Bibb, being first duly sworn, on oath states that he is the attorney for the defendant above named.[2] Affiant further states that

1. It was held reversible error to refuse a continuance on this affidavit.

2. Who may Make Affidavit. — The affidavit ought to be made by, or be supported by the affidavit of, the person who has knowledge that the absent wit-

said defendant is a corporation organized under the laws of the state of *Nebraska*, and doing business in the city of *Beatrice*, *Gage* county, in said state, said business being the manufacturing of tiling, sewer pipes, brick, etc.; that said defendant cannot safely proceed to trial in the above entitled cause at the present term of court on account of the absence of one *Charles Huggins*,[1] a material and important witness on the part of the said defendant, and that said witness is now a resident of the state of *California*,[1] the exact place in *California* where said witness is residing being unknown to affiant, although he has made diligent inquiries in the endeavor to find out the post-office address of said *Charles Huggins*, as have also the officers of said defendant; that said *Charles Huggins* formerly resided in the city of *Beatrice*, *Gage* county, *Nebraska*, but left for *California* before the commencement of this action. That the said defendant expects to prove by the said *Charles Huggins* (who is the pressman referred to in plaintiff's petition) that[2] on or about the *5th*

ness will testify as stated. Williams *v.* State, 6 Neb. 334. See also *supra*, note 3, p. 317, note 1, p. 332.

1. The name and residence of the witness should be stated if known. See Polin *v.* State, 14 Neb. 540; Comstock *v.* State, 14 Neb. 205; *supra*, note 1, p. 334.

2. Expected Testimony and Materiality Thereof.—The facts to which the absent witness will testify must be stated. Farmers', etc., Bank *v.* Berchard, 32 Neb. 785; Williams *v.* State, 6 Neb. 334. See also Hair *v.* State, 14 Neb. 503. And it must appear or be shown by a proper statement that such facts are material and admissible. Burgo *v.* State, 26 Neb. 639; Clark *v.* Mullen, 16 Neb. 481; Polin *v.* State, 14 Neb. 540; Farmers', etc., Bank *v.* Berchard, 32 Neb. 785. See also *supra*, note 7, p. 335.

Form of Affidavit Held Insufficient.—In Burgo *v.* State, 26 Neb. 640, where the defendant was prosecuted for assault with intent to kill and his defense was insanity, the following affidavit for continuance, omitting the formal parts, was held insufficient for the reason, among others, that it did not allege that the defendant at the time of committing the act was unable to distinguish right from wrong in regard to that particular act. "The affiant, Peter Benjamin Burgo, says that he is not ready for trial at this term of the court, because of the absence of the following witnesses [naming them], which said witnesses all live out of this state, and who severally reside at and in the states particularly and specially stated in the affidavit of this affiant's attorney, Charles Offutt, filed herein. Affiant says that he can prove by each of the said witnesses that this affiant has suffered from hereditary insanity, to a greater or less extent, all through his life, and that he inherited the same from his mother, who was so insane for more than twenty years next before her death, which occurred five years ago, that she was unable to recognize any person related to or previously known to her; that for many years before the twenty years, at which she became so insane as aforesaid, she was subject to temporary fits of insanity, during which she did not know what she was doing, and did not understand either the legal or moral effect of her acts; that at said time his mother attempted suicide. Affiant further says that during all his life, or the greater part thereof, he has lived outside the state of Nebraska, and has only recently come to live in the city of Omaha; that he knows no one in the city of Omaha who will testify to the aforesaid facts, or any part thereof, and does not know any one in the said city who knows this affiant sufficiently well to be able to state what the true facts are in relation to the mental condition of this affiant. He further says that he believes that he can prove by each of said witnesses that this affiant has been for many years, and that he was at the time of the assault complained of, unable to distinguish right from wrong, and did not know the legal or moral effect or consequences of his acts. He further says that this affidavit is not made for delay, but in order that he may obtain a just and fair trial."

day of *September*, 1887, he, the said *Charles Huggins*, was in the employment of defendant, engaged in the running of the press mentioned in said petition; that when the said plaintiff commenced to work upon said press, in company with said *Charles Huggins*, the said plaintiff was fully and completely and properly instructed as to the proper manner of performing the duties of his position, and avoiding the dangers of his said occupation, and that plaintiff was fully advised in the premises; that plaintiff was injured by his own gross carelessness and fault, and not through the fault, carelessness or neglect of him, the said *Charles Huggins*, the defendant, or any of the other of its employees; that said plaintiff was injured by carelessly thrusting his hand into the cylinder mentioned when and while the piston therein was rising, notwithstanding the fact that said plaintiff had been instructed and warned to keep his hands out of said cylinder when said piston was rising, and that immediately upon the happening of the injury complained of the said plaintiff stated in the presence of the said *Charles Huggins* "that it was his (plaintiff's) own fault that he had been injured." That he knows of no other person or persons by whom the above stated facts can be proven,[1] [and that he believes the same to be true,][2] and affiant further states that when he was employed as attorney for the defendant, he supposed that the present pressman at defendant's works was the one who was working there when plaintiff was injured, and that it was only a short time ago, and since the commencement of this term of court, or immediately prior thereto, that he discovered otherwise; that this affiant and the officers of said defendant having used due diligence, by making every inquiry possible to find the whereabouts of said *Charles Huggins*, and have asked all of those who would be likely to know here what his post-office address is, but could get no further information than that he was in *California*.[3] Affiant further says that he expects to procure the testimony of said *Charles Huggins* at the next term of this court;[4] that it would be dan-

1. No Other Witness to Same Facts. — In Burgo *v.* State, 26 Neb. 641, the affidavit, which is quoted in full in the preceding note, was held defective because it did not allege that the same facts could not be proved by other witnesses. See also Rowland *v.* Shephard, 27 Neb. 494; Johnson *v.* Mills, 31 Neb. 524, where the affidavit held sufficient contained this averment; and *supra*, note 2, p. 343.

2. Testimony Believed to be True. — The affidavit pronounced sufficient in Johnson *v.* Mills, 31 Neb. 524, contained this averment, which is commonly inserted, and has been held to be necessary. See *supra*, note 2, p. 342.

3. Diligence to Obtain the Testimony. — The statement of diligence "should be of specific acts done or excuses for not doing them, and given with such particularly that an indictment for perjury would lie in case of its being false." Ingalls *v.* Noble, 14 Neb. 272, where the witness was in some place in Colorado unknown, and the allegation of inquiries made to ascertain his whereabouts was held too indefinite for omitting to state when and of whom the inquiries were made. For a similar case see Comstock *v.* State, 14 Neb. 205. For other cases of insufficient diligence see McClelland *v.* Scroggin, 48 Neb. 141; Peavy *v.* Hovey, 16 Neb. 416; Rowland *v.* Shephard, 27 Neb. 494; and for cases where the diligence alleged was held sufficient see Hair *v.* State, 14 Neb. 503; Gandy *v.* State, 27 Neb. 707; Newman *v.* State, 22 Neb. 355; Johnson *v.* Mills, 31 Neb. 524, where the substance of the affidavit is given; Miller *v.* State, 29 Neb. 437. See, generally, as to averments of diligence, *supra* note 5, p. 339 *et seq.*

4. Expectation of Procuring the Testimony. — It should be alleged that the

gerous for defendant to proceed to trial in said action without the testimony of said witness, and affiant further says that this application for continuance is not made for delay, but that justice may be done.[1]

[*R. S. Bibb.*

Subscribed and sworn before me by *R. S. Bibb* this *first* day of *September*, 1889.

(SEAL) *Norton Porter*, Notary Public within and for the county of *Gage*, State of *Nebraska*.]

Form No. 6294.[2]

State of *South Dakota*, } ss.
County of *Lawrence*. }

Henry Frawley, being duly sworn, upon his oath deposes and says: I reside in *Deadwood*, *South Dakota*; I am an attorney at law by occupation,[3] and am actively engaged in the practice of my profession; am the attorney for the defendants,[4] *John Fitzgerald* and *David Fitzgerald*, copartners as *John Fitzgerald & Brother*, defendants above named, and have been their attorney since *April*, 1890. Affiant further says: That *David Fitzgerald*, by occupation a railroad contractor, and who now resides at *Lincoln*, state of *Nebraska*,[3] *Charles McGlave*, by occupation bookkeeper and accountant, and who now resides at *Lincoln*, state of *Nebraska*, *John J. Cagney*, by occupation bookkeeper, and who now resides at *Plattsmouth*, state of *Nebraska*, *I. S. P. Weeks*, by occupation a railroad civil engineer, and who now resides at *Lincoln*, state of *Nebraska*, and *F. C. Tucker*, by occupation a railroad civil engineer, and who now resides at *Lincoln*, state of *Nebraska*, and *E. O. Bailey*, by occupation a clerk, residence, *Lincoln*, state of *Nebraska*, are material witnesses for the defendants, *John Fitzgerald & Brother* aforesaid, without whose testimony they cannot safely proceed with the trial of this action.

party expects to procure the absent testimony at the time to which he seeks to continue the case. See Barton *v.* McKay, 36 Neb. 632; Johnson *v.* Mills, 31 Neb. 524, and *supra*, note 8, p. 345. And if the witness is out of the state or his whereabouts unknown, facts should be alleged showing that there is reasonable ground to believe that his testimony can be so procured. Rowland *v.* Shephard, 27 Neb. 494; McClelland *v.* Scroggin, 48 Neb. 141; Polin *v.* State, 14 Neb. 540.

1. Application Not Made for Delay Merely. — See *supra*, note 7, p. 347.

2. South Dakota. — Rule No. XXIX of the circuit court (6th Jud. Cir.).

This form was kindly furnished by Hon. Howard G. Fuller, judge of the supreme court of South Dakota, and, as supplemented by the notes, is a copy of the affidavit filed in the circuit court in Adams *v.* Grand Island, etc., R. Co., (S. Dak. 1897) 72 N. W. Rep. 577, holding that the refusal of a continuance was reversible error.

3. "Name, residence and occupation of the affiant and of the witness" must be stated, "unless the name of the witness is not known, in which case the affiant shall state such facts, if possible, as will establish the identity and existence of the witness." Rule No. XXIX, subd. 1, of the circuit court (6th Jud. Cir.). See further, as to statement of name and residence of witness, *supra*, note 1, p. 334.

4. Who may Make Affidavit. — "Motions for a continuance on account of the absence of witnesses, in all cases, civil or criminal, must be based upon the affidavit of the party, his agent or attorney, except in criminal cases where the defendant is confined in jail, when the affidavit may be made by any person knowing the facts." Rule No. XXIX of the circuit court (6th Jud. Cir.).

That the material facts which it is expected to be proven by said witnesses, and each of them, is as follows (*statement of facts expected to be proved*).[1] Affiant further says, that he believes the aforesaid

1. Facts Expected to be Proved. — The affidavit must state "the material facts which it is expected to prove by said witness." Rule No. XXIX, subd. 2, of the circuit court (6th Jud. Cir.). See also *supra*, note 7, p. 335.

The affidavit continued as follows:

"David Fitzgerald had the sole charge of the construction of said railroad during the time the plaintiff alleges he worked upon section 101 thereof and had personal charge of the construction of the line of railroad from Edgemont, Fall River county, to Pennington, Lawrence county, South Dakota, from on or about the 15th day of April, 1890, until the completion thereof, and that said David Fitzgerald knows and can prove that the firm of John Fitzgerald & Brother is not now and was not on the 31st day of November, 1890, indebted to the said A. H. Fitch, in any sum whatever under the said contract under which the said plaintiff alleges he was employed to and did perform labor and that the said A. H. Fitch total value of labor done under his said alleged contract was $37,047.10, and no more, and that the total amount paid by said John Fitzgerald & Brother to the said A. H. Fitch and accepted and received by said A. H. Fitch upon his said contract was the sum of $41,085,06, and that there is now and was on the 1st day of December, 1890, due and owing from the said A. H. Fitch to the said John Fitzgerald & Brother the sum of $4,037.96.

That Charles McGlave is now, and was during all the time during which the plaintiff alleges he was at work on section 101, the general bookkeeper of John Fitzgerald & Brother, and as such had general charge of all the books of original entry, receipts, vouchers, dates of payment, and payments made by John Fitzgerald & Brother aforesaid to the said A. H. Fitch mentioned in plaintiff's complaint, and knows the fact and has the written and documentary evidence in his possession to prove and sustain that the total value of the work and labor performed by A. H. Fitch under his said contract was $37,047.10, and that the said John Fitzgerald & Brother paid to said Fitch and the said Fitch accepted upon his said contract from them the sum of $41,085,06, and that there is not now and was not on the 31st day of November, 1890, any sum due from said John Fitzgerald & Brother to the said A. H. Fitch upon his said alleged contract, and that in fact there was due and owing and is now due and owing and since the first day of December, 1890, has been due and owing from A. H. Fitch to John Fitzgerald & Brother the sum of $4,037.96.

That John J. Cagney was the local bookkeeper upon said line of railroad and assistant paymaster of John Fitzgerald & Brother during the season of 1890, and paid to said A. H. Fitch, upon his said contract, large sums of money and made the entries in the original books thereof.

That I. S. P. Weeks was the chief engineer, who had general charge and supervision of the construction of the entire line of said railroad hereinbefore mentioned, and that F. C. Tucker was the division engineer under said I. S. P. Weeks during the entire time of the construction of said railroad; that the contract under which the said A. H. Fitch is alleged by the plaintiffs to have constructed the railroad mentioned in the plaintiff's petition provides, among other things, as follows:

'It is also agreed that in case the engineer shall be of the opinion that any portion of the work is not progressing at such rate as to insure the completion of the work according to the contract, then, if he so elects, he is herewith invested with full power and authority, any supposed privilege of contractor or subcontractor to the contrary notwithstanding, to place such force of men and teams on said work as will in his judgment be desirable to the quick completion of said work, the expense of which so incurred shall be deducted from the amount to be paid to the contractor, or subcontractor.' And said contract under which said work is alleged to have been performed by A. H. Fitch contained among other provisions the following: 'The quantities and amounts of the several kinds of work performed under this contract shall be determined by the measurement and calculation of the engineer or his assistants acting under his direction, and the said engineer

facts to be true,[1] and that he knows of no other witnesses by whom such facts can be fully proven.[2] Affiant further says that he believes all the aforesaid facts to be true, and that if said witnesses were present, they will personally testify to the same. (*Diligence to obtain the witness or his testimony*).[3] That affiant believes that if this case be

shall have full power to reject or condemn any and all work which in his opinion does not conform to the spirit of this agreement. And it is expressly agreed by the parties of this contract that the measurement and determination of the quantities by said engineer or his assistants under his directions shall be final and conclusive upon both parties hereto, and that his decision, directions and determinations, in the execution of the work herein shall be binding and conclusive upon the parties.' That said engineers, Weeks and Tucker, will prove that the said A. H. Fitch did not complete his work in accordance with said contract, and that the said engineers, Weeks and Tucker, did elect that the said A. H. Fitch, in their opinion, was not progressing in such time as would insure the completion of said work according to the contract, and said engineers did elect and place upon said work men and teams, and E. O. Bailey kept time of the number of days and number of teams employed upon said work so contracted to be done by said A. H. Fitch, and that the total value of the said work and labor of the men and teams elected to be placed upon said work of said A. H. Fitch amounted to $15,941.45, and that the names of the men and the value of the labor performed upon the work undertaken to be completed by said A. H. Fitch is hereto attached, marked Exhibit *A*, from pages 12 to 25 inclusive; that the said Tucker and Weeks did determine the amount due under said contract of said A. H. Fitch and the value thereof in his final estimate, and that the amount and value thereof was paid and accepted by said A. H. Fitch, as aforesaid.

Affiant further says, that pages 2 to 11, inclusive, contain payments and advances made to said A. H. Fitch on his said contract, which is hereto attached and marked Exhibit *B*."

1. Facts Believed to be True. — "That affiant believes them to be true" must be stated. Rule No. XXIX, subd. 2, of the circuit court (6th Jud. Cir.). See also *supra*, note 2, p. 342.

2. No Other Witness to Same Facts. — The affidavit must state that the affiant "knows of no other witness by whom such facts can be fully proved." Rule No. XXIX, subd. 2, of the circuit court (6th Jud. Cir.). See also *supra*, note 2, p. 343.

3. Diligence to Obtain the Witness or his Testimony. — The affidavit must state "efforts constituting due diligence to obtain such witness or his testimony." Rule No. XXIX, subd. 3, of the circuit court (6th Jud. Cir.). See also *supra*, note 5, p. 339 *et seq*.

The affidavit continued as follows:

"Affiant further says, that on the 22d day of January, 1894, this cause was set for trial by said court upon the 8th day of February, 1894; that upon said 22d day of January, 1894, affiant advised his clients by letter directed to their home in Lincoln, Neb., and received in reply a letter hereto attached and marked Exhibit *C*, and made a part of this affidavit, and that thereafter to wit, on the 31st day of January, 1894, affiant received another letter from his said client in reference to the witness O. E. Bailey, which is hereto attached and marked Exhibit *D*, and hereby made a part of this affidavit; and that thereafter, to wit, on the 4th day of February, 1894, affiant received another letter in reference to witnesses in this case from his said clients, which is hereto attached and made a part of this affidavit and marked Exhibit *E*, and again on the 7th day of February, 1894, affiant received a telegram in reference to the witnesses in this case, from his said clients, which is hereto attached and marked Exhibit *F*, and hereby made a part of this affidavit. Affiant further says, that David Fitzgerald, Charles McGlave, I. S. P. Weeks and F. C. Tucker, are unavoidably detained as witnesses in the United States Circuit Court for the State of Nebraska, now in session in the city of Omaha, for that on the 5th day of February, 1894, the case of James Halley, who is the assignee of Chamberlain & Skinner, against John Fitzgerald & Brother for the sum of over $58,000 was commenced and that the said case is now in progress of trial; that said case arises and grows out of the construction of the line of railroad constructed by John Fitzgerald

postponed until the determination of the case in the *United States* Court at *Lincoln, Nebraska*, the said witnesses can be obtained in this court on behalf of the defendant.[1] (*Grounds for belief.*)[2] Wherefore affiant asks that this case be postponed until the trial of the case now pending in the *United States* Court is concluded, which will not exceed, in affiant's opinion and belief, *ten* days, and that affiant's witnesses will be present at said time, and that the case now being tried by Mr. *Van Cise* will be concluded by that time, and he and all the witnesses for the defendants will be ready to proceed with the trial of this case; that this application is not made for the purpose of

& Brother between Edgemont and Deadwood during 1890; that said case was originally brought in the Circuit Court of the Seventh Judicial Circuit of the State of South Dakota, subsequently removed to the United States Circuit Court of the District of South Dakota, and thereafter, and after all the testimony on part of the plaintiff was taken, dismissed by the plaintiff; that affiant was engaged as counsel for John Fitzgerald & Brother, therein and during the taking of plaintiff's testimony in the case, and that the witnesses, F. C. Tucker, I. S. P. Weeks, David Fitzgerald were present thereat; that affiant knows that the said defendants herein and for whom this affidavit is made do not desire a postponement of this case and that the witnesses on their behalf would now be present if they had not unavoidably been detained; that E. O. Bailey's mother died since this case was set for trial, as affiant is informed and believes; that the case now pending in the United States Court was set for trial, as affiant was informed, by N. K. Griggs, on the 4th day of February, 1894, unexpectedly, and that it was a great surprise to the defendants in said case; that the reason said Fitzgerald, McGlave, Cagney and Bailey's testimony was not taken was because they had agreed to be here personally and had in several cases heretofore tried, testified in Deadwood in like cases; that if F. C. Tucker and I. S. P. Weeks's testimony was not taken for the reason that since said case was set for trial they each said they would be here personally and have personally attended the trial of lien cases involving the same propositions in this city."

1. Expectation of Obtaining the Testimony. — See *supra*, note 8, p. 345.

2. Grounds for Belief. — The affidavit must state "facts showing reasonable grounds for the belief that the attendance of the witness or his testimony can be procured at the next term or at the time to which the continuance is asked." Rule No. XXIX, subd. 4, of the circuit court (6th Jud. Cir.). See also *supra*, note 3, p. 347.

The affidavit continued as follows:

"Affiant further says, that McGlave, Fitzgerald, Weeks and Tucker are now each personally attending the United States court at Omaha as witnesses in the aforesaid case, and affiant from his knowledge of said case believes the same will occupy in the trial thereof about two weeks, and that inasmuch as all said witnesses have agreed to attend the trial in this court and affiant knows that all the books, final estimates and vouchers used and growing out of the construction of said railroad are now in the custody of the said McGlave and Cagney, Weeks and Tucker for the purpose of being used as evidence in the case now being tried in said United States court, and for that reason are unable to be used at this time in the trial of this case. Affiant further says: that the said Bailey has not yet returned from his trip east occasioned by the death of his mother, who died since this case was set for trial and is unavoidably detained thereat, and unable to be here at this time, but from affiant's information and knowledge, inasmuch as he resides in Lincoln, affiant believes he can be obtained and will be here personally to testify in this case as soon as the case now pending in Omaha is determined. Affiant further says, that Edwin Van Cise, attorney for the defendant railroad companies, is now unavoidably detained at Hot Springs, South Dakota, in the trial of an important case thereat, and that said case and the trial thereof was set since this case was called and regularly set for trial. That this action is an action to foreclose a lien upon the railroad claimed or owned by the clients of the said Van Cise."

delay,[1] but that justice may be done in the premises.[2]

Henry Frawley.[3]

Subscribed and sworn to before me this *eighth* day of *February*, 1894.
(SEAL) *J. P. Laffey*, Notary Public.

TEXAS — CIVIL CASE — FIRST APPLICATION.

Form No. 6295.[4]

1. **Application Not Made for Delay.** — See *supra*, note 7, p. 347.

2. **Excuse for Delay in Making Application** — *In Civil Cases.* — "All motions for a continuance must be filed on or before the first day of the term and called up for hearing upon the preliminary call of the calendar, unless the cause of such continuance shall have arisen or come to the knowledge of the party subsequent thereto, in which case the motion shall be made as soon as practicable, and the affidavit must state the facts showing reasonable diligence and constituting an excuse for delay." Rule No. XXVII of the circuit court (6th Jud. Cir.).

"*In criminal actions* the motion for a continuance must be made as soon as practicable after issue of fact joined, and the affidavit must show that it is so made." Rule No. XXVIII of the circuit court (6th Jud. Cir.).

For a form of averment under a statutory provision similar to the foregoing rules, see the concluding part of Form No. 6289.

3. **Defendant's Affidavit.** — There was also filed a separate affidavit by the defendant, as follows:

"State of Nebraska, } ss.
County of Douglas. }

Affidavit of David Fitzgerald for continuance.

David Fitzgerald, being duly sworn on oath, deposes and says he is one of the defendants in the above entitled action; that one Edward O. Bailey is a material witness for the defendant in the trial of the above entitled action; that the defendants have not taken the deposition of the said Bailey for the reason that the aforesaid Bailey had agreed with defendants, and particularly with this affiant, to go to Deadwood, South Dakota, to attend court and testify in this case whenever the said case would be reached; that defendant relied upon his promise, and that Bailey would go to Deadwood and testify in the case were it not for the reason that said Bailey's mother died at Dayton, Ohio, last week. and the said Bailey was obliged to go on to Dayton, Ohio, to attend the funeral and look after his mother's estate; that the said Bailey was not aware until just before he left here that he would have to go on, and these defendants did not know until just before he started that he was going away; and that when he left here he promised these defendants to return just as soon as possible; and that he would in all probability be back within a week, but that these defendants, and particularly this affiant, have written and telegraphed said Bailey asking him to return at once, and since he went away the above entitled cause has been set for trial, but have received no reply from the said Bailey; that the said Bailey is the only witness who can testify as to the amount of time that plaintiff worked for Mr. Fitch; and that the testimony of the witness Bailey with reference to this point is vital and material to this case; that this affiant, one of the defendants, who is a material witness for the defendants in the above entitled action, will be unable to be present at the time the case is set for trial, for the reason that he is a party to a case now being tried in the United States court for the district of Nebraska; and that said case will last for some considerable time, just how long this affiant is unable to say, but probably for two or three weeks; and that defendants cannot go to trial in Deadwood without the testimony of this affiant; that this affidavit for a continuance is not made for the purpose of delay, but that the defendants may be able to present testimony vital to their interests, and that their rights may be protected.

David Fitzgerald.

Subscribed in my presence and sworn to before me this sixth day of February, 1894. W. L. Learned,
(SEAL) Notary Public."

4. **The statutory provision** regulating first applications for continuance in civil cases in the district and county courts is Tex. Rev. Stat. (1895), art. 1277.

(Precedent in Doll *v.* Mundine, 84 Tex. 317.)

[The State of *Texas*, County of *Lee*. } *District* Court, ——— Term, A. D. 1886.

W. W. Mundine, plaintiff, against *Eliza Doll et al.*, defendants.

The State of *Texas*, County of *Lee*. } ss.]

Now come the defendants in the above cause by their attorney,

Other Approved Forms. — In Bailey *v.* State, 26 Tex. App. 341, a proceeding for forfeiture of a bail bond, the following affidavit, omitting the caption, signature and jurat, was held sufficient:

"Now come the defendants, *S. M. Millhollan* in person, and *J. D. Lindley* by attorney, and say they cannot safely go to trial in this case at this term of the court, for the want of the testimony of the defendant, *J. D. Lindley*, *Eli Lindley* and *Batt Millhollan*, all of whom reside in *Hopkins* county, *Texas*, and each of whom is and are material witnesses for the defendants in this case; and defendants say they have used due diligence to procure the testimony of each of said witnesses, *Eli Lindley* and *Millhollan*; that both of said witnesses have been in attendance upon this court during the present term thereof, and the witness *Batt Millhollan* was in attendance upon this court on yesterday or the day before. Defendants say that, since the last term of this court and before the present term of this court, and a few days after the service of the writ of scire facias upon these defendants, they caused to be issued a subpœna by the clerk of this court for said witnesses, *Eli Lindley* and *Batt Millhollan*, in due form of law; that said subpœnas were served on each of said witnesses by the sheriff and deputy sheriff of this county before the present term of this court. They say that said subpœna has not been returned into court, or, if so, has not been found by the defendants at all. The defendant *S. M. Millhollan* says that he saw defendant *J. D. Lindley* on last night, and that said *J. D. Lindley* was sick in bed, and is not able to be in attendance upon this court today; that he, *J. D. Lindley*, lives about ten miles from the court-house of this county, and is a material witness in this case for this defendant, *S. M. Millhollan*. Premises considered, this defendant asks for himself, and for and in behalf of the defendant *J. D. Lindley*, that this cause be continued until the next term of this court. This defendant herewith annexes and makes a part of this showing the certificate of the physician, *Doctor B. Worcham*, showing the sickness of *J. D. Lindley*."

The following is the body of an affidavit which was held sufficient in Cleveland *v.* Cole, 65 Tex. 403:

"Now come the defendants in the above cause, and say that they cannot safely go to trial at this term of the court, for want of the testimony of *A. Tidwell*, who resides in *San Jacinto* county, *Texas*; that the testimony of that witness is material for their defense; that they have used due diligence to procure the same in that they caused a subpœna to be issued by the clerk of the district court of *San Jacinto* county, on *October 3*, 1885, and executed by serving, by the proper officer, to wit, the sheriff of *San Jacinto* county, upon that witness, on *October 31*, 1885, which subpœna, with the officer's return thereon, is hereto attached, marked Exhibit *A* and made part hereof; that they expect to procure the testimony of the witness by the next term of the court; that there are no other witnesses known to defendants by whom the same facts can now be proved on this trial."

In Texas Transp. Co. *v.* Hyatt, 54 Tex. 214, the affidavit, omitting formal parts, was as follows:

"Now comes the defendant, and says it cannot go safely to trial at this term of the court, because of the absence of testimony material to its cause, to wit, the absence of the witnesses *J. W. Goodwin* and *S. W. Allen*. Affiant states that it has used due diligence to procure the testimony of these witnesses, in that it caused a subpœna to be issued for said witnesses out of the

Charles J. Stubbs, and show to the court, that they cannot go safely to trial at the present term of this honorable court for the want of testimony material[1] to their defense, viz., that of *John H. Mundine*, *I. Douglass*, *R. M. Dickson*, *Dr. H. Bain*, *Thomas Douglass*, *Mr. Hardcastle*, *Dr. W. S. Johnson*, *A. H. Gladdish*, *John Caplen*, *R. H. Flannigan*, *Mrs. W. Rowland*, *Mrs. Wilson*, *George Guthrie*, *Mrs. J. W. Schive*, and *Robert V. Guthrie*, all of whom reside in *Lee* County, except *A. H. Gladdish* and *John Caplen*; and also *D. C. Cunningham*, a resident of *Galveston* County, *Texas*. That defendants have used due diligence[2] to procure the testimony of said witnesses (except *Cunningham*), by causing a subpœna to be issued out of this court on the *4th* day of *November*, 1*889*, summoning all said persons except the said *Cunningham*, which subpœna went into the hands of the sheriff of *Lee* County on the *4th* day of *November*, 1*889*, and was executed as to *John Mundine*, *I. Douglass*, *R. M. Dickson*, *Dr. H. Bain*, *Thomas H. Douglass*, *Mr. Hardcastle*, *R. H. Flannigan*, *Mrs. W. Rowland*, *Mrs. Wilson*, *George Guthrie*, *Mrs. J. W. Schive*, *Robert*

district court of *Harris* county, on the *11th* day of *October*, 1877, and the same was placed in the hands of the sheriff of *Harris* county, *Texas*, by whom it is returned on the *29th* day of *October*, 1877, 'served on all said witnesses except *Charles Pearce*,' to which subpœna now on file among the papers of this cause reference is had for greater certainty. That said witnesses reside in *Harris* county, *Texas*, and that this defendant expects to procure their testimony by the next term of this court; that they are not absent by the procurement or consent of this defendant, and this application is not made for delay, but that justice may be done, and that their testimony is material to the defense of this cause.

E. W. Cave, Agent.

Sworn to and subscribed before me, this *12th* day of *November*, 1877.

J. Burke, Jr., Clerk *D. C. H.* Co."

In reversing the judgment for refusal to grant a continuance on the foregoing affidavit the court said: "The further question is presented whether defendant, seeking a first continuance, failed to show diligence in that it failed to show a tender of their fees to the absent witnesses. The court in signing the bill of exceptions refers to the case of Bryce *v.* Jones, 38 Tex. 205. In that case it was made to appear by counter affidavits that the case had been regularly reached on the preceding day, when the absence of the witnesses became known, and at the request of plaintiffs the case was put off until the next day. The court held that the plaintiffs should have resorted to an attachment, and not having placed themselves in a condition to do so by tendering the witnesses their fees, they were wanting in diligence. The facts of that case were peculiar, and the *decision* does not necessarily involve the rule that in ordinary cases a first application for a continuance must show that the witness fees were tendered. It is not believed that such a rule has heretofore prevailed in practice, and in our opinion the court erred in enforcing it. The application for a continuance was sufficient and it was error to refuse it."

Forms of Affidavits Held Insufficient. — See Missouri Pac. R. Co. *v.* Aiken, 71 Tex. 373; Bryce *v.* Jones, 38 Tex. 205; Texas, etc., R. Co. *v.* Hall, 83 Tex. 675; Falls Land, etc., Co. *v.* Chisholm, 71 Tex. 523.

1. Materiality of Testimony. — The affidavit must state that the absent testimony is "material." Tex. Rev. Stat. (1895), § 1277. For want of that averment in McGehee *v.* Minter, (Tex. Civ. App. 1894) 25 S. W. Rep. 718, it was held that the motion was properly overruled. See also *supra*, note on p. 338.

2. Due Diligence. — The affidavit must state that "due diligence has been used to procure" the absent testimony. Tex. Rev. Stat. (1895), § 1277. See also *supra*, note 5, p. 339.

"It is not sufficient to state the diligence without also stating that it was due or sufficient diligence." St. Louis, etc., R. Co. *v.* Woolum, 84 Tex. 570, holding that it is not obligatory on the court to grant a continuance if the averment is omitted.

V. Guthrie, and *Dr. W. Johnson*, duly served, and not executed as to *A. H. Gladdish* and *Caplen*, all of which will appear from the said process, which is hereby referred to, together with the returns thereon, as a part hereof.[1]

That said *Cunningham* is also an important and material witness[2] and a party to this suit, whose deposition has not been taken, because he expected and intended to be present at the trial of the cause; but since the service of the citation herein he has been taken sick, and is still sick and unable either to travel or submit to having his deposition taken; and he is affected with partial paralysis, and was so taken ill about *November 2*, 1889. * * *

Wherefore defendants ask the court that the cause is continued to the next term of this honorable court.

Charles J. Stubbs,
Attorney in fact for *Elizabeth Doll et al.*[3]

Sworn to and subscribed to before me this the *6th* day of *November*, 1886.

(SEAL) *J. J. Dardin*, District Clerk.

TEXAS — CIVIL CASE — SECOND OR SUBSEQUENT APPLICATION.[4]

Form No. 6296.[5]

(*Title of court and cause, and venue as in Form No. 6295.*)

1. Statement of Diligence. — The affidavit must state the diligence used to procure the testimony. Tex. Rev. Stat. (1895), § 1277; Missouri Pac. R. Co. *v.* Aiken, 71 Tex. 373, giving the full form of an affidavit pronounced insufficient and holding that facts must be stated, and not mere legal conclusions. See also *supra*, note 5, p. 339.

In Tittle *v.* Vanleer, (Tex. Civ. App. 1894) 27 S. W. Rep. 736, the affidavit alleged that a subpœna had been issued and placed in the hands of the sheriff on the day preceding the application, but did not show when and by whom the subpœna had been served, stating only "which subpœna has been served." It was held that the affidavit should have stated the date of the service in order that it might appear that the witness had been subpœnaed in time to enable him to be in attendance upon the trial. To the same effect see Brown *v.* Abilene Nat. Bank, 70 Tex. 750, and the same principle was applied in Gulf, etc., R. Co. *v.* Wheat, 68 Tex. 133.

In the following cases the statement of diligence was held not to disclose sufficient diligence: East Dallas *v.* Barksdale, 83 Tex. 117; Texas, etc., R. Co. *v.* Hall, 83 Tex. 675; Falls Land, etc., Co. *v.* Chisholm, 71 Tex. 523; Missouri Pac. R. Co. *v.* Shuford, 72 Tex. 165; Campbell *v.* McCoy, 3 Tex. Civ. App. 298; International, etc., R. Co. *v.* Ragsdale, 67 Tex. 24; Texas, etc., R. Co. *v.* Hardin, 62 Tex. 367. In Blum *v.* Bassett, 67 Tex. 194, the affidavit was held sufficient.

2. See *supra*, note 1, p. 400.

3. Affidavit by Attorney in Fact. — Tex. Rev. Stat. (1895), art. 5, provides that "whenever at the commencement or during the progress of any civil suit or judicial proceeding it may be necessary or proper for any party thereto to make an affidavit, such affidavit may be made by either the party or his agent or attorney." "The clear meaning of this provision of the law," said the court in this case, "is to confer upon the attorney the same right to make an affidavit during the progress of a cause that the law confers upon his client."

4. The code provisions governing second or subsequent applications for continuance are to be found in Tex. Rev. Stat. (1895), art. 1278.

5. This form slightly modifies the precedent in Prewitt *v.* Everett, 10 Tex. 283, to make it conform more accurately to the code provisions now in force.

In Dillingham *v.* Ellis, 86 Tex. 447, the affidavit was held to be in strict compliance with the statute and the refusal of a continuance reversible error.

Now comes the defendant and says that he cannot safely go to trial without the evidence of *Joel Hughes*,[1] which is material to his defense;[2] that he expects to prove by said witness that plaintiff only charged defendant *one hundred* dollars for services in favor of defendant against *J. P. Hughes*; defendant also expects to prove by said witness the indebtedness of the plaintiff to the defendant as charged in his answer.

The defendant has used due diligence[3] to procure the testimony of said witness in that he (*Here state the diligence used*).[3] Defendant knows not the cause of the absence of the said witness, unless it is the sickness of his family. Defendant knows the wife of said witness was sick and unable to sit up last *Tuesday* morning.[3] Defendant says that he expects to procure the testimony of the said witness at the next term of this court,[4] that the same testimony cannot be obtained from any other source,[5] that the said *Hughes* resides in *Cass* county, *Texas*,[6] and that this continuance is not sought for delay only, but that justice may be done.[7] (*Signature and jurat as in Form No. 6295.*)

TEXAS — CRIMINAL CASE — FIRST APPLICATION.[8]

Form No. 6297.

(Precedent in Dinkens *v.* State, 42 Tex. 250.)[9]

The State of Texas }
v. } Now comes the accused in the above styled cause, and moves the court for a continuance,
Louis Dinkens. } because he says that he cannot go safely to

1. The name of the witness must be stated. Tex. Rev. Stat. (1895), art. 1278. See also *supra*, note 1, p. 334.

2. Statement of Expected Testimony and Materiality Thereof.— The affidavit must state that the absent testimony "is material, showing the materiality thereof" and what the applicant expects to prove by the absent witness. Tex. Rev. Stat. (1895), art. 1278. See also *supra*, note 7, p. 335 *et seq.*

In Owen *v.* Cibolo Creek Mill, etc., Co., (Tex. Civ. App. 1897) 43 S. W. Rep. 297, it was not sufficiently shown that the testimony was material. And in Merchant *v.* Bowyer, 3 Tex. Civ. App. 367, the affidavit was held insufficient because it did not set forth the evidence of the witness.

3. Diligence to Procure the Testimony. — The affidavit must state that the applicant "has used due diligence to procure [the absent] testimony, stating such diligence, and the cause of failure if known." Excepting the last clause of the foregoing quotation, it is identical with the showing required for a first continuance as exemplified in Form No. 6295, *supra*. In Little *v.* State, 75 Tex. 616, the diligence shown was held insufficient.

4. Expectation of Procuring Testimony. — See *supra*, note 8, p. 345.

5. Same Testimony Not Elsewhere Obtainable. — The affidavit must state that the absent testimony "cannot be obtained from any other source." Tex. Rev. Stat. (1895), art. 1278. See also *supra*, note 2, p. 343.

For want of that averment an affidavit for a third continuance was held insufficient in Rowland *v.* Wright, 64 Tex. 261.

6. The residence of the witness must be stated. Tex. Rev. Stat. (1895), art. 1278. See also *supra*, note 1, p. 334.

7. Application Not Made for Delay Only. — The affidavit must "state that the continuance is not sought for delay only, but that justice may be done." Tex. Rev. Stat. (1895), art. 1278. See also *supra*, note 7, p. 347.

8. The Statutory Provisions. — First applications for a continuance on behalf of the defendant in a criminal case are governed by Tex. Code Crim. Proc. (1895), art. 597, cited in the following notes.

9. The defendant had been committed by a magistrate on a charge of horse-stealing. He was subsequently indicted, and it was held reversible error

trial at this term of the court for the want of the evidence of *Fayett Gibbs*, who resides in *Walker* county, in the state of *Texas*,[1] and who is a material witness for him; that on the same day that the indictment was filed[2] in said cause, to wit, the *13th* of *October*, 1874, he made, by his counsel, application for an attachment to *Walker* county for said witness, and placed the same in the hands of *M. M. Cone*, *Deputy Sheriff* of *Grimes* county, with request to serve the same immediately; that said attachment has not been returned to this court;[3] that said defendant expects to prove by said witness,

when the case was called for trial to refuse an application for continuance on this affidavit.

Forms Held Insufficient. — See Shanks *v.* State, 25 Tex. Supp. 328; Murry *v.* State, 1 Tex. App. 175.

Another precedent of the first application by defendant may be found in Beach *v.* State, 32 Tex. Crim. Rep. 241, which, omitting the formal parts, was as follows: "Now at this term of the court comes the defendant, *Lute Beach*, in the above styled and numbered cause, and says he cannot go safely to trial at this term of the court, for the want of the testimony of *John Thompson*. That said witness resides in *Erath* county, *Texas*, in the neighborhood of the town of *Duffan*, in said county. That the defendant expects to prove by said witness, *John Thompson*, that he, *Thompson*, was with the defendant on the night of the *31st* day of *October*, A. D. 1888, in the town of *Stephenville*, the time and place where the defendant is charged with having carried a pistol in the indictment in this case, and that he will prove by said witness that he, the witness, was with defendant just a few minutes before the defendant was supposed to have been seen with the pistol; and that said witness will testify that the defendant had no pistol, but had a bottle of whiskey in his pocket, and that the witness saw the defendant drop the bottle of whiskey out of his pocket, and that afterward the witness picked said bottle up, and knows and will testify that it was not a pistol, but was a bottle of whiskey. That these facts have come to the knowledge of the defendant since the commencing of this court. The diligence used to procure the attendance of said witness is this: That on the *5th* day of *December*, A. D. 1888, the defendant caused to be issued, out of the county court of *Erath* county, a subpœna for the said *Thompson*, and placed said subpœna in the hands of *N. J. Shand*, sheriff of *Erath* county, on said last named date; that said subpœna is hereto attached and made a part hereof; that said subpœna has not been served by reason of the inclemency of the weather That the witness is not absent by the procurement or consent of the defendant. That the application is not made for delay. That there is no reasonable expectation that the attendance of said witness can be procured during the present term of the court, by a postponement of the trial to some future day of said term."

Another approved form in Austin *v.* State, 42 Tex. 346, would not now be available without amendment, as it fails to conform to the requirements of the statutory provisions now in force.

1. Residence of Witness. — Tex. Code Crim. Proc. (1895), art. 597, subd. 1, requires that the affidavit shall state "the name of the witness and his residence if known, or that his residence is not known." See also *supra*, note 1, p. 334.

2. The defendant had employed counsel before indictment found, and the trial court erroneously held that he should have prepared for trial before the presentation of an indictment.

3. Diligence to Procure the Testimony. — "The affidavit must state the diligence which has been used to procure his attendance, and it shall not be considered sufficient diligence to have caused to be issued or to have applied for a subpœna, in cases where the law authorizes the issuance of an attachment." Tex. Code Crim. Proc. (1895), art. 597, subd. 2. In this case the trial was in Grimes county and the witness resided in Walker county. In such cases, viz., where the witness resides in another county, an attachment may be issued for him without previously serving him with a subpœna. Tex. Code Crim. Proc. (1895), art. 525. Where the witness resides in the county in which the trial is had, there must be disobedience of a subpœna before an attach-

that one *Phil. Blue* had the horse charged to have been stolen by the accused, in the possession of the said *Blue*, and that *Blue* invited the accused to ride behind him, and told the accused that the horse belonged to him, and that the said *Phil. Blue* placed said horse in the possession of the accused, and directed the accused to ride the horse up to the house of *J. T. Wilkinson*, who resides in *Walker* county, and ask if they might stay all night, which he did; that said witness had been with the accused all the day preceding this occurrence, and the part of the night that had elapsed before he met the said *Blue*, and that up to that time the accused had nothing to do with said horse; that the horse was taken out of the possession of the accused by the aforesaid *J. T. Wilkinson* at his house, and was not in the possession of the accused more than ten minutes; that the accused had been pulling fodder for Mr. *Estien* in *Grimes* county, near the line of *Grimes* and *Walker* counties, and was on his way home to his father's home, who resides near *Huntsville*, in *Walker* county, when he accepted the invitation of the said *Phil. Blue* to ride behind him, the said Blue going in the direction of *Huntsville*.[1] Affiant further says that the above facts are true.*

The said witness is not absent by the procurement or consent of the accused,[2] and this application for a continuance is not made for delay.[3] [Affiant further says that there is no reasonable expectation that attendance of the said *Fayett Gibbs* can be secured during the present term of the court by a postponement of the trial to some future day of said term.][4]

his
Louis × *Dinkens.*
mark

(*Jurat as in Form No. 6295.*)[5]

ment can issue, and no averment relative to an attachment is necessary. Tex. Code Crim. Proc. (1895), art. 524. A precedent of this kind is exhibited *supra*, note on p. 403, in the case of Beach *v.* State, 32 Tex. Crim. Rep. 241.

It is not sufficient to state in general terms that the applicant has used due diligence; he must state what acts of diligence he has done. Tanner *v.* State, (Tex. Crim. App. 1898) 44 S. W. Rep. 489. See also *supra*, note 5, p. 339.

1. Statement of Expected Testimony and Materiality Thereof. — The affidavit must state "the facts which are expected to be proved by the witness, and it must appear to the court that they are material." Tex. Code Crim. Proc. (1895), art. 597, subd. 3. See also *supra*, note 7, p. 335.

2. Witness Not Absent by Procurement, etc. — The affidavit must state "that the witness is not absent by the procurement or consent of the defendant." Tex. Code Crim. Proc. (1895), art. 597, subd. 4. See also *supra*, note 5, p. 345.

An affidavit stating that the witness was not absent by the "fraud of the defendant" was held an insufficient compliance with the foregoing provision. Bresnan *v.* People, (Tex. Crim. App. 1897) 43 S. W. Rep. 111.

3. Application Not Made for Delay. — The affidavit must state "that the application is not made for delay." Tex. Code Crim. Proc. (1895), art. 597, subd. 5. See also *supra*, note 7, p. 347.

4. Necessity for Continuance Over the Term. — The averment in brackets is required by Tex. Code Crim. Proc. (1895), art. 597, subd. 6.

5. Jurat. — There was no jurat in the report of the case, but Tex. Code Crim. Proc. (1895), art. 599, provides that "all applications for continuance on the part of the defendant must be sworn to by himself."

TEXAS — CRIMINAL CASE — SECOND OR SUBSEQUENT APPLICATION.

Form No. 6298.[1]

(*Commencing as in Form No. 6297, and continuing down to* *). That the same testimony cannot be procured from any other source known to the affiant,[2] and that the affiant has reasonable expectation of procuring the same at the next term of the court[3] (*concluding as in Form No. 6297*).

6. For Absence of Documents.[4]

Form No. 6299.

(*Title of court and cause, and venue and commencement.*)[5] That certain papers and documents, material to their defense in this cause, are now in the hands of *Antonio M. Mico*, who resides at and whose post-office address is *San Blais, Mexico*, and among the said papers and documents the defendants specify the following: (1) The original denouncement of the mine of *New Almaden* and the judicial possession given of the same in the year 1845. (2) The confirmation of said denouncement and possession by the supreme government of *Mexico* in the year 1846, and prior to the late declaration of war by the *United States* against the republic of *Mexico*. (3) The original grant of land, including said mining possession, made by the supreme government of *Mexico* (prior to the declaration of war as aforesaid) to the owners of said mine. (4) The original documents showing the ownership of said mine and land in the parties from whom the defendants derive title; and the defendants verily believe that the land ferred to in said papers and documents is the same land as that upon which the pretended trespass is alleged in plaintiff's complaint to have been committed. And the defendants further say that they have exercised all due diligence to procure the said papers and documents at the present term of this court, by writing on the *twentieth* day of *November*, 1850, to the said *Antonio M. Mico* at *San Blais, Mexico*, who holds them, but to this date the defendants have not

1. Applications for continuance on the part of the defendant subsequent to the first must be supported by an affidavit stating in addition to what is required in first applications, as shown in Form No. 6298, the facts specified in the following notes. Tex. Code Crim. Proc. (1895), art. 598.

2. **Testimony Not Elsewhere Obtainable.** — The affidavit must state "that the testimony cannot be procured from any other source known to the defendant." Tex. Code Crim. Proc. (1895), art. 598, subd. 1. See also *supra*, note 2, p. 343.

3. **Expectation of Procuring Testimony.** — The affidavit must state "that the defendant has reasonable expectation of procuring the same at the next term of the court." Tex. Code Crim. Proc. (1895), art. 598, subd. 2. See also *supra*, note 8, p. 345, note 3, p. 347.

In Tanner *v.* State, (Tex. Crim. App. 1898) 44 S. W. Rep. 489, the affidavit stated that the applicant expected to procure the attendance of the witness at a subsequent term because the witness was under indictment in the same county in a local option case. "It is questionable," said the court, "whether this fact would justify the assertion in his application of his expectation. It might suggest the contrary."

4. **As a Ground for Continuance.** — See, generally, article CONTINUANCES, 4 Encycl. of Pl. and Pr. 849, 880.

5. **For title of court and cause,** and venue and commencement of affidavits for continuances, generally, see Forms Nos. 6272 to 6297, *supra*.

received them, this delay having been caused, as defendants verily believe, by the failure of the mail steamers running from *Panama* to *San Francisco* to touch, as heretofore has been their custom, at the port of *San Blais* in *Mexico*, from which place the defendants have expected, and still expect, to receive said papers.[1]

And the defendants further aver that the said papers and documents for which they have sent as aforesaid, and which they are daily expecting to receive, are absolutely necessary to them in the above entitled cause, and that they cannot proceed with the trial of the cause without said papers and documents; that they expect and believe they can procure the same by the next term of this court; and that this application is not made for delay, but that justice may be done.

(*Signature and jurat.*)[2]

7. On Account of Another Suit Pending.

GARNISHMENT PROCEEDINGS PENDING IN ANOTHER STATE.[3]

Form No. 6300.

(*Title of court and cause, and venue ana commencement*)[4] that heretofore, to wit, on the *third* day of *January*, in the year 1*898*, *John Jones* commenced an action of debt against the said *John Doe*, the plaintiff herein, for the sum of *one thousand* dollars and damages, in the *District* Court, in the state of *Nevada*, and duly prosecuted his said claim to final judgment, which sum is largely in excess of the amount sought to be recovered by said plaintiff herein, to wit, *five hundred* dollars in excess thereof; that on the *tenth* day of *March*, in the year 1*898*, and before the commencement of this action, a writ of garnishment was, at the instance and in the name of the said *John Jones*, duly issued, according to the laws of the said

1. This form is a slight modification of an affidavit used in an ejectment case in *California*, which is quoted in U. S. *v.* Castillero, 2 Black (U. S.) 37.

In some of the states there is no express statutory provision or rule of court concerning affidavits for continuance on account of the absence of documentary evidence. In other states affidavits for continuance on this ground are regulated in the same section of the statute which prescribes the requisites of affidavits for continuance on account of an absent witness. It is believed that this form not only meets the requirements of any local unwritten rule of practice, but also complies with any of the statutory provisions just mentioned. The practitioner will observe that it shows: (1) The materiality of the evidence, describing it, (2) Where the evidence is believed to be, (3) Diligent efforts to obtain it, (4) The supposed reason for failure to obtain it, (5) Reasonable expectation that it will be procured by the next term, (6) That the application is not made for delay.

The forms of affidavits for continuance on account of an absent witness (Forms Nos. 6272 to 6298), and the notes thereto, should also be consulted for local statutory provisions, if any there be, which apply to all affidavits for continuance; as, for instance, that the affidavit must state an excuse for not making an earlier application.

2. Signature and jurat of affidavits for continuances, generally, see Forms Nos. 6292 to 6297, *supra*.

3. As a Ground for Continuance. — See 1 Encyc. of Pl. and Pr. 767.

4. For title of court and cause and venue and commencement of affidavits for continuances, generally, see Forms Nos. 6272 to 6297, *supra*.

state of *Nevada*, to wit (*Here plead the statute authorizing the proceeding*), commanding this defendant to appear in said court on the ——— day of *March*, in the year 1898, and answer under oath what he was at that time indebted to the said *John Doe*, the defendant in said proceedings and the plaintiff herein; that this defendant did so appear as he was commanded to do in and by said writ of garnishment, and did make statement under oath in said court as by said writ he was required to do, that he was indebted to the said *John Doe* in the sum of *five hundred* dollars, which is the same debt sought to be recovered by the said *John Doe* in this action, and no other; that said writ of garnishment was duly issued according to the laws of said state, providing that (*Here state the due performance of the conditions precedent to the issuance of the writ*), and was duly served on this defendant before the return day thereof, and was duly returned to said court, and that said debt, due from this defendant to the said *John Doe* as aforesaid, was then and there placed in the custody of the law; that said garnishment and attachment proceedings are still pending and undetermined in the said court of the said state; and that this application is not made for delay, but that justice may be done. (*Signature and jurat.*)[1]

8. For Surprise at Trial.[2]

a. By Amendment of Pleadings.[3]

Form No. 6301.

(*Title of court, cause and venue as in Form No. 6285.*)

1. **Signature and jurat of** affidavits for continuances, generally, see Forms Nos. 6272 to 6297, *supra*.

2. **For Surprise at Trial.** — The motion should be made promptly and supported by affidavit. 4 Encycl. of Pl. and Pr. 863 *et seq*.

3. **At common law,** it was conclusively presumed that the defendant in any suit was surprised and unprepared for trial whenever the declaration was amended in any material particular, and the cause had to be continued, if the defendant desired it, without any affidavit therefor. Chicago, etc., R. Co. *v.* Goyette, 32 Ill. App. 576; Illinois Mut. F. Ins. Co. *v.* Marseilles Mfg. Co., 6 Ill. 236; Hawks *v.* Lands, 8 Ill. 227; Schnertzel *v.* Purcell, 1 Cranch (C. C.) 246.

By statute, in many of the states, the amendment of pleadings does not warrant a continuance, unless the court is satisfied by affidavit, or otherwise, that the adverse party cannot be ready for trial in consequence of the amendment.

Arkansas. — Sand. & H. Dig. (1894), § 5774.

Iowa. — Anno. Code (1897), § 3602.

Kansas. — Gen. Stat. (1897), c. 95, § 142.

Kentucky. — Code Civ. Proc. (1888), § 136.

Missouri. — Burns' Anno. Pr. Code (1896), § 503.

Nebraska. — Comp. Stat. (1897), § 5738.

Ohio. — Bates' Anno. Stat. (1897), § 5117.

In *Georgia*, "When any amendment shall be made to pleadings or other proceedings in the cause, if the opposite party will make oath, or his counsel state in his place, that he is surprised by such amendment, and that he is less prepared for trial, and how, than he would have been if such amendment had not been made, and that such surprise is not claimed for the purpose of delay, the case may be continued in the discretion of the judge, and charged to the amending party." Code (1895), § 5128. See for a case of reversible error in refusing to allow a continuance Central R., etc., Co. *v.* Jackson, 94 Ga. 630.

In *Indiana*, "No cause shall be delayed by reason of an amendment ex-

Richard Wolfe,[1] being first duly sworn, on oath says that he is the defendant in the above entitled cause; that on the trial the plaintiff,

cepting only the time to make up issues, but upon good cause shown by affidavit of the party or his agent asking such delay;" and "the affidavit shall show distinctly in what respect the party asking the delay has been prejudiced in his preparation for trial by the amendment." Horner's Stat. (1896), §§ 394, 395.

In Danley *v.* Scanlan, 116 Ind. 10, the substance of an affidavit for a continuance by the defendant is set forth, which was held a sufficient showing of surprise on account of an amendment of the complaint on the trial, and judgment was reversed for refusal to allow a continuance.

Necessity for Affidavit. — When the statute positively requires an affidavit, a motion for continuance without an affidavit will be overruled. Chicago, etc., R. Co. *v.* Stein, 75 Ill. 41; Lindsey *v.* Lindsey, 40 Ill. App. 389; Clause *v.* Bullock Printing Press Co., 20 Ill. App. 113. And an offer to make and file an affidavit, without actually doing so, is not enough. Ryan *v.* People, 62 Ill. App. 355.

Discretion of Court. — Even if the affidavit is formally sufficient, the refusal of a continuance will not constitute error where it appears that there was no abuse of discretion. Chicago, etc., R. Co. *v.* Goyette, 32 Ill. App. 577.

For numerous cases where the refusal of a continuance was sustained, and others where it caused a reversal of the judgment on appeal, see 4 Encycl. of Pl. and Pr. 836 *et seq.*

Surprise. — The affidavit must show that the party was taken by surprise by the amendment. Keltenbaugh *v.* St. Louis, etc., R. Co., 34 Mo. App. 151; Ledbetter *v.* McWilliams, 90 Ga. 44; Atlanta Cotton-Seed Oil Mills *v.* Coffey, 80 Ga. 145; Peters *v.* West, 70 Ga. 343. And that the amendment makes it necessary to produce evidence which would not have been required if the amendment had not been made. Fisk *v.* Miller, 13 Tex. 225.

Hence an amended pleading which states only facts which could reasonably have been anticipated from the pleadings as they before stood is not a ground for continuance. Lamb *v.* Beaumont Temperance Hall Co., 2 Tex. Civ. App. 289; Texas, etc., R. Co. *v.* Neal, (Tex. Civ. App. 1895) 33 S. W. Rep. 693; Wilcox *v.* American Sav. Bank, 21 Colo. 348; Jones *v.* Henderson, 49 Ga. 170; Wilson Coal, etc., Co. *v.* Hall, etc., Woodworking Mach. Co., 97 Ga. 330; Constitution Pub. Co. *v.* Way, 94 Ga. 120; Lewis *v.* Bracken, 97 Ga. 337; Pifer *v.* Stanley, 57 Mo. App. 516; Cozzens *v.* Chicago Hydraulic Press Brick Co., 166 Ill. 213.

And if there are several allegations in the amendment the affidavit must point out which allegation the applicant regards as introducing new matter. Lamb *v.* Beaumont Temperance Hall Co., 2 Tex. Civ. App. 289.

On the other hand, justifiable ignorance of an important amendment until the trial demands a continuance on proper application. Central R., etc., Co. *v.* Jackson, 94 Ga. 640. Or new matter pleaded on the eve of trial. Galveston, etc., R. Co. *v.* Smith, 9 Tex. Civ. App. 450. Or on the trial. Vale *v.* Trader, 5 Kan. App. 307.

Meritorious Defense. — The defendant's affidavit for continuance must show that he has a meritorious defense. Though the statutes are silent on this point, the courts enforce the rule. Keltenbaugh *v.* St. Louis, etc., R. Co., 34 Mo. App. 151; Mills *v.* Bland, 76 Ill. 381; Cummings *v.* Rice, 9 Tex. 527. And if the affidavit is evasive on this point it will not sustain the motion. Ravenswood Bank *v.* Hamilton, (W. Va. 1897) 27 S. E. Rep. 296, where the insufficient affidavit is set forth verbatim. And it must appear that he has a meritorious defense to the claim shown by the amendment as well as by the original pleading. Colhoun *v.* Crawford, 50 Mo. 458.

Materiality of Expected Evidence. — In Storch *v.* McCain, 85 Cal. 307, it was held that upon a motion for continuance on the ground of absence of evidence to meet the issues raised by the amendment the affidavit must show the materiality of the evidence expected to be obtained and that due diligence has been used to obtain it.

1. **The form in the text** is suggested by the affidavit set forth in Wolfe *v.* Johnson, 152 Ill. 283, which was held insufficient, but is herein modified and expanded in some essential particulars.

It is here assumed that the action is trespass on the case to recover damages under section 9 of the Dram-shop

by leave of court, amended the declaration filed herein by filing an additional count which the defendant believes and is advised by his counsel makes a substantially different case from that made by the original declaration, and that in consequence thereof the defendant is unprepared to proceed to and with the trial of the cause at this term; that it is alleged in the additional count that *James Wolfe* kept a dram-shop with the knowledge of this defendant on *July 1st*, 1890, and then sold intoxicating liquors to the plaintiff's husband; that until such additional count was filed the defendant supposed that the plaintiff intended to produce testimony only to prove that the defendant was the keeper of the dram-shop and sold said liquors to her husband, all of which the defendant denies; that if the fact alleged in the additional count had been alleged in the original declaration the defendant could and would produce *James Wolfe*, who would testify that he did not sell or give any kind of intoxicating liquors whatsoever to the plaintiff's husband on *July 1st*, 1890, nor at any other time before or since that date;[1] and the defendant believes that

act (Rev. Stat. Ill., c. 43), the plaintiff's declaration alleging that on July 1st, 1890, the defendant, Richard Wolfe, was the keeper of a dram-shop, and being such keeper, sold intoxicating liquors to the plaintiff's husband and caused him to become intoxicated, whereby, etc. The defendant files a general denial. On the trial the plaintiff is allowed to amend his declaration by filing an additional count charging that one James Wolfe was the keeper of a dram-shop, and being such keeper sold intoxicating liquors to the plaintiff's husband on July 1st, 1890, thereby causing him to become intoxicated; that the defendant was then the owner of the building in which such dram-shop was kept; that he had knowledge that a dram-shop was kept in said building and that intoxicating liquors were sold therein; and that he permitted the said James Wolfe to keep said dram-shop and sell intoxicating liquors therein; and that in consequence of such intoxication so as above produced in her husband the latter assaulted, beat and bruised her, etc., and that the defendant was liable to her as such owner. Whereupon the defendant moves for a continuance and files his affidavit as herein set forth.

In Illinois, in common-law actions, "no amendment shall be cause for continuance unless the party affected thereby or his agent or attorney shall make affidavit that in consequence thereof he is unprepared to proceed to or with the trial of the cause at that term, stating in such affidavit what particular fact or facts the party expects to prove by such evidence and that he verily believes that if the cause is continued he will be able to procure the same by the next term of the court." Starr & C. Anno. Stat. Ill. (1896), p. 3001, par. 26. See also as to affidavit for continuance on account of amendment of pleadings in chancery Starr & C. Anno. Stat. Ill. (1896), p. 589, par. 37.

1. **The particular facts** which the applicant expects to prove must be set forth. Cassem *v.* Galvin, 158 Ill. 34; Evans *v.* Marden, 154 Ill. 446.

Insufficient Form, and Comments of Court. — In Mills *v.* Bland, 76 Ill. 381, upon amendment of the declaration the defendant moved for a continuance upon an affidavit as follows: "Erastus W. Mills, being duly sworn, upon his oath says he is one of the defendants in the above entitled cause and that he is not prepared to proceed to trial on account of the amendments at this term and believes he will be ready at the next term." The court said: "The affidavit fails to show that the defendants had any defense whatever upon the merits to the action or that they were taken by surprise by the amendment made to the declaration. The affidavit in order to authorize a continuance of the cause should have contained facts from which the court could have seen that by reason of the amendment made the defendants were not then ready for trial and that at another term of court a meritorious defense could have been interposed to the plaintiff's cause of action."

said facts are true. The defendant says that said *James Wolfe* is now in the city of *New York*, and was not present at the trial because the defendant did not know that his testimony would become material under the issues made by the pleadings; and the defendant verily believes that if this cause is continued he will be able to procure the testimony of said *Wolfe* to the facts as above stated by the next term of this court. (*Signature and jurat as in Form No. 6285.*)

b. By Suppression of Deposition.

Form No. 6302.

(Precedent in Grigsby *v.* May, 57 Tex. 256.)

D. B. Grigsby et al.,
No. *2262.*
vs.
W. H. Bowles et al.

Now come the plaintiffs in the above entitled cause and move the court to [permit them to withdraw their announcement of ready, and to][1] grant them a continuance of this cause as to the defendant *M. A. May*, because the court has, upon the verbal motion of defendant, excluded the depositions of *Lucinda Madden* and *D. H. Edens*, for the reason that plaintiffs are unable to make proof of service upon said defendant of notice of filing interrogatories upon which said depositions were taken; plaintiffs aver that they cannot go to trial without the said depositions; that plaintiffs claim the land in controversy herein as the heirs of their mother, *Louisa Edens*, formerly *Louisa Grigsby*; that in order to establish their title to said land it is necessary for them to show that said land was a part of the community estate of their said mother and her former husband, *John Grigsby*, and also to show that they are the children of their said mother, and the number of children that their said mother had; that by said depositions they have fully proved how many children their said mother had; that they are the children of said *Louisa Edens*, formerly *Grigsby*; that she is dead, and that the land in controversy was a part of the community estate of their said mother; that they know of no other witnesses by whom they can prove these facts; that they caused these said depositions to be taken for the purpose of proving these facts; that after filing the interrogatories upon which said depositions were taken, and long before the issuance of the commission to take said depositions, plaintiffs had a precept regularly prepared and issued by the clerk of this court and directed to the sheriff or any constable of *Dallas* county, commanding him to notify the said defendant, who is, and was then, a resident of *Dallas* county, *Texas*, that said interrogatories had been filed and that said depositions would be taken; that immediately upon its issuance said precept was placed in the hands of some proper officer to be by him served, but what officer plaintiffs do not now remember; that plaintiffs had made diligent search for said precept, but the same cannot now be found;

1. Where the statute does not, as in *Texas*, require announcement of ready for trial, the words in brackets should be omitted.

that plaintiffs do not know of any one by whom they can prove the fact of the service of said precept; that no motion has ever been filed by said defendant to suppress said depositions for want of such notice, although said depositions have been on file among the papers of this cause since the *first* day of *November*, A. D. 1879; that plaintiff had no notice before the commencement of this trial that defendant would object to said depositions on account of a want of such notice, and plaintiffs have been surprised by the ruling of the court in requiring plaintiffs to make proof of such notice, and in sustaining the verbal motion of defendant to exclude said depositions for want of said proof of said notice. Plaintiffs aver that the said *Lucinda Madden* and *D. H. Edens* are now, and have been since the institution of this suit, residents of *Houston* county, *Texas*, and are not now in *Dallas* county; that plaintiffs will have the testimony of said witnesses by the next term of this court; that this application for a continuance is not made for delay, but that justice may be done. This application is made and sworn to by *Jeff. Word, Jr.*, and *Richard Morgan*, attorneys for plaintiffs, because the said plaintiffs are not present. They do not reside in *Dallas* county, and are not now in *Dallas* county.[1]

Jeff. Word, Jr.
Richard Morgan.

Sworn to and subscribed before me,
H. W. Jones, Clerk *District* Court, *Dallas* Co.

c. By Forged Written Evidence.

Form No. 6303.

(Precedent in Hastings *v.* Hastings, 31 Cal. 96.)[2]

[In the *Superior* Court of the county of *Solano*, state of *California*.]

S. C. Hastings, plaintiff,
against
D. N. Hastings, defendant. } Affidavit for Continuance.

State of *California*, }
County of *Solano*. } ss.][3]

L. B. Mizner, being duly sworn, says that he is the attorney for the plaintiff in the above entitled action, and that since trial of said

1. The supreme court said: "There was error in the action of the court in sustaining an oral objection to the depositions, for which the judgment must be reversed. The court also erred in overruling the motion of plaintiffs to withdraw the announcement of readiness for trial and continue the case based upon the erroneous ruling above stated. The depositions had been on file over two years and no objection was made to the same until offered in evidence on the trial. Under the circumstances the plaintiff could well claim that they had been taken by surprise, and as the affidavit for continuance showed the materiality of the evidence and was otherwise sufficient the motion should have been sustained."

For another case of surprise by the suppression of depositions see Moore *v.* Smith, 88 Ky. 151.

2. The case was tried before the court, a jury having been waived. It was held that a continuance on this affidavit was a proper exercise of discretion.

3. The words to be supplied in [ ] are not found in the reported case, but have been added to render the form complete.

action [1] he has discovered that the pretended receipt offered in evidence in said case, purporting to have been signed by said *S. C. Hastings* in favor of said *D. N. Hastings* for *one thousand and eighty* dollars, was in fact signed by said *S. C. Hastings* for *Lloyd Tevis*, and that the name "*Lloyd Tevis*" has been removed from said receipt without, as this deponent believes, the consent of said *S. C. Hastings* or *Tevis*, and that said fact, or at least some word or words, or name, has or have been removed from said receipt in fraud of and to the prejudice of said *Hastings* in this action, and that the same appears upon the face of said receipt; that this deponent had never seen said receipt until it was produced in the trial of this case yesterday, and that no copy of said receipt appears in the pleadings or was ever served upon the deponent or the said plaintiff, to the best of deponent's information and belief; that deponent objected to the introduction of said receipt on the ground that the same had been altered. Whereupon deponent asks that this case be reserved for further consideration until the next regular term of the court; that this application is not made for delay but that justice may be done.

L. B. Mizner.

Subscribed and sworn to before me this *19th* day of *May*, 1865.

W. J. Costigan,
Deputy Clerk.

9. Additional or Amended Affidavit.[2]

Form No. 6304.

(Precedent in Bryce *v.* Jones, 38 Tex. 206.)[3]

[(*Title of court, cause and venue as in Form No. 6295.*)][4]

With leave of court, now come plaintiffs and say, that on yesterday, since *12* o'clock, one of the plaintiffs, *W. M. Bryce*, went to the residence of the said witness, *A. P. Swisher*, for the purpose of securing his attendance, so that there might not be a failure of trial in consequence of his absence, and for the purpose of tendering said witness his fees, and requesting said witness to be present upon the

1. The court held, however, that although the judge had orally announced his decision, the case had not been tried to a legal intent, since the decision itself had not been entered in the minutes, or reduced to writing by the judge, and signed by him and filed with the clerk, as the statute required.

2. **When Allowable.** — See 4 Encycl. of Pl. and Pr. 875.

3. **The original and counter affidavits** are set forth in Form No. 6308, and the note to that form.

The showing for a continuance by the original and amended affidavits was held to be insufficient for the reason that the plaintiff who demanded the witness should have resorted to an attachment after obtaining the postponement on the preceding day. But the precedent is instructive in that it illustrates the possible utility of an additional or amended affidavit in supplying details relating to diligence used which may not have been stated with sufficient fullness in the original affidavit. See also State *v.* Evans, 1 Overt. (Tenn.) 216; Lucas *v.* Sevier, 1 Overt. (Tenn.) 105; McNealley *v.* State, (Wyoming, 1894) 36 Pac. Rep. 824; Petty *v.* State, 4 Lea (Tenn.) 326; Com. *v.* Hourigan, 89 Ky. 305.

4. The words and figures enclosed by [ ] are not found in the reported case, but have been added to complete the form.

trial of this cause when called this morning. Plaintiff further states, that the said *Swisher* was not at home when the said *Bryce* went to see him yesterday, and could not be found. Plaintiff further states, that the said *Swisher* did, on *Friday* last, the *thirty-first* day of *March*, 1871, during the term of this court, and before this case was ever reached or called, promise plaintiff that he would not fail to be present and testify as commanded to do by the subpœnas served upon him as aforesaid. Plaintiffs state that the said *Bryce* remained at the residence of the said *Swisher* until after dark on yesterday, waiting for him to return home, but said *Swisher* did not come. Plaintiff would further state, that he left word with the said *Swisher's* wife to tell the said *Swisher* to be certain to be in attendance upon the court by *9* o'clock *A.* M. of today. Plaintiffs would further represent that the said *Swisher* resides about ten miles from this place. Plaintiffs deny that they ever agreed to try this case absolutely on today; but the postponement was merely for the purpose of having their attorney present to attend to the case when called. [(*Jurat as in Form No. 6295.*)][1]

W. M. Bryce.

IV. CERTIFICATE OF PHYSICIAN.[2]

Form No. 6305.

(Precedent in State *v.* Maddox, 117 Mo. 680.)[3]

Ely, Mo., September 5, 1892.

This is to certify that I waited upon the wife of *Morgan Maddox* the night of *August 25*, 1892, and that abortion took place about *twelve* o'clock of said night. She had a severe chill and temperature rose

1. The words and figures enclosed by [ ] are not found in the reported case, but have been added to complete the form.

2. The court is not bound to grant a continuance on the certificate of a physician. Waarich *v.* Winter, 33 Ill. App. 36. And in Randall *v.* United L., etc., Ins. Assoc., (Super. Ct.) 14 N. Y. Supp. 631, the certificate was disregarded because it was not verified.

Not a Substitute for Affidavit. — An unverified certificate of a physician cannot be accepted in lieu of an affidavit which is required in ordinary cases. Harlow *v.* Warren, 38 Kan. 480, where it is suggested that the affidavit of the physician would have been sufficient.

3. This certificate was presented in connection with the affidavit for a continuance by the defendant in a criminal case on account of the absence of a material witness, the affidavit alleging that she was too sick to attend court. The affidavit is in Form No. 6291.

Preceding the certificate as set forth in the opinion the court said: "It was admitted and conceded by the prosecuting attorney that the certificate was in the genuine and proper handwriting of Dr. Mattox, and that at the date it was given Dr. Mattox was a regularly practicing physician in good standing near Ely, Marion county, Missouri."

In commenting upon the certificate and affidavit the court said: "Her [the wife's] condition was fully corroborated by her physician's certificate. The only possible suggestion that can be made against the sufficiency of this affidavit is that the physician's certificate does not say she was too ill to have her deposition taken, but the affidavit does, and the physician's certificate discloses a condition in which the court as well as an expert could see the defendant's wife ordinarily would be in no condition to stand the excitement of the examination and cross-examination in a trial involving the liberty of her husband."

to *one hundred and five* degrees, pulse *one hundred and fifty*, with delirium, showing all the symptoms of septicæmia, resulting from the absorption of putrid fœtus and its membranes, and I should not think it would be safe for her, under the most favorable circumstances, to leave her room under *six* weeks from the time the abortion took place.

S. Mattox, M. D.

V. STIPULATION FOR CONTINUANCE.

1. In General.

Form No. 6306.

(Precedent in Alton *v.* Gilmanton, 2 N. H. 520.)[1]

Town of Alton
v.
Town of Gilmanton.
} *February* Term, 1822.

The parties agree that this action shall stand continued. The plaintiff agrees to abandon the first and last articles in the account, and the defendant agrees to waive all objections to the notice[1] and service of the notice and form of the plaintiff's writ.

Neh. Eastman, for Plaintiff.
Stephen Moody, for Defendant.

2. In Justice's Court.

Form No. 6307.

(Precedent in DeMott *v.* Taylor, 51 N. J. L. 308.)[2]

To Justice *Schor*.

It is hereby stipulated between the said plaintiff and the said defendant that this case stands adjourned to *Friday, December 16th*, 1887, at *2 P.* M., at Justice *Schor's* office, in *Leonia*, and without prejudice to either party.

William Taylor, plaintiff.
Henry J. DeMott, defendant.

Dated *December* ———, 1887.

VI. COUNTER AFFIDAVITS.[3]

1. The action was assumpsit for relief furnished to a pauper, and the notice referred to in the stipulation was the statutory notice of supplies furnished, which is a condition precedent to liability. The stipulation was executed in court, and it was held that the waiver contained therein was binding.

2. Another Precedent. — In Johnson *v.* Hagberg, 48 Minn. 221, will be found the following stipulation for a continuance in a justice's court:

(*Title.*) "The parties to this action hereby stipulate and agree that this action be adjourned from *April tenth* to *April fourteenth*, 1891, at *two* o'clock *p.* m., with consent to both parties to file their pleadings on said last mentioned day.

Dated *April 7th*, 1881.

T. F. O'Hair, Plff's Atty.
J. Bohmbach, Deft's Atty."

3. Admissibility of Counter Affidavits — *In the Absence of Statutes or Rules of Court.* — In the case furnishing this precedent the court said: "In the case of Hyde *v.* State, 16 Tex. 453, Mr. Justice Wheeler elaborately reviewed

Form No. 6308.

(Precedent in Bryce *v.* Jones, 38 Tex. 205.)[1]

the authorities and laid down the rule that counter affidavits are admissible to disprove due diligence. We have long felt the necessity of the application of this rule in second and subsequent applications under our statute. If the affidavit for continuance remains uncontradicted, it forces the court to a continuance of the cause where the suspicion of bad faith and want of diligence is irresistible."

To the extent indicated in the foregoing quotation it is believed that the weight of authority favors the admission of counter affidavits. State *v.* Murdy, 81 Iowa 603; State *v.* McCoy, 111 Mo. 517.

Other cases go further and hold that "although it is not in general admissible to file counter affidavits controverting the truth of the application for a continuance, * * * yet where the counter affidavit is made by the witness mentioned in the application, then the counter affidavit may be received to controvert the truth of allegations made in the application respecting the affiant witness." State *v.* Hilsabeck, 35 Tex. Crim. Rep. 525. See also Wilkins *v.* State, (Tex. Crim. App. 1896) 132 Mo. 348.

In State *v.* Good, 132 Mo. 114, it was said that counter affidavits "are not permitted to controvert the truth of the allegations made by the applicant for a continuance as to what the testimony of the witnesses would be, and this seems to be the general rule where counter affidavits are allowed, except where fraud or imposition is suggested, or there is good reason to believe the object is delay." See also Cunneen *v.* State, 95 Ga. 330; Wells *v.* Com., (Ky. 1890) 13 S. W. Rep. 915; Bowling *v.* Whatley, 53 Ga. 24.

In McClurg *v.* Inglehart, (Ky. 1895) 33 S. W. Rep. 80, the court said: "The rule of practice seems to be that, where the affidavit is in reference to absent witnesses, setting forth fully and with certainty what he expects to prove by them, giving their names and showing diligence, that then this cannot be controverted by counter affidavits; and this rule is stated because, it is said, the code has specifically pointed out the particular manner by which one desiring a trial can obtain the same against such affidavit, and that is by admitting that the witnesses, if present, would testify as stated by the applicant; and that, the code having specifically done this, it means that the matter as to the ground of continuance is no longer in the discretion of the court."

Some cases seem to discountenance the use of counter affidavits altogether. Petit *v.* State, 135 Ind. 393; Eslinger *v.* East, 100 Ind. 434; State *v.* Simien, 30 La. Ann. 296; State *v.* Abshire, 47 La. Ann. 542; Price *v.* People, 131 Ill. 231. But, as was said in Waarich *v.* Winter, 33 Ill. App. 36, after holding that the trial court erred in allowing counter affidavits to be read: "Such error will not constitute ground for reversal where the affidavits for continuance are not sufficient. In such case the counter affidavits will not be regarded as inducing the refusal of the continuance."

Where Continuance is Sought for Absence of Party. — See *supra*, note on p. 329.

The allowance of counter affidavits or a counter showing to an application for continuance is regulated by statute or rule of court in some jurisdictions.

Arkansas. — Sand. & H. Dig. (1894), § 5797.

Georgia. — 2 Code (1895), § 966.

Iowa. — Anno. Code (1897), § 3668.

Maine. — Rules Supreme Jud. Ct., No. 15.

Massachusetts. — Rules of Pr. at Com. L., No. 11 (104 Mass. 558).

Montana. — Rules Dist. Ct. (4th Jud. Dist.), No. 12.

New Mexico. — Comp. Laws (1884), § 2052.

North Carolina. — Code Civ. Proc., § 402; as *amended* Acts (1885), c. 394.

Ohio. — Rules Ct. Com. Pl., No. 19*a*, adopted Oct. 1, 1891.

South Dakota. — Rules Cir. Ct. (6th Jud. Cir.), No. 30.

Texas. — Code Crim. Proc. (1895), arts. 601, 602.

1. In this case there was filed the original affidavit set forth in the next note but one, this counter affidavit (the precedent set out in the text, Form No. 6308), and the additional or amended affidavit set out in Form No. 6304.

[(*Title of court and cause, and venue as in Form No. 6295.*)][1]

And now comes the defendant *Moore*, who resists the application for continuance made by plaintiffs[2] on account of the absence of the witness, *Swisher*, and says that this cause was regularly reached in its call upon the docket yesterday at *12* o'clock; this witness was then absent and in contempt of the court, and this within the knowledge of the plaintiff, *Bryce*, and his attorney, *J. D. Sayers*; that said case was postponed upon request by plaintiff till *9* o'clock this morning; that it was the duty of plaintiff to take other and different modes of compelling the attendance of said witness, instead of relying upon said subpœna or order to continue said cause. That said witness resides about *ten* miles from the court-house, so this defendant is informed and believes. [(*Signature and jurat as in Form No. 6295.*)][1]

VII. ORDER OF CONTINUANCE.[3]

ORDER FOR CONTINUANCF IN CRIMINAL CASE, AND REMAND OF PRISONER.

Form No. 6309.

(Precedent in McKay *v.* State, 12 Mo. 493.)

State of Missouri
vs.
Burt McKay and Hugh Gillespie.
} Indictment for *Grand Larceny.*

And now upon the motion of the attorney for the State, this

1. The matter enclosed by [ ] is not found in the reported case, but added to complete the form.

2. **The application alluded to** was made upon an affidavit which, omitting the formal parts, was as follows: "Now come plaintiffs and say, that they cannot go safely to trial of this cause for the want of the testimony of *A. P. Swisher*, a witness for plaintiffs, who resides in the said county of *Bastrop* and State of *Texas*. Plaintiffs would further represent that the testimony of said *Swisher* is material to the case to aid plaintiffs in the maintenance of their suit. Plaintiffs would further represent that they have used due diligence to procure the attendance and testimony of the said *Swisher*, in this, that they caused subpœnas to be issued for the said *Swisher*, and served upon him at the following dates, to wit: *April 23*, 1869; *December 14*, 1869; *March 22*, 1871; said subpœnas being on file and made a part of this affidavit and hereto attached; and that the said witness has been in attendance at every term of said court up to the present term of the same. Plaintiffs would further state that the said *Swisher* is not absent with the consent or at the contrivance of plaintiffs, and that they expect to procure his attendance at the next term of this court. Plaintiffs would further state that they do not know why the said *Swisher* is not in attendance; that this their first application for a continuance is not made for delay; wherefore plaintiffs pray that this cause be continued until the next term of this court."

3. **Order Continuing Cause by Consent.** — In Tucker *v.* St. Louis, etc., R. Co., 54 Mo. 179, the order, omitting the formal parts, was as follows: "Now at this day appear the parties by their respective attorneys, and by consent this cause is continued to the *December adjourned* term (*4th* day, No. *162.*)"

Order for Continuance in Civil Case, and for Payment of Costs. — In Connett *v.* Hamilton, 16 Mo. 445, the order, omitting the formal parts, was as follows:

"And now here come the said parties by their attorneys, and on motion of the said plaintiff it is ordered that this cause be continued until the next term of this court and that the said plaintiff pay the costs of the present term of this court."

Order Continuing Cause to Perfect Service. — In Baker *v.* Thompson, 75 Ga.

cause is continued to the next term of this court, and upon the motion of the attorney for said defendants, it is ordered by the court, that said defendants, *Burt McKay* and *Hugh Gillespie*, be remanded to the common jail of *St. Louis* County, and that the Sheriff of *Jefferson* County convey the bodies of the said defendants to the said county of *St. Louis*, and there deliver them to the keeper of said common jail of said county of *St. Louis*.

VIII. ORDER SETTING ASIDE ORDER FOR CONTINUANCE.[1]

Form No. 6310.

(Precedent in McKay *v.* State, 12 Mo. 494.)[2]

State
v.
McKay and Gillespie.

And now it is here considered by the court that the order of con-

165, the order, omitting the formal parts, was as follows: "There having been no service of defendant in this case, or waiver of service, upon motion of plaintiff's counsel, it is ordered that said case be continued until the next term of this court."

Order for Continuance After Submission to Jury. — In Jackson *v.* State, 51 Ga. 403, the order, omitting the formal parts, was as follows:

"It appearing to the court that *James Bass*, who was qualified as a juror in this case, served upon the grand jury which found the true bill, it is, upon motion of the solicitor-general, ordered by the court that the case be withheld from consideration by the jury, and continued for trial."

Order for Continuance in Criminal Case. — In Jumpertz *v.* People, 21 Ill. 375, the order, omitting the formal parts, was as follows:

"And now on this day came the said People by *Carlos Haven*, their artorney, and on his motion it is ordered that this cause be continued to next term."

In Kibler *v.* Com., (Va. 1897) 26 S. E. Rep. 859, the order, omitting the formal parts, was as follows: "This cause is continued until the *5th* day of *May*, 18*96* (it being the *eighth* day of next term of the court for the commonwealth), the attorney for the commonwealth being physically unable to proceed with the case, and six witnesses who have been summoned for the prosecution failing to appear, and the importance of five of them being known to the commonwealth's attorney, as stated by him in open court."

Order Continuing Criminal Case on Stipulation. — In Kibler *v.* Com., (Va. 1897) 26 S. E. Rep. 859, the order, omitting the formal parts, was as follows: "By agreement of counsel this case is continued to the *March* term, 18*96*, of this court, the commonwealth's attorney of *Page* county being absent and engaged in public service in the General Assembly of *Virginia*, now in session."

1. Affidavit resisting motion to set aside continuance as given in McKay *v.* State, 12 Mo. 494, omitting the formal parts, was as follows:

"This day personally appeared in open court, *A. P. Field*, who being duly sworn, deposes and says that he is the only counsel employed to defend the above persons, that he is in possession of the facts of their case; that their cases have been continued until the next term; that they were set for trial on *Tuesday*; he further states that he is employed in several important criminal cases in the *St. Louis Criminal* Court, some of them where he is the only counsel, several of them set for trial on tomorrow, which compels him to leave this morning for *St. Louis*; he further states that for the last *two* days he has been laboring under severe indisposition, so much so that he is entirely unable by reason of said indisposition to attend to the defense of said *McKay* and *Gillespie*, and that for the reasons aforesaid, as well as others, he objects to the setting aside the continuance.

A. P. Field.

Sworn to and subscribed in open court, *November 30th*, 18*48*.

T. H. Alford, Clerk."

2. On the second day of the regular term this case had been continued until

tinuance [and the order of transmission of said defendants to the common jail of *St. Louis* county][1] made herein, be set aside,[2] and said cause is set for trial on the *18th* day of *December* next, and it is ordered that said defendants and their counsel be notified thereof.[3]

IX. ADJOURNMENTS.

1. In General.

ORDER OF ADJOURNMENT OF TERM AND CONTINUANCE OF UNFINISHED BUSINESS.

Form No. 6311.

the next regular term, upon the application of the state. Three days thereafter, upon application of the state, resisted by counsel for the prisoner, the order of continuance was set aside and the cause set for the 18th of December as stated in the text, that date being the commencement of an adjourned term. For this "unsound exercise of judicial discretion," a judgment of conviction was reversed and a new trial granted.

Notice of the Motion. — In Marsh *v.* Morse, 18 Mo. 477, as also in the case cited in the text, the party moving to set aside the order of continuance gave the opposite party notice of the motion. And in Newell *v.* Clodfelter, 3 Ill. App. 259, reasonable notice to the opposite party or his solicitor of an intended application to set aside an order of continuance was held to be indispensable. To the same point see Papin *v.* Buckingham, 33 Mo. 456.

1. If the order be made in a civil case, omit the words in brackets.

2. Power to Set Aside Order. — There is no doubt that during the term of court at which an application for continuance is granted the court may for sufficient cause vacate or set aside the order at the instance of either party. Marsh *v.* Morse, 18 Mo. 477; Lamont *v.* Williams, 43 Kan. 558; State *v.* Plowman, 28 Kan. 569; Chase *v.* People, 2 Colo. 513; Hunt *v.* Listenberger, (Ind. 1895) 42 N. E. Rep. 240. Even where the continuance was granted by consent of the parties. Gray *v.* Ulrich, 8 Kan. 112. And unless the record on appeal shows the grounds upon which the action of the court was based, it will be presumed that they were sufficient. Amory *v.* Reilly, 9 Ind. 490.

As an Exercise of Discretion. — Although the action of the court in the matter is largely discretionary, Gridley *v.* Capen, 72 Ill. 12, and will not be disturbed by the appellate court where the record does not show that the party complaining was in any way injured, Barner *v.* Bayless, 134 Ind. 605; Callahan *v.* State, 30 Tex, 488, it is "ordinarily * * * improper after a case has been continued to set aside the continuance and dispose of the case in the absence of one party and on the application and in favor of the other." Gray *v.* Ulrich, 8 Kan. 112, where, however, it was said that the appellate court would probably be constrained to let a judgment rendered under such circumstances stand until at least application had been made to the court in which it was rendered to vacate it. Mattoon *v.* Hinkley, 33 Ill. 209; McKee *v.* Ludwig, 30 Ill. 28; Taff *v.* Westerman, 39 Mo. 413.

Objection and Exception. — A party claiming to be prejudiced by an order vacating a continuance should object to the same and take an exception to the action of the court, else the objection will be considered as waived. Gridley *v.* Capen, 72 Ill. 11. See also Callahan *v.* State, 30 Tex. 488.

3. Notice of Order Vacating Continuance. — When a party procures a continuance, and at his instance the court enters an order vacating the same, the opposite party "should be served with an authentic copy of the order. It would be dangerous to trust to rumor, or any other source of information than a service of a copy of the order, to affect a party with notice that the continuance has been set aside. He then could appear and show cause why a trial should not be held at that time." Marsh *v.* Morse, 18 Mo. 478, granting a new trial because the party complaining had no formal notice.

(Precedent in State *v.* Ross, 118 Mo. 41.)[1]

Ordered by the court that all business pending and undisposed of be, and the same is hereby, continued until the next regular term of this court, and the court adjourned until court in course.

George Houck,
Special Judge for *March* Term, 1893.

2. Directing Clerk to Adjourn.

a. Generally.

Form No. 6312.

(Precedent in Smith *v.* State, 4 Neb. 284.)[2]

Fremont, Sept. 8, 1875.

At the request of the attorneys of *Buffalo* county, I hereby adjourn the *district* court of *Buffalo* county until the *2d Monday* of next *December*.

Samuel Maxwell, Judge.

b. By Mail.

Form No. 6313.

(Precedent in State *v.* Holmes, 56 Iowa 589.)[3]

Owing to the inability of the undersigned to reach the county seat in time to open court today, it is therefore hereby ordered that the *District* Court for *Winneshiek* county be and the same is hereby adjourned until *Thursday*, the *10th* day of *March*, 1881, at *9* o'clock *A.* M.

Dated *March 9*, 1881.

E. E. Cooley, Judge *District* Court,
10th Judicial District, *Iowa*.

1. Order Continuing Unfinished Business. — In Lamb *v.* State, 73 Ga. 588, is found the following order: "There being a number of cases on the common law, equity, motion, certiorari, claim and criminal dockets of *Taylor Superior* Court that have not been reached and disposed of during the present term for want of time, it is ordered that all cases on any of the dockets of said court that have not been reached and disposed of be continued until the next term of this court."

2. This order was sent to the clerk five days before the time appointed by law for the court to be held. It was held that the adjournment by the clerk pursuant to the order was effectual, although the order would have been in better form if it had specially designated the September term as the one which the order was intended to affect. The statute relating to adjournments in vacation provided that "If the judge is sick, or for any other sufficient cause is unable to attend court, at the regularly appointed time, he may by a written order direct an adjournment to a particular day therein specified, and the clerk shall on the first day of the term, or as soon thereafter as he receives the order, adjourn the court as therein directed." It was furthermore held that the order need not disclose the cause for adjournment, and this view is supported by State *v.* Pate, 40 La. Ann. 748, a case exactly in point.

3. See *infra*, note 1, p. 420.

c. By Telegram.

Form No. 6314.

(Precedent in State *v.* Holmes, 56 Iowa 589.)[1]

Calmar, Iowa, March 9th, 1881.

To *M. M. Harden*, Clerk — I have made and sent you a written order adjourning court until tomorrow morning, *nine* o'clock. Adjourn it accordingly.

E. E. Cooley, Judge.

3. Justice's Docket Entry.

Form No. 6315.

(Precedent in Anderson *v.* Southern Minnesota R. Co., 21 Minn. 30.)[2]

By consent of the parties, the case is adjourned until *Monday, September 23*, 1873, at *one* o'clock in the *after*noon.

1. This telegram was received by the clerk at half past three o'clock p. m. on March 9th, which was the third day of the term, and a few minutes before five o'clock p. m. of the same day he adjourned the court until March 10th at nine o'clock a. m. At a quarter past six o'clock p. m. of March 9th the clerk received by mail the order set forth in Form No. 6313, *supra*. It was held that the adjournment upon receipt of the telegram was a lawful adjournment on a "written order" under the following statutory provision: "If the judge does not appear by five o'clock of the third day * * * the court shall stand adjourned till the next regular term. If the judge is sick, or for any other sufficient cause is unable to attend court at the regularly appointed time, he may, by a written order, direct an adjournment to a particular day therein specified, and the clerk shall, on the first day of the term, or as soon thereafter as he receives the order, adjourn the court as therein directed."

2. This was held a sufficient compliance with the statute requiring an entry on the docket of "every adjournment, stating to what time and place."

CONTRACT LABOR LAW.

By Charles E. Harris.

I. Action for Penalty, 421.
II. Criminal Prosecution, 424.

CROSS-REFERENCES.

For Forms relating to Exclusion of Chinese Laborers, see the title EXCLUSION OF CHINESE LABORERS.
For matters of Substantive Law, see the title CONTRACT LABOR LAW, 7 American and English Encyclopædia of Law (2d ed.), p. 83.

I. ACTION FOR PENALTY.[1]

Form No. 6316.[2]

The *Circuit* Court of the United States of America for the District of *Massachusetts*.

The United States of America against *Charles E. Symonds.* } At Law. No. *212.* Plaintiff's Declaration.

First count: And the plaintiff says that during the month of *July*, in the year 1893, in a foreign country, to wit, in the city of *Sheffield*, in *England*, the defendant did make and enter into a contract[3] with one *William Henry Bownes*, said *Bownes* being then and there an alien and a foreigner[4] and said contract being substantially in the terms following,[5] to wit, that if the said *Bownes* would agree to migrate and come to *Salem*, in the United States of America and *common-*

1. **For the formal parts** of a complaint or petition in a particular jurisdiction consult the title Complaints, vol. 4, p. 1019. For the formal parts of a declaration consult the title Declarations.

2. *United States.* — 23 Stat. at Large, p. 332, c. 164, §§ 1, 3; Rev. Stat. (Supp. 1891), p. 479, c. 164, §§ 1, 3.

See insufficient declarations for penalties under this statute in U. S. *v.* Gay, 80 Fed. Rep. 255; Moller *v.* U. S., 57 Fed. Rep. 491.

3. **Contract Before Immigration.** — The declaration must allege that previous to the immigrant's becoming a resident of the United States he entered into a contract to perform labor or service here. Moller *v.* U. S., 57 Fed. Rep. 490; U. S. *v.* Craig, 28 Fed. Rep. 795. And the contract or agreement must be an enforceable contract, either express or implied. U. S. *v.* Edgar, 45 Fed. Rep. 44.

4. **Immigrant an Alien.** — The statute is directed only against alien immigrants, and, consequently, alien residents when returning after a temporary absence in a foreign country are not within its purview. *In re* Maiola, 67 Fed. Rep. 114; *In re* Martorelli, 63 Fed. Rep. 437; *In re* Panzara, 51 Fed. Rep. 275.

5. **Terms of Contract.** — In an action under this statute, a declaration is insufficient which fails to show, at least in substance, the terms of the contract.

wealth of *Massachusetts*, and to perform manual work and labor, to wit, the work of a *blacksmith*,[1] in said *Salem*, for said defendant, he, the said defendant, would pay the said *Bownes* for said work and labor the sum of *twelve* dollars per *week*, and would also prepay the transportation or passage money of said *Bownes* from said *England* to said United States. And said *Bownes* did, at said *Sheffield*, at the time aforesaid, accept said offer of said defendant, and did then and there promise said defendant to come to said *Salem* and there to perform work and labor for said defendant in accordance with the said defendant's said offer to him, said *Bownes*.

And the plaintiff further says that thereafter, to wit, in the month of *August* in said year, said *Bownes* did, in pursuance and performance of said contract, actually migrate[2] and come from said *England* into said United States, to wit, to said *Salem*, and did, at said *Salem*, perform work and labor for the defendant in accordance with the terms of said contract.

And the plaintiff further says that before, by and after the making of said contract as aforesaid the defendant did knowingly encourage and solicit the said *Bownes* to migrate and come into the said United States, and did knowingly encourage and solicit the importation and migration of said *Bownes* into said United States, both in the manner aforesaid and also by prepaying, after the making of said contract, and knowing said contract to have been made,[3] the transportation of said *Bownes* from said *England* to said United States. And the plaintiff further says that, at the time of the making of said contract, and at the time of said encouragement and solicitation by the said defendant, and at the time of his, said *Bownes's*, migration and coming into said United States, he, said *Bownes*, was a foreigner, whose migration and coming into said United States under contract as aforesaid it was unlawful for the defendant to assist and encourage as aforesaid, all of which the defendant, at the time of the making of said contract and of said encouragement and solicitation, well knew. Whereby and by force of the statute in such cases made and provided, said defendant has forfeited to the plaintiff the sum of *one thousand* dollars, and by force of said statute an action has accrued to the plaintiff to recover of said defendant the sum of *one thousand* dollars, to be paid into the treasury of the United States.

under which the laborer came to this country. U. S. *v.* Gay, 80 Fed. Rep. 254.

1. Manual Labor or Service. — It is settled that the statute must be considered as limited to cases where the assisted immigrant was brought into this country under a contract to perform "manual labor or service." U. S. *v.* Laws, 163 U. S. 258; Holy Trinity Church *v.* U. S., 143 U. S. 457, *reversing* 36 Fed. Rep. 303. And a declaration is insufficient which does not state the character of the labor or service which the immigrant was under contract to perform, and hence fails to bring the case within the terms of the statute as construed by the supreme court. U. S. *v.* Gay, 80 Fed. Rep. 254.

2. Averment of Actual Immigration. — The declaration is fatally defective if it fails to allege that the foreign laborer did actually emigrate to this country. U. S. *v.* Borneman, 41 Fed. Rep. 751; U. S. *v.* Craig, 28 Fed. Rep. 795.

3. Defendant's Knowledge of Contract. — The declaration is fatally defective if it fails to allege that the defendant, when he assisted the foreign laborer to emigrate, knew that he was under contract. U. S. *v.* Borneman, 41 Fed. Rep. 751; U. S. *v.* Craig, 28 Fed. Rep. 795.

Second count: And the plaintiff says that during the month of *June*, in the year 1893, the defendant caused to be printed and published in a foreign country, to wit, in *England*, in a newspaper called the *Sheffield Telegraph*, published in the city of *Sheffield*, in said *England*, an advertisement containing a promise or offer of employment substantially in the terms[1] following, to wit, that a competent *blacksmith* could obtain employment as a *blacksmith*[2] in the city of *Salem*, in the United States of America and *commonwealth* of *Massachusetts*, at good wages, and requesting any person who was a *blacksmith* and who desired to obtain said opportunity of employment in said *Salem* to call upon one *Richard Toon*, at *216 Fitzwilliam street*, in said *Sheffield*, to obtain from said *Toon* further particulars relative to said offer of employment at said *Salem*.

And the plaintiff further says that one *William Henry Bownes* saw said advertisement in said *Sheffield Telegraph* during said month of *June*, and in consequence of said advertisement did thereafter, to wit, during the month of *August* in said year 1893, migrate[3] and come to the United States, to wit, to said *Salem*, and did then and there perform work and labor for said defendant in pursuance of said defendant's offer, solicitation and inducement contained in said advertisement.

And the plaintiff further says that by the printing and publishing of said advertisement as aforesaid, the defendant did knowingly encourage and solicit the said *Bownes* to migrate and come into said United States, there to perform labor.

And the plaintiff further says that the defendant, after the printing and publishing of said advertisement as aforesaid, and after the reading of said advertisement by *Bownes* as aforesaid, did prepay the transportation of said *Bownes* from said *England* to said United States, said *Bownes* being at the time of said prepayment of his said transportation an alien under contract to perform work and labor in said United States, all of which the defendant at the time of his said prepaying of said transportation well knew.[4]

And the plaintiff further says that at the time of the printing and publication of the said advertisement and at the time of said encouragement and solicitation and at the time of said prepayment of said *Bownes's* transportation, he, said *Bownes*, was an alien and a foreigner,[5] whose migration and coming into said United States under contract as aforesaid it was unlawful for the defendant to assist and encourage as aforesaid.

Whereby and by force of the statute in such cases made and provided, said defendant has forfeited to the plaintiff the sum of *one thousand* dollars, and by force of said statute an action has accrued to the plaintiff to recover of said defendant the sum of *one thousand* dollars, to be paid into the treasury of the United States.

And the plaintiff further says that the two counts of said declaration are for one and the same cause of action.

By its Assistant Attorney,
W. G. Thompson.

1. See *supra*, note 5, p. 421.
2. See *supra*, note 1, p. 422.
3. See *supra*, note 2, p. 422.
4. See *supra*, note 3, p. 422.
5. See *supra*, note 4, p. 421.

II. CRIMINAL PROSECUTION.[1]

Form No. 6317.[2]

In the *District* Court of the United States of America for the District of *Massachusetts*.

Of the *October* Term in the year of our Lord one thousand eight hundred and *ninety-seven*.

United States of America, } Sct.
District of *Massachusetts*. }

The grand jurors of the United States of America, chosen, selected and sworn in and for the district of *Massachusetts*, in the name and by the authority of the said United States, upon their oaths present that *John Doe*, late of *Boston*, in the said district, on the *fourth* day of *September*, in the year of our Lord one thousand eight hundred and *ninety-seven*, within the district aforesaid, was the master of the steamship "*Columbia*," a vessel plying between the port of *Boston*, in said district, and the city of *Liverpool*, in *England*, and on said *fourth* day of *September*, in the year aforesaid, did knowingly, wilfully and unlawfully land and permit to be landed from said *Liverpool* at the city of *Boston* aforesaid, one *Richard Roe*, an alien laborer, mechanic and artisan, to wit, a *blacksmith*, he, the said *Richard Roe*, previous to his embarkation on the said steamship "*Columbia*," to wit, on the *fifteenth* day of *August* in the year aforesaid, having entered into a contract and agreement with one *Leonard A. Ford*, a citizen of the city of *Boston*, in the district aforesaid, whereby it was agreed that the said *Richard Roe* would migrate and come to the city of *Boston* aforesaid, and there perform manual work and labor, to wit, the work of a *blacksmith*, in said city of *Boston* for said *Leonard A. Ford*, and that said *Leonard A. Ford* would pay him, the said *Richard Roe*, for such services, the sum of *twelve* dollars per *week*, and would also prepay the transportation and passage money of the said *Richard Roe* from *Liverpool* aforesaid to said city of *Boston*, he the said *John Doe*, then and there knowing of the existence of the said contract, against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

Daniel Webster, United States Attorney.

1. For the requisites of an indictment, generally, consult the title INDICTMENTS.

2. *United States*. — 23 Stat. at Large, p. 332, c. 164, § 4; Rev. Stat. (Supp. 1891), p. 479, c. 164, § 4.

CONTRACTS.

See the titles ARBITRATION AND AWARD, vol. 2, p. 33; *ASSUMPSIT*, vol. 2, p. 294; *ATTORNEYS*, vol. 2, p. 969; *AUCTIONEERS*, vol. 2, p. 1067; *BASTARDY*, vol. 3, p. 153; *BILLS AND NOTES*, vol. 3, p. 260; *BONDS AND UNDERTAKINGS*, vol. 3, p. 526; *BONDS AND UNDERTAKINGS (ACTIONS ON)*, vol. 3, p. 528; *BOOK DEBT*, vol. 3, p. 1018; *BREACH OF PROMISE OF MARRIAGE*, vol. 3, p. 1051; *BROKERS*, vol. 4, p. 90; *BUILDERS AND ARCHITECTS*, vol. 4, p. 121; *CARRIERS*, vol. 4, p. 192; *CATTLE AND DOMESTIC ANIMALS*, vol. 4, p. 376; *CHARTER-PARTIES*, vol. 4, p. 759; *COMPROMISE; CONTRACTS OF HIRE; CONTRIBUTION; CORPORATIONS; COVENANTS; DEBT; DENTISTS; DRUGGISTS; EXECUTORS AND ADMINISTRATORS; GOODS SOLD AND DELIVERED; GOODWILL; LANDLORD AND TENANT; MASTER AND SERVANT; MONEY HAD AND RECEIVED; MONEY LENT; MONEY PAID; PARTNERSHIP; PRINCIPAL AND AGENT; PRINCIPAL AND SURETY; SALES; WORK AND LABOR; also the GENERAL INDEX to this work.*

CONTRACTS OF HIRE.

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CROSS-REFERENCE.

For matters of Substantive Law, see the title CONTRACTS OF HIRE (LAW OF BAILMENTS), 7 American and English Encyclopædia of Law (2d ed.), p. 299.

I. ACTIONS EX CONTRACTU.[1]

1. By Bailor.

a. For Hire.

Form No. 6318.

(2 Chit. Pl. 55.)

In the *Common Pleas.*

Saturday next after the *Morrow of All Souls* in *Michaelmas* Term, *1 Wm. IV.*

Middlesex, to wit. *Richard Roe* was attached to answer *John Doe* of a plea of trespass on the case upon promises, and thereupon the said *John Doe*, by *Jeremiah Mason*, his attorney, complains. For that whereas the said *Richard Roe* heretofore, to wit, on the *first* day of *January*, in the year of our Lord 1830, in the county of *Middlesex* aforesaid,* was indebted to the said *John Doe* in the sum of £20 for the use and hire of divers horses, mares, and geldings, bridles, saddles, and harness, and of divers chaises and other carriages, by the said *John Doe* before that time let to hire and delivered to the said *Richard Roe*, and at his special instance and request, and by the said *Richard Roe*, under and by virtue of that letting to hire before then, had and used. And being so indebted, he, the said *Richard Roe*, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, in the county of *Middlesex* aforesaid, undertook, and then and there faithfully promised the said *John Doe* to pay him the said last mentioned sum of money, when he, the said *Richard Roe*, should be thereunto afterwards requested. Nevertheless, the said *Richard Roe*, not regarding his said promise and undertaking, but contriving and fraudulently intending craftily and subtly to deceive and defraud the said *John Doe* in this behalf, hath not as yet paid the said sum of £20, or any part thereof, to the said *John Doe*, although often requested so to do, but the said *Richard Roe* to pay him the same hath hitherto wholly neglected and refused, and still doth neglect and refuse, to the damage of the said *John Doe* of £5, and, therefore he brings his suit, etc.

Pledges to Prosecute { *John Den* and *Richard Fen.*

Form No. 6319.

(Md. Pub. Gen. Laws (1888), art. 75, § 23.)[2]

John Doe against *Richard Roe.* } In the *Circuit* Court of *Baltimore City.*

John Doe, by *Jeremiah Mason*, his attorney, sues *Richard Roe* for * the hire of certain household furniture, linen and other necessaries

1. For the formal parts of a declaration in a particular jurisdiction consult the title DECLARATIONS. For the formal parts of complaints or petitions consult the title COMPLAINTS, vol. 4, p. 1019.

2. The same form is set out in Fla. Rev. Stat. (1892), § 1058.

by the plaintiff let to hire to the defendant, and the plaintiff claims therefor the sum of *two hundred* dollars.

Jeremiah Mason, Plaintiff's Attorney.

Form No. 6320.

(Mass. Pub. Stat. (1892), c. 167, § 94.)

John Doe vs. *Richard Roe.* } *Middlesex* Sup. Ct. Plaintiff's Declaration.

And the plaintiff says the defendant owes him *one hundred* dollars for the use of a certain horse and carriage hired of the plaintiff by the defendant.

Jeremiah Mason, Attorney for Plaintiff.

Form No. 6321.

John Doe, plaintiff, against *Richard Roe*, defendant. } In the *District* Court of *Custer* County, *Nebraska*.

The plaintiff for cause of action herein alleges, and shows to the court that on the *first* day of *May*, 1896, the defendant hired from the plaintiff *five* mowing machines, the property of the plaintiff, for the space of *two* months then next ensuing, for the use of which he promised to pay to plaintiff the sum of *thirty* dollars per month, amounting in the whole to the sum of *three hundred* dollars, which sum became due on the *first* day of *July*, 1896, but no part of the same has been paid.

Wherefore plaintiff demands judgment against defendant for said sum of *three hundred* dollars, and the costs and disbursements of this action

Jeremiah Mason, Plaintiff's Attorney.

b. For Failure to Return Chattel.

Form No. 6322.

(Precedent in Field *v.* Brackett, 56 Me. 121.)[1]

[(*Commencement.*)][2] For that the said defendants, at *Lewiston*, to wit, at said *Auburn*, on the *eighteenth* day of *June*, in the year of our Lord one thousand eight hundred and *sixty-seven*, had and received

1. The defendant admitted the agreement set out in the declaration and alleged that the wagon was stolen during the month for which it was hired while defendants were in the exercise of ordinary and proper care, and that they had never been able to find and recover the wagon. Whereupon the question was submitted to the presiding judge, with the right to except, whether as matter of law the plaintiff was entitled to recover. The presiding judge ruled as matter of law that plaintiff was entitled to recover, to which ruling defendants excepted, and their exceptions were sustained, the court holding that a promise to "return in good order" does not make the bailee an insurer against all casualties and contingencies whatsoever. No special obligation is incurred beyond that which the law implies in the ordinary transaction of letting a vehicle for hire.

2. See note 1, p. 428.

of the plaintiff the plaintiff's single wagon, of the value of *one hundred and fifty* dollars, the same to be kept and used by the said defendants for the period of *one* month from the said *eighteenth* day of *June* aforesaid and the said defendants, in consideration that the plaintiff would so let to them, the said defendants, said wagon as aforesaid, then and there promised the plaintiff to return the said wagon to him at the expiration of the month aforesaid in good order; yet the said defendants, not regarding their promise aforesaid, did not return the said wagon according to their promise, but though the month has long since elapsed, and though often thereto requested, the said defendants have neglected and refused and still neglect and refuse so to do. [(*Conclusion.*)][1]

Form No. 6323.

Supreme Court, *Suffolk* County.

John Doe, plaintiff,
against
Richard Roe, defendant.

The complaint of the above named plaintiff respectfully shows to the court, that on the *first* day of *January*, 1896, the defendant hired from the plaintiff *one* Steinway baby-grand piano, of the value of *seven hundred* dollars, to be used by the defendant from the *first* day of *January*, 1896, to the *first* day of *July*, 1896, and that defendant agreed to take due care of said piano, and to return the same to plaintiff at the expiration of said term in good condition, reasonable wear excepted. That the term for which said piano was hired has elapsed, and that defendant has not returned the same, although on the *third* day of *July*, 1896, he was by plaintiff requested so to do.

Wherefore plaintiff demands judgment against the said defendant for the sum of *seven hundred* dollars, with interest from the *second* day of *July*, 1896, and all costs and expenses of this action.

Jeremiah Mason, Plaintiff's Attorney.

Form No. 6324.

(Tenn. Code (1896), § 4660.)

John Doe
v.
Richard Roe.

The plaintiff sues the defendant for the following horses, the property of the plaintiff (*or other personal property, describing it succinctly,*) with the value of the hire or use thereof, during the detention, viz.: from the *tenth* day of *August*, 1896, to the *first* day of *September*, 1896.

Jeremiah Mason, Attorney for the Plaintiff.

c. For Misuse of Chattel.

Form No. 6325.

(2 Chit. Pl. 146.)[2]

(*Commencing as in Form No. 6318, and continuing down to* *) in con-

1. For the commencement and conclusion of the declaration in *Maine* consult the title DECLARATIONS.

2. See also substance of a similar declaration in Frye *v.* Burdick, 67 Me. 408.

sideration that the said *John Doe*, at the special instance and request of the said *Richard Roe*, had let to hire and delivered to the said *Richard Roe* a certain horse of the said *John Doe* of great value, to wit, of the value of *£20*, to be ridden and used by the said *Richard Roe*, he the said *Richard Roe* undertook, and then and there faithfully promised the said *John Doe*, to ride and use the said horse in a moderate, careful and proper manner. And although the said *Richard Roe* then and there had and received the said horse of and from the said *John Doe* for the purpose aforesaid; yet the said *Richard Roe*, not regarding his said promise and undertaking, but contriving and intending to injure the said *John Doe* in this behalf, did not nor would ride or use the said horse in a moderate, careful or proper manner, but wholly neglected and refused so to do. And on the contrary thereof he the said *Richard Roe*, after the making of his said promise and undertaking, to wit, on the day and year aforesaid, at *Middlesex* aforesaid, so carelessly and improperly rode and used the said horse, that by means thereof the said horse became and was greatly lamed and hurt, and so remained and continued for a long space of time, to wit, hitherto, during all which time he the said *John Doe* thereby lost and was deprived of the use and benefit of the said horse, and also thereby the said horse, being of the value aforesaid, became and was greatly damaged, lessened in value, and spoiled, to wit, at *Middlesex* aforesaid.

Wherefore the said *John Doe* saith that he is injured and hath sustained damage in the amount of *£15*, and therefore (*concluding as in Form No. 6318*).

Form No. 6326.

In the *Superior* Court of the *City and* County of *San Francisco*, State of *California*.

John Doe, plaintiff, against *Richard Roe*, defendant. } Complaint — Breach of Contract of Hire.

John Doe, the plaintiff in the above entitled action, complaining of *Richard Roe*, the defendant in said action, alleges:

I. That on the *first* day of *January*, 1896, the defendant hired from the plaintiff *one* Miller upright piano to be used by the defendant from the said *first* day of *January*, 1896, to the *first* day of *January*, 1897.

II. That defendant promised to take due care of said piano and to return the same to plaintiff at the expiration of said term in good condition, reasonable wear excepted.

III. That the said term for which the said piano was hired has expired.

IV. That defendant so negligently and improperly cared for said piano that the same was wholly lost to plaintiff.

V. That the said piano was of the reasonable value of *five hundred* dollars.

Wherefore plaintiff prays judgment against the defendant for the said sum of *five hundred* dollars, and costs of suit.

Jeremiah Mason, Attorney for Plaintiff.

2. By Bailee for Defect in Chattel Let.

Form No. 6327.

(2 Wentw. Pl. 155.)

Markham and LeBlanc.

Trin. Term, 7 *Geo. II.*

Middlesex, ss. *William Fletcher* complains of *Daniel Dean*, in the custody of the marshal of the marshalsea of our lord the now king before the king himself of a plea of trespass on the case upon promises; for that whereas the said *William*, at the special instance and request of the said *Daniel*, on the *third* day of *October* in the year of our Lord *1732*, at the parish of *St. Botolph* without *Aldgate*, in the said county, hired of the said *Daniel one* gelding, for a journey with him the said *William*, from thence to *Chester*, in the county of *Chester*, and from *Chester* aforesaid back to the parish aforesaid, for a certain price or hire, to wit, for the price of *one hundred* shillings of lawful money of Great Britain, he the said *Daniel* assumed upon himself and undertook that the said gelding was fit and able to perform the said journey; and although the said *William* afterwards, to wit, on the said *third* day of *October*, set forward on his said journey to *Chester* on the said gelding so hired as aforesaid; yet, notwithstanding the assumption and undertaking of the said *Daniel* as aforesaid, the said gelding was not fit and able to perform the said journey, but tired on the road in the said journey, and became entirely unfit and unable to perform the residue of the said journey; by reason of which he the said *William* was put unto and sustained great expenses in and about providing himself with horses for the residue of the said journey, to the damage of the said *William* of *nine* pounds *nineteen* shillings, and therefore he brings suit, etc.

Form No. 6328.

(Precedent in Windle *v.* Jordan, 75 Me. 149.)

[(*Commencement.*)][1] In a plea of the case, for that the said defendant, at said *Lisbon*, on the *second* day of *September*, in the year of our Lord one thousand eight hundred and *seventy-nine*, in consideration that the plaintiff at the special instance and request of the defendant, had hired of him *one* horse and wagon for the purpose of riding from *Lisbon*, aforesaid, to *Lewiston* in said county, and in return from said *Lewiston* to said *Lisbon*, for the price and hire of a reasonable sum of money, to wit: *two* dollars, and for other good and valuable considerations, then and there promised the plaintiff that the said horse was sound, kind, safe, and serviceable, and free from the vice of kicking, and that the same would perform well when harnessed in said wagon, and was suitable to perform said purpose and service.

And the plaintiff in fact saith, that he, confiding in said promise of the said defendant, did, on the *second* day of *September*, aforesaid, set forward on said purpose and service with said wagon, drawn by said horse of the defendant, hired for the purpose aforesaid, as aforesaid.

1. For the commencement and conclusion of a declaration in *Maine* consult the title DECLARATIONS.

Yet the said defendant did not regard his promise, aforesaid, but then and there craftily and subtly deceived the plaintiff in this, that the said horse was then and there unkind, unsafe, unsound, and unsuitable for said purpose and service, and that said horse was not free from the vice of kicking, but on the contrary said horse was then there in the habit of viciously and violently kicking, all of which the said defendant then and there well knew.

And the plaintiff avers that, in the performance of said service, the said horse was driven and managed by the plaintiff with due care.

Yet, by reason of the said unkindness, unsoundness and unsuitableness of the said horse for said purpose and service, the said horse then and there became restive, violent, furious, and uncontrollable, and then and there, while in said service, to wit: at said *Lewiston*, the said horse viciously and violently kicked the plaintiff upon his left knee and broke the knee-cap thereof, and then and there kicked the plaintiff upon his right leg and upon his thumb and finger, all without the fault of the plaintiff, and the plaintiff was thereby then and there greatly and permanently injured in his left knee, right leg and thumb and finger, and by reason of his said wounds and injuries, then and there received, as aforesaid, the plaintiff then and there, for a long time afterwards, suffered great pain and anxiety, and became sick, sore, lame, disordered, and incapable of transacting his ordinary and necessary labor, affairs, and business; and so continued for a long space of time, to wit: ever since.

And the plaintiff avers that his said injuries are incurable, that by reason of said wounds, injuries, and bruises so received, as aforesaid, he was obliged to expend, and did expend large sums of money, to wit: *three hundred* dollars, in endeavoring to be cured of said wounds and injuries, occasioned as aforesaid, and for board, nursing, medicine, and attendance. ⌈(*Conclusion.*)⌉[1]

II. ACTIONS EX DELICTO.[2]

1. By Bailor for Improper Use of Chattel.

Form No. 6329.

(Md. Pub. Gen. Laws (1888), art. 75, § 23.)

(*Commencing as in Form No. 6319, and continuing down to* *) that the defendant hired from the plaintiff a horse to ride from *Frederick* to *Hagerstown*, and thence back to *Frederick*, in a proper manner; and the defendant rode said horse so immoderately that he became lame and injured in value. And the plaintiff claims (*concluding as in Form No. 6319*).

1. For the commencement and conclusion of a declaration in *Maine* consult the title DECLARATIONS.

2. For the formal parts of a declaration in a particular jurisdiction consult the title DECLARATIONS. For the formal parts of complaints or petitions consult the title COMPLAINTS, vol. 4, p. 1019.

Form No. 6330.

(Precedent in Spooner *v.* Manchester, 133 Mass. 270.)[1]

[(*Caption as in Form No. 6320.*)][2]

And the plaintiff says the defendant hired the plaintiff's horse and carriage to drive from *Worcester* to *Clinton* and back in a prudent, careful and proper manner, and that the defendant drove the same beyond *Clinton* to *Northborough* wrongfully, and managed and drove said horse so improperly, unskilfully and wrongfully while at said *Northborough* that said horse's ankle was broken and otherwise injured, to the great damage of the plaintiff.

[(*Signature as in Form No. 6320.*)][2]

2. By Bailee for Damages Due to Defect in Chattel Let.

Form No. 6331.[3]

Suffolk, ss. *Superior* Court. *April* term, 1873.

Horne et al. vs. *Meakin et al.* } Plaintiffs' Declaration.

And the plaintiffs say that the defendants are livery-stable keepers and accustomed to let horses and carryalls for hire, and the plaintiff, *James W. Horne*, hired[4] of the defendants a horse and carryall to attend the funeral of a brother-in-law and take with him his wife and family, for a certain sum to be paid by him to the defendant for the use of such horse and carryall. And the defendants were bound and agreed[5] to furnish the plaintiff with a suitable and proper horse and carryall to attend such funeral. Yet the defendants, neglecting their said obligation and duty, did not furnish the plaintiffs with a suitable and proper horse or suitable and proper carryall to attend such funeral, but on the contrary furnished them with a horse and carryall both of which were unsuitable and improper,[6] the horse being unkind, vicious, and unsafe, and the carryall frail and unsafe, whereby, while the plaintiffs were riding in said carryall in attending said funeral, and the said *James W.* was driving and exercising due care, said horse suddenly started and ran and kicked, one of the wheels of the carryall broke down, and the female plaintiff was thrown out and bruised and injured internally and subjected to great pain and suffering.

S. J. Thomas, Attorney for Plaintiff.

1. This declaration is sufficient in form, but it appeared in evidence that the defendant unintentionally took the wrong road in returning to Worcester, and having traveled on such road a few miles discovered his mistake and took what he considered the best way back to the place of hiring; and it was held that he was not liable in trover for the conversion of the horse.

2. The matter to be supplied within [] will not be found in the reported case.

3. This form is the declaration as drawn in conformity with instructions of the court in Horne *v.* Meakin, 115 Mass. 326. It is copied from the record.

4. This allegation is sufficient if (as the jury found in the present case) the contract was made by the father for his son James W., and if the defendants knew the purpose for which the horse was to be used by the son. Horne *v.* Meakin, 115 Mass. 326.

5. In letting a horse for hire, there is an obligation and implied agreement on the part of the letter to furnish a horse that is suitable for the purpose for which it is hired. Horne *v.* Meakin 115 Mass 326.

6. It is not necessary for the plaintiffs to allege that the defendants knew that the horse was unsuitable. The fact that the defendants did not know that the horse was unsuitable would not furnish them any defense. Horne *v.* Meakin, 115 Mass. 326.

CONTRIBUTION.

By R. G. Dodge.

I. Between Co-debtors in General, 433.
II. Between Co-sureties, 441.
1. *In General*, 441.
2. *Where Some Co-sureties are Insolvent*, 446.
3. *Where Contribution is Sought from Estate of Deceased Co-surety*, 447.
III. Between Partners, 448.
IV. Between Stockholders, 449.
V. Between Joint Owners of Property, 450.
1. *Where Plaintiff has Repaired Property*, 450.
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VI. Between Co-devisees and Co-legatees, 455.
VII. Between Joint Tort-feasors, 456.

CROSS-REFERENCES.

For Forms relating to General Average, see the title GENERAL AVERAGE.

For matters of Substantive Law, see the title CONTRIBUTION AND EXONERATION, 7 American and English Encyclopædia of Law (2d ed.), p. 325.

I. Between Co-debtors in General.

Form No. 6332.

(Conn. Prac. Act, p. 65, No. 92.)

To the sheriff of the county of *Hartford*, his deputy, or either constable of the town of *Hartford* in said county — Greeting:

By authority of the State of *Connecticut*, you are hereby commanded to attach, to the value of *fourteen hundred* dollars, the goods

1. For the formal parts of a declaration, complaint, petition or bill in equity in a particular jurisdiction consult the titles Declarations; Complaints, vol. 4, p. 1019; Bills in Equity, vol. 3, p. 417.

For statutes relating to the right of contribution between joint debtors see as follows:

California. — Civ. Code (1897), § 1432; Code Civ. Proc. (1897), § 709.

Delaware. — Rev. Stat. (1893), p. 533, § 2.

Georgia. — 2 Code (1895), § 3991.

Kentucky. — Barb. & C. Stat. (1894), §§ 484–488, 4665–4667.

Michigan. — How. Anno. Stat. (1882), §§ 5906, 6122, 6154–6159.

or estate of *Richard Roe*, of Windsor, in said county, and him summon to appear before the *Superior* Court to be held at *Hartford*, in and for the county of *Hartford*, on the *first Monday* of *February*, 188*0*, then and there to answer unto *John Doe*, of said *Hartford*, in a civil action, wherein the plaintiff complains and says:*

1. On *May 1st*, 187*9*, the plaintiff and defendant made and delivered to *Henry Rogers* their promissory note, of which a copy is hereto annexed, marked Exhibit *A*.

2. At the maturity of said note, the plaintiff was compelled to pay and did pay all of said note.[1]

3. The defendant was and is bound to pay $*1,000* to the plaintiff, as his contributive share thereof.

4. On *November 1st*, 187*9*, the plaintiff demanded of the defendant said sum, or contributive share of $*1,000*, which he refused to pay, and no part thereof has been repaid to the plaintiff.

The plaintiff claims $*1,200* damages.

[*Samuel Short* of *Hartford* is recognized in $ ——— to prosecute, etc.]

Of this writ, with your doings thereon, make due return.

Dated at *Hartford*, this *fifteenth* day of *January*, 188*0*.

Abraham Kent, Justice of the Peace.

Form No. 6333.

(Precedent in Security F. & M. Ins. Co. *v.* St. Paul Ins. Co., 50 Conn. 234.)[2]

[(*Commencing as in Form No. 6332, and continuing down to* *.)][3]

1. Prior to the *24th* of *April*, 187*4*, the defendant with the plaintiff and other insurance corporations, had severally issued policies of fire insurance to Messrs. *Taylor, Randall & Co.*, of *Boston, Massachusetts*, upon property on *Central Wharf*, in said *Boston*, the policies of the defendant and plaintiff being each for the sum of *twenty-five*

Minnesota. — Stat. (1894), § 5479.
Montana. — Civ. Code (1895), § 1942.
New York. — Birds. Rev. Stat. (1896), p. 1156, § 922 *et seq.*
North Dakota. — Rev. Codes (1895), § 3767.
Oregon. — Hill's Anno. Laws (1892), § 298.
Pennsylvania. — Bright. Pur. Dig. (1894), p. 1095, § 11.
Washington. — Ballinger's Anno. Codes & Stat. (1897), § 5294.

1. Allegation of Payment — *Generally.* — There must be an allegation in the bill or complaint, etc., to the effect that the plaintiff has made some payment of money, for no right to contribution arises until some payment has been made. Taylor *v.* Means, 73 Ala. 468; Smith *v.* State, 46 Md. 617; Phillips *v.* Blatchford, 137 Mass. 510; Van Petten *v.* Richardson, 68 Mo. 379; Morgan *v.* Smith, 70 N. Y. 537. And an allegation that judgment has been recovered against the plaintiff is insufficient. Huey *v.* Stewart, 69 Ga. 768.

Payment Compulsory.—It must further be alleged that the payment by the plaintiff was compulsory, for a voluntary payment gives rise to no right of contribution. Bradley *v.* Burwell, 3 Den. (N. Y.) 61; Webster's Appeal, 86 Pa. St. 409; Aldrich *v.* Aldrich, 56 Vt. 324; Watson *v.* Wilcox, 39 Wis. 643.

As to the effect of payment to avoid levy of execution after judgment see *infra*, note 3, p. 441.

2. This case was reserved, upon demurrer, for the advice of the supreme court, which advised the superior court that the complaint was sufficient.

3. The matter to be supplied within [ ] will not be found in the reported case.

hundred dollars, and, prior to said date, said insured property had been destroyed by fire, and, on said date, claims were being made by the insured on said policies against the defendant and plaintiff and said other insurance corporations.

2. Prior to said *April 24*, 1874, the plaintiff and defendant, together with the *German Insurance Company*, of *Erie, Pennsylvania*, which had a policy of insurance on said property of $5,000, and the *Mississippi Valley Insurance Company*, of *Memphis, Tennessee*, which had a policy of insurance on said property of $5,000, the *Mechanics and Traders Insurance Company*, of *New York City*, the *Kings County Fire Insurance Company*, of *New York*, the *Franklin Insurance Company*, of *Indianapolis, Indiana*, the *Franklin Insurance Company*, of *Wheeling, West Virginia*, the *Lafayette Fire Insurance Company*, of *New York City*, the *Adriatic Fire Insurance Company*, of *New York City*, the *Oswego & Onondaga Insurance Company*, of *Baldwinsville*, in the state of *New York*, the *Ben Franklin Insurance Company*, of *Allegheny, Pennsylvania*, the *Hibernia Mutual Fire Insurance Company*, of *Newark, New Jersey*, the *Globe Insurance Company*, of *Chicago, Illinois*, and the *Clay Fire Insurance Company*, of *Louisville, Kentucky*, all of which said companies had severally policies on said insured property, each of $2,500, had determined that the claims made on said policies by the insured were fradulent and invalid, and on said last mentioned date the plaintiff and defendant and said other insurance corporations mentioned in this article, entered into and signed the following written agreement with each other: (*Here was inserted a copy of the agreement.*)[1]

1. **The agreement** set out was in the words and figures following: "*In re Taylor, Randall & Co.* vs. *St. Paul Fire & Marine Ins. Co. et als.* The undersigned insurance companies having policies outstanding, issued to *Taylor, Randall & Co.*, upon property on *Central Wharf, Boston*, upon which claims have been made against said companies, do, in consideration of *one* dollar by each paid to the other, and divers other good and valuable considerations, mutually covenant and agree to and with each other as follows, that is to say, the said companies will unite in resisting the claim made upon said policies, and on each thereof, and in the defense of any and all suits and legal proceedings that have been or may be instituted against any of said companies upon any of said policies, and will, when and as required by the committee hereinafter mentioned, contribute to and pay the costs, fees and expenses of said suits and procedings *pro rata*, that is to say, each company shall pay such proportion of said costs, fees and expenses as the amount insured by said company shall bear to the whole amount insured on said property by all the companies subscribing to the agreement; the management and conduct of said resistance to said claims and defense of said suits and proceedings shall be and is fully entrusted to and devolved upon a committee to be composed of *W. H. Brazier*, of the city of *New York*, *Charles W. Sproat*, of the city of *Boston*, *James R. Lott*, of the city of *New York*, and *L. S. Jordan*, of the city of *Boston*; which committee shall have full power and authority to employ counsel and attorneys to appear for said companies and each thereof, and defend said suits and legal proceedings, and to employ other persons for other services relative thereto, and to assess upon and demand and receive from such companies from time to time, as such committee shall deem proper, such sum or sums of money, for the compensation of such counsel and attorneys, and such other persons, and all other expenses of such defense of said suits, as said committee shall deem necessary and expedient; such assessment upon and payment by each of said companies to be *pro rata* as above mentioned. Each and every of said companies shall fully and faithfully

3. At tne time of the execution of said agreement suits were pending in *Massachusetts* against the *Franklin Insurance Company*, of *Indianapolis*, and the *Clay Insurance Company*, of *Kentucky*, and the defendant, and the caption of said agreement refers to such suits.

4. Mr. *Edward T. Woodward*, of said *Boston*, was duly employed, under said agreement, on behalf of the subscribers thereto, to assist in the defense of said suits as an expert on sundry matters therein involved and for other purposes, and in pursuance of such employment the said *Woodward* rendered great and valuable services in the defense of said suits.

5. After long and exhaustive trials the plaintiffs in those suits were beaten on the merits of the controversy, and it was established as the results of said suits that the plaintiffs therein would not be able to enforce their claims against the subscribers to said agreement.

6. At the close of said suits said *Woodward* presented to the committee mentioned in said agreement a bill for his services, amounting to the sum of $\$5,000$, which bill was approved by said committee and was reasonable, and was so adjudged by the *United States Circuit* Court as below stated.

7. In a reasonable time thereafter said committee levied an assessment upon the companies who were parties to said agreement, to pay the bill of said *Woodward* and other expenses incurred in said suits, but no company paid its assessment; each of said companies, including the defendant, alleging the bill to be unreasonable in amount.

8. In the year 1879 said *Woodward* sued this plaintiff in said *Boston*, to recover for his said services, and thereafter such proceedings were had as that in the *United States Circuit* Court for the *First* Circuit, held in *Boston*, in *January*, 1880, said *Woodward* recovered judgment against this plaintiff for the value of his services so rendered as aforesaid, to the amount of $\$5,000$ and interest thereon, the whole of said judgment being about the sum of $\$5,444.08$. Each of said defendants knew of the existence of said suit, and during its progress claimed that said bill was unreasonable in amount.

9. On an execution issued on said judgment, this plaintiff, on *March 26*, 1881, paid the whole amount thereof, which with interest was the sum last above stated, and this plaintiff was further subjected to the payment of the additional sum of $\$943$, being for expenses and legal services incidental to the trial of said cause.[1]

10. Since the signing of said agreement, and before *March 26*, 1881, the said *German Insurance Company*, the *Hibernian Mutual Fire Insurance Company*, and the said *Globe Insurance Company*, represent-

adhere to this agreement, and shall refrain from any act or proceedings in reference to such claims or suit or the defense thereof that can or may in anywise defeat, obstruct or interfere with the acts or proceedings of said committee relative thereto, and shall at all times furnish to said committee any and all papers, information and assistance in and about such management and conduct of such resistance and defense, as may be in the possession or power of said companies respectively and as may be desired by said committee. In witness whereof, the said insurance companies have subscribed this agreement, the *24th* day of *April*, 1874."

1. See *supra*, note 1, p. 434.

ing in all $*10,000* of the insurance on said property, had utterly failed and there were in existence no assets of said companies or of either of them; and the said *Oswego & Onondaga Insurance Company* had been dissolved under the laws of the state of *New York* and could not be sued in law or equity in that state and is not within the jurisdiction of this court.

11. On or about *May 23*, 1*881*, the plaintiff made demand upon all the remaining signers to said agreement, including the defendant, that they should contribute according to the amount of their several policies to reimburse the plaintiff what would be legally and equitably due on the facts aforesaid.

12. Some companies, other than the defendant and other than said insolvent companies, have responded to the demand of the plaintiff, so that there remains unpaid of the sum of $*5,444.08*, the principal sum of $*2,252.52*, and of the sum of $*943*, the principal sum of $*400*, but the defendant has refused to pay to the plaintiff any sum whatever.

13. All the other signers to said agreement, except the defendant, are without the jurisdiction of this court.

The plaintiff claims equitable relief, and that there be an accounting between the plaintiff and the defendant, and that of the sums paid by the plaintiff as aforesaid, and remaining unpaid, the defendant be decreed and ordered to pay the plaintiff one-half thereof, to wit: the sum of $*1,750*; and such other relief as shall be equitable in the premises. [(*Concluding as in Form No. 6332*).][1]

Form No. 6334.[2]

In the *Cook* County *Circuit* Court.

February Term, 1*898*.

State of *Illinois*, } ss.
County of *Cook*. }

John Doe, plaintiff, by *Jeremiah Mason*, his attorney, complains of *Richard Roe*, defendant, in a plea of trespass on the case on promises: For that whereas the said plaintiff and said defendant, jointly, as purchasers, on the *fourth* day of *January*, 1*896*, entered into a written contract, under their joint seal, with *Richard Fen*, of the city of *Chicago*, in said county of *Cook*, as vendor for the purchase of a certain tract of land (*describing it*), whereby said *Doe* and said *Roe* promised to pay therefor the sum of *eighty thousand* dollars, in *five* monthly instalments of *sixteen thousand* dollars each, on the *first* day of each

1. The matter to be supplied within [ ] will not be found in the reported case.

2. This declaration is based on the facts in the case of Harvey *v.* Drew, 82 Ill. 606. In the form given in the text, however, it is alleged that the plaintiff had been compelled to pay the entire sixteen thousand dollars with costs, while in the case on which the form is based the plaintiff compromised the judgment for a smaller amount and merely alleged in his declaration that he had "discharged" the judgment. Under a declaration in that form, it is of course necessary to introduce evidence as to the amount which was paid in discharging the judgment, for it is not the amount of the judgment, but the sum paid by the plaintiff, which determines the extent of the defendant's liability.

See also the substance of plaintiff's statement of claim in a similar case in Flanagan *v.* Duncan, 133 Pa. St. 373.

month, beginning with the *first* day of *February*, 1896. That the first *four* instalments were duly paid, but that the *fifth* instalment, due the *first* day of *June*, 1896, was not paid; and that said instalment still remaining unpaid said *Richard Fen* began suit therefor in the *Circuit* Court of *Cook* county, and on the *twenty-eighth* day of *November*, 1896, recovered judgment therein against said *Doe* and *Roe* for *sixteen thousand* dollars, the amount of said instalment, together with *one hundred and twenty-four* dollars and *fifty-two* cents costs. That on the *thirtieth* day of *November*, 1896, execution was duly issued upon said judgment directed against said *Doe* and said *Roe*, to the sheriff of the county of *Cook* aforesaid; that in order to prevent the levy of such execution upon his property, said *John Doe* paid to the sheriff of *Cook* county aforesaid the amount of said judgment, *sixteen thousand one hundred and twenty-four* dollars and *fifty-two* cents.[1]

Whereby the defendant *Richard Roe*, by virtue of the facts hereinbefore alleged, becomes indebted and liable to pay to the plaintiff one-half of the amount of said judgment, to wit, the sum of *eight thousand and sixty-two* dollars and *twelve* cents, and being so indebted the defendant, in consideration thereof, then and there promised the plaintiff to pay him the said sum of money on request.

Yet the said defendant, notwithstanding his said promises, though often requested thereunto by the plaintiff, has not paid the same or any part thereof, but neglects and refuses wholly so to do, to the damage of the plaintiff *eighteen thousand* dollars, and therefore he brings his suit, etc.

Jeremiah Mason, Plaintiff's Attorney.

Form No. 6335.

(Precedent in Sexton *v.* Sexton, 35 Ind. 89.)

State of *Indiana*, } ss. In the court of *George W. Beard*, justice of the
Greene county. } peace of *Center* township.

Lemuel B. Sexton
v.
John G. Sexton.

Lemuel B. Sexton, plaintiff, complains of *John G. Sexton*, defendant, and says that on the *10th* day of *January*, 1860, the said plaintiff and defendant, by their promissory note, a copy of which is filed herein,[2] promised to pay to the order of *Wm. Stalcup*, *Wm. Haltsdaw*, *James G. Stalcup* and *Squire Graves*, under the name and style of *Hance Stalcup's heirs*, the sum of *two hundred and forty-seven* dollars

1. See *supra*, note 1, p. 434.

2. **The note**, a copy of which was filed with the complaint, was as follows:

"$247.18.

Bloomfield, January 10th, 1860.

On or before the *25th* day of *December*, 1860, after date, we promise to pay to the order of *Hance Stalcup's heirs two hundred and forty-seven* dollars and *eighteen* cents, for value received, without any relief whatever from valuation, appraisement, or stay laws, with interest from date.

Lemuel B. Sexton.
John G. Sexton."

And it was held that in the absence of an allegation to the contrary, it was to be presumed that both parties were principals, and the complaint was therefore sufficient to entitle the plaintiff to recover one-half from the defendant.

and *eighteen* cents, with interest from date; that on the *7th* day of *January*, 1*861*, said plaintiff paid on said note the sum of *fifty* dollars; that on the *22d* day of *January*, 1*861*, said plaintiff paid on said note the sum of *one hundred and two* dollars; the *12th* day of *April*, 1*861*, said plaintiff paid on said note the sum of *twenty* dollars; that on the ——— day of ———, 1*861* or 1*862*, said plaintiff paid the remainder of said note, principal, and interest, and that said last payment was never credited on said note; that said defendant *John G. Sexton*, has never paid said plaintiff the one-half of said note, principal and interest, paid by said plaintiff for said defendant on said note, although often requested so to do; wherefore [plaintiff prays judgment against said defendant for *one hundred and thirty* dollars, and for other proper relief.

D. E. Williams, Attorney for Plaintiff.][1]

Form No. 6336.[2]

To the *Supreme* Court.

Rockingham, ss.

James O. Walker, *Randolph C. Hurd*, *Lawrence Huse*, *Arthur M. Moody*, *Robert Dorral*, and *William Plumer*, all of *Exeter* in said county of *Rockingham*, complain of *John Cheever* and *Henry Cheever*, as executors of the will of *Charles A. Cheever*, deceased, both of said *Exeter*, and say: That the *six* complainants above named, together with *Charles A. Cheever*, *John Knowlton*, *Thomas A. Tullock*, and *Josiah Stevens*, all also of said *Exeter*, on the *twenty-sixth* day of *April*, 1*852*, made and delivered to the *Boston and Maine Railroad Company*, a corporation organized and existing under the laws of the *commonwealth* of *Massachusetts*, their joint and several promissory note, whereby they promised to pay, in *six* months from said day, to said *Boston and Maine Railroad Company*, or order, the sum of *ten thousand* dollars, with legal interest thereon:

That said note was made by the said makers aforenamed for the accommodation of the *Portsmouth and Concord Railroad Company*, a corporation organized and existing under the laws of the state of *New Hampshire*, to which corporation the sum of *ten thousand* dollars, as consideration for said note, was paid, on the *twenty-sixth* day of *April*, before mentioned, by the said *Boston and Maine Railroad Company*:

That said *Charles A. Cheever* died at said *Exeter* on the *first* day of *September*, 1*852*, testate; that his will was duly proved at a Court *of Probate* held at *Exeter* within and for the county of *Rockingham*, on the *ninth* day of *November*, 1*852*; that by said will the defendants *John Cheever* and *Henry Cheever* were nominated executors and de-

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. In Walker *v.* Cheever, 35 N. H. 339, upon the facts of which case this bill is based, the defendant demurred on the ground that the case made by the bill did not fall within the equity jurisdiction of the court, and that it appeared that the complainants had an adequate remedy at law. The court held, however, that the bill stated sufficient grounds for equitable relief, and that, notwithstanding the complainants might have had an adequate remedy at law, equity was not ousted of its jurisdiction.

clared residuary legatees; and that said defendants duly gave bond as such executors, and duly qualified, and accepted such trust:

That on the *first* day of *July*, 1854, in order to avert suit then threatened by said *Boston and Maine Railroad Company*, then holder of said note, the *six* complainants above named were compelled to pay, and did pay, to said company the sum of *ten thousand* dollars in payment and discharge of said note:

That said *John Knowlton* and said *Thomas A. Tullock* have since such payment paid and refunded to the complainants the sums of *one thousand* dollars each, wherefore no claim is made against them and they are not made defendants herein:

That suits at law have been commenced against said *Josiah Stevens* for the purpose of recovering from him his proportion of the note, but whether said *Stevens* is solvent or not, or whether his share will be collected, the complainants are unable to say:

That there is due from the defendants, as executors and residuary legatees of said *Charles A. Cheever*, to the complainants, on account of said payment of said note, and by way of contribution, the sum of *one thousand* dollars, with interest thereon from the *first* day of *July*, 1854, aforesaid:

That there have come to the hands of said defendants, as such executors or as such residuary legatees, sufficient goods and estate of the said *Charles A. Cheever* to satisfy the complainants' claim:

That immediately after the payment of said note by the complainants, the complainants made demand upon the defendants, as executors of said *Cheever*, to pay to said complainants *one thousand* dollars, as the share of said *Cheever*, on the payment of said note; but the defendants refused and have ever since refused so to do, and the same has not been paid:

That since the probate of the will of said *Cheever*, aforementioned, the defendants have for the most part resided out of this state, so that the complainants have not had the means or opportunity, for the space of time allowed by the statute and laws of this state in such cases, to prosecute their claim against the executors, the said defendants, at law or in equity or to serve process on them.

Wherefore the complainants pray that it may be ordered and decreed by said court, that the defendants come to a fair and just account with the complainants of the note aforesaid, and of the money paid thereon by the complainants, and of the interest, charges and expenses thereon, and of the fair and just share of the same to be paid out of the estate of the said *Charles A. Cheever* by the defendants as executors thereof; and that the defendants may be required forthwith to pay the sum so found due from them in such capacity to the complainants; and for such other and further relief as may be just.

James O. Walker.
Randolph C. Hurd.
Lawrence Huse.
Arthur M. Moody.
Robert Dorral.
William Plumer.

Emery & Hatch, Solicitors.

Form No. 6337.

(Precedent in Gaster *v.* Waggoner, 26 Ohio St. 450.)[1]

[State of *Ohio*, *Wyandot* County, ss. } In the Court *of Common Pleas.*

Rosina Waggoner, plaintiff, against *Robert Gaster*, defendant. } Petition.

The plaintiff says:][2]

That on the *12th* day of *May*, 1872, *John D. Sears*, *R. McKelly*, *C. Berry*, *Jr.*, *Henry Maddix*, *and D. D. Hare* recovered a judgment in the Court *of Common Pleas* of *Wyandot* county, in the State of *Ohio*, against the plaintiff and the defendant, *Robert Gaster*, for the sum of $*1,206* debt, and costs of suit amounting to $*6.96*. That on or about the *1st* day of *June*, 1873, the plaintiff, with her own means, paid off said judgment and costs in full, whereby the defendant, *Robert Gaster*, became indebted to the plaintiff in the sum of $*606.48*, with interest from *May 12*, 1873.

[Wherefore said plaintiff prays judgment against said defendant for said sum of $*606.48*, with interest from the *twelfth* day of *May*, A. D. 1873.

John D. Sears, Plaintiff's Attorney.][2]

II. BETWEEN CO-SURETIES.

1. In General.[3]

1. The defendant in this case demurred to the petition on the ground that the nature of the cause of action which produced the judgment was not stated, and that it did not appear that the defendant was beneficially interested in the consideration of the joint liability on which the judgment was obtained. But the court held that, as it appeared that the judgment was against the plaintiff and the defendant jointly, and was for a debt, it was fairly made out that the claim was founded on a contract and that the parties against whom the judgment was rendered were jointly liable for the claim; that the case thus stated in the petition was *prima facie* in favor of the plaintiff's right to contribution. It was for the defendant to show that the parties were not equally liable on the claim.

On the other hand, in Bailey *v.* Bussing, 29 Conn. 1, the declaration alleged that a joint judgment had been recovered against the plaintiff, the defendant and another, which the plaintiff had been compelled to pay, and that the defendant was in duty bound and liable to pay to the plaintiff one-third of the amount, but contained no allegation as to the cause of action upon which the judgment had been rendered, and the court held that it could not infer, as matter of law, that the cause of action was one which imposed upon the defendant the duty to contribute, and hence that no sufficient consideration for the implied promise to contribute was alleged.

2. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

3. **For the formal parts** of a declaration, complaint, petition or bill in equity in a particular jurisdiction consult the titles DECLARATIONS; COMPLAINTS, vol. 4, p. 1019; BILLS IN EQUITY, vol. 3, p. 417.

For statutes relating to contribution among co-sureties see as follows:

Alabama. — Civ. Code (1886), §§ 3149, 3151.

California. — Civ. Code (1897), § 2848; Code Civ. Proc. (1897), § 709.

Delaware. — Rev. Stat. (1893), p. 533, § 3.

Florida. — Rev. Stat. (1892), § 983.

Georgia. — 2 Code (1895), §§ 2989, 2992–2994.

Idaho. — Rev. Stat. (1887), § 411.

Indiana. — Horner's Stat. (1896), § 1215.

Iowa. — Code (1897), § 3826.

Kentucky. — Barb. & C. Stat. (1894), § 4665.

Louisiana. — Voorhies' Rev. Civ. Code (1889), arts. 2104, 3058.

Maine. — Rev. Stat. (1883), c. 47, § 9.

Maryland. — Pub. Gen. Laws (1888), art. 8, § 7.

Minnesota. — Stat. (1894), § 5479.

Mississippi. — Anno. Code (1892), § 3279.

Missouri. — Rev. Stat. (1889), § 8349; Burns' Anno. Prac. Code (1896), § 1179.

Montana. — Civ. Code (1895), § 3694; Code Civ. Proc. (1895), § 1242.

New Jersey. — Gen. Stat. (1895), p. 2566, § 199.

North Carolina. — 1 Code (1883), § 2094.

North Dakota. — Rev. Codes (1895), § 4660.

South Carolina. — Rev. Stat. (1893), § 2310.

Tennessee. — Code (1896), § 5390.

Texas. — Rev. Stat. (1895), arts. 3815, 3816.

Virginia. — Code (1887), § 2895.

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 5710.

West Virginia. — Code (1891), c. 101, § 5.

Allegation of Payment — *Generally.* — There is no right to contribution until payment of the debt, and payment must consequently be alleged. See *supra*, note 1, p. 434. But an allegation that plaintiff paid the debt by giving his note is sufficient. Owen *v.* McGehee, 61 Ala. 440; Keller *v.* Boatman, 49 Ind. 104; Stubbins *v.* Mitchell, 82 Ky. 535.

What the plaintiff has received from the principal must, of course, be deducted from the amount toward which defendant must contribute, and plaintiff is bound to realize on securities for the benefit of his co-sureties; and if plaintiff's declaration shows that the plaintiff has surrendered such security without the consent of his co-surety, or has failed to collect it, it is fatally defective. Taylor *v.* Morrison, 26 Ala. 728; Chilton *v.* Chapman, 13 Mo. 470; Kerns *v.* Chambers, 3 Ired. Eq. (38 N. Car.) 576.

Payment under Compulsion. — It should appear that the payment by plaintiff was not voluntary, that is, was not one that he could legally have resisted. Skillin *v.* Merrill, 16 Mass. 40; Russell *v.* Failor, 1 Ohio St. 327; Aldrich *v.* Aldrich, 56 Vt. 324. Thus if it appear that the plaintiff paid a note which was barred by the statute of limitations, the defendant could successfully demur. Shelton *v.* Farmer, 9 Bush (Ky.) 314. But if plaintiff allege that a judgment was recovered against him, that is sufficient without a further allegation that an execution was issued. Stallworth *v.* Preslar, 34 Ala. 505; Buckner *v.* Stewart, 34 Ala. 529; Bradley *v.* Burwell, 3 Den. (N. Y.) 61. And in many states a complaint which merely sets forth a valid debt, due *in præsenti*, without even alleging the recovery of a judgment against the plaintiff, is sufficient. Fishback *v.* Weaver, 34 Ark. 569; Harvey *v.* Drew, 82 Ill. 606; Minneapolis Mill Co. *v.* Wheeler, 31 Minn. 121; Crisfield *v.* Murdock, 127 N. Y. 315; Mason *v.* Pierron, 69 Wis. 585.

Co-surety's Knowledge of Suit. — In Malin *v.* Bull, 13 S. & R. (Pa.) 441, it was held that a surety who had been compelled, by a suit at law, to pay the debt, need not allege, in his complaint against his co-surety for contribution, that the latter had notice of the earlier suit. If there was no such notice, however, the court says it would be open to the defendants to show that the former judgment was erroneous. It would seem that, whether there were notice or not, the surety would not be concluded as to his liability for the debt by a judgment against his co-surety unless he was a party to the suit. Lowndes *v.* Pinckney, 1 Rich. Eq. (S. Car.) 155; Glasscock *v.* Hamilton, 62 Tex. 143.

Payment of More than Plaintiff's Share. — The complaint or declaration must allege that the plaintiff has paid more than his just share of the debt. Taylor *v.* Means, 73 Ala. 468; Lytle *v.* Pope, 11 B. Mon. (Ky.) 309; Wood *v.* Leland, 1 Met. (Mass.) 387. But it need not necessarily show that plaintiff has paid more than half the debt, provided it sets forth that the creditor has given a release in full or that the debt is discharged. Stallworth *v.* Preslar, 34 Ala. 505; Werborn *v.* Kahn, 93 Ala. 201.

Inability to Collect from Principal. — There has been much difference of opinion as to whether plaintiff must allege that he has been unable to obtain reimbursement from the principal, or, in other words, that the latter is insolvent. In equity, it seems that such an allegation is necessary. Morrison *v.* Poyntz, 7 Dana (Ky.) 307; Stone *v.*

Form No. 6338.

(Precedent in Stallworth *v.* Preslar, 34 Ala. 506.)

[The State of *Alabama*, *Choctaw* County. } In the *Circuit* Court, *June* Term, 1842.][1]

William M. Stallworth vs. *Holden Preslar.* } The plaintiff claims of the defendant the sum of *five hundred* dollars, being one-half the sum of *one thousand* dollars, paid by said plaintiff in satisfaction of a certain judgment rendered in the *county* court of *Monroe* county, *Alabama*, at its *January* term, 1842, for the sum of *three thousand four hundred and sixty-six 31-100* dollars, together with the costs, in favor of *Halsey, Utter & Co.*, against *Thomas R. Watts* and said plaintiff; said judgment being founded on a promissory note for the sum of *two thousand six hundred and forty-six 04-100* dollars, made at *Sparta, Alabama*, on the *11th July*, 1837, negotiable and payable at the *Branch Bank at Mobile*, due on the *1st* day of *March* next after the date thereof, signed by said *Thomas R. Watts*, said defendant and plaintiff, and in favor of *Halsey, Utter & Co.* And said plaintiff avers that he together with said defendant signed said note as the sureties of said *Watts*; that suit was brought on said note by *Halsey, Utter & Co.*, against said *Watts*,

Buckner, 12 Smed. & M. (Miss.) 73; Allen *v.* Wood, 3 Ired. Eq. (38 N. Car.) 386. In actions at law, on the other hand, the contrary is the rule. Buckner *v.* Stewart, 34 Ala. 529; Taylor *v.* Reynolds, 53 Cal. 686; Sloo *v.* Pool, 15 Ill. 47; Croy *v.* Clark, 74 Ind. 597; Goodall *v.* Wentworth, 20 Me. 322; Odlin *v.* Greenleaf, 3 N. H. 270. And with the modern fusion of law and equity courts it has become less and less common to regard such an allegation as essential. But if it appeared from the declaration that plaintiff had failed to enforce an indemnity held by him a demurrer by his co-surety would be sustained. Frink *v.* Peabody, 26 Ill. App. 390.

Demand on Co-surety. — Plaintiff need not allege a previous demand upon the defendant for his share of the debt. Collins *v.* Boyd, 14 Ala. 505; Taylor *v.* Reynold, 53 Cal. 686; Chaffee *v.* Jones, 19 Pick. (Mass.) 260. *Contra*, Carpenter *v.* Kelly, 9 Ohio 106.

Sureties' Liability the Same. — A complaint for contribution is not necessarily defective because it shows that the sureties were not bound by the same instrument, provided it shows that they were bound for the same principal and the same undertaking. Breckinridge *v.* Taylor, 5 Dana (Ky.) 110; Craig *v.* Ankeney, 4 Gill (Md.) 225; Chaffee *v.* Jones, 19 Pick. (Mass.) 260; Armitage *v.* Pulver, 37 N. Y. 494; Butler *v.* Birkey, 13 Ohio St. 514. For the form of a complaint in such a case see Stevens *v.* Tucker, 87 Ind. 109. On the other hand, if the complaint shows that the plaintiff and defendant were bound for different debts, or different portions of the same debt, it is of course bad. Hammock *v.* Baker, 3 Bush (Ky.) 208; Chapman *v.* Garber, 45 Neb. 16; Hanner *v.* Douglass, 4 Jones Eq. (57 N. Car.) 262; Rosenbaum *v.* Goodman, 78 Va. 121. And it must not appear from the complaint that by the terms of the contract each surety was to be liable only for a certain sum. In such cases there is no right to contribution. Paul *v.* Berry, 78 Ill. 158; Bagott *v.* Mullen, 32 Ind. 332; Barry *v.* Ransom, 12 N. Y. 462; Moore *v.* Isley, 2 Dev. & B. Eq. (22 N. Car.) 372.

If it appears from the complaint that while plaintiff is the surety of the principal, defendant is the surety of a surety, or *vice versa*, a demurrer will be sustained. Both must stand in the same relation to the principal. Bulkeley *v.* House, 62 Conn. 459; Robertson *v.* Deatherage, 82 Ill. 511; Price *v.* Edwards, 11 Mo. 524; Adams *v.* Flannagan, 36 Vt. 400.

1. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

plaintiff and defendant; that said suit was discontinued as to said defendant, because the writ was not served on him; that the judgment hereinabove mentioned was rendered against said *Watts*, who then was, and continued thereafter to be insolvent, and died insolvent, without having paid said judgment, which was also rendered against plaintiff, which said judgment being unreversed and in full force, plaintiff has paid and satisfied the same by the payment of *one thousand* dollars, to wit, on the *15th April*, 1*854*. By means whereof, the defendant became liable to pay and reimburse to plaintiff the said sum of *five hundred* dollars, with interest thereon, being one-half of the said sum of *one thousand* dollars. The plaintiff claims of the defendant, also, the further sum of *five hundred* dollars, for moneys paid, laid out and expended, by said plaintiff, for said defendant, at his request, to wit, on the *15th April*, 1*854*. Said sums of money, with the interest thereon, remain unpaid.

[*William Boyles*, Attorney for Plaintiff.][1]

Form No. 6339.[2]

Pulaski Circuit Court.

John Doe, plaintiff,
against
Richard Roe, defendant. } Complaint at Law.

The plaintiff, *John Doe*, states that on the *first* day of *July*, 1*893*, one *John Fen* made and delivered to one *Richard Den*, his promissory note, dated on said day and due *twelve* months after date, payable to said *Richard Den* or order, for *five hundred* dollars (a copy of said note is herewith filed, marked Exhibit *A*, and made a part hereof); that the plaintiff and the defendant signed said note as sureties to the said *Richard Den* or his assigns; that when said note became due said *John Fen* was wholly insolvent and unable to pay the same, and has ever since remained so insolvent and unable to pay; that thereupon, being threatened with suit upon said undertaking of suretyship on said note, the plaintiff was compelled to pay to said *Richard Den* on the *eighth* day of *July*, 1*894*, the sum of *five hundred* dollars thereon; that immediately thereafter the plaintiff demanded of the defendant that he pay to the plaintiff *two hundred and fifty* dollars as his share of said compulsory payment, but the defendant refused and has ever since refused.

Wherefore the plaintiff demands judgment against the defendant for *two hundred and fifty* dollars, with interest thereon from the *eighth* day of *July*, 1*894*, and all other proper relief.

Jeremiah Mason, Plaintiff's Attorney.

(*Verification.*)[3]

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. This form is adapted from the form in Sand. & H. Dig. Ark. (1894), p. 1639, No. 80. See also Sand. & H. Dig. Ark. (1894), § 7314.

3. For the form of verification in a particular jurisdiction consult the title VERIFICATIONS.

Form No. 6340.[1]

Thomas Newcomb against *Nehemiah Gibson.* } *Suffolk*, Sup. Ct. Plaintiff's Declaration.

And the plaintiff says that *A. S. Smalley* made a promissory note for *twenty-five hundred* dollars to the order of *A. S. Foss*, and the plaintiff and the defendant signed the note as joint sureties for *Smalley*; that, in *May*, 1897, said *Foss* recovered judgment against said *Smalley*, the plaintiff and the defendant, in the sum of *two thousand eight hundred and eighteen* dollars and *thirty-eight* cents; that said sum with the expenses accruing upon the execution thereon, amounting in all to the sum of *two thousand eight hundred and eighty-four* dollars and *seventy-seven* cents, was collected of the plaintiff; that the note was secured in part by certain bonds, which the plaintiff received upon the settlement of the execution, and sold for *five hundred* dollars; and the defendant owes the plaintiff *eleven hundred ninety-two* dollars and *thirty-eight* cents.

Thomas Newcomb,
By *C. S. Griffin*, his Attorney.

Form No. 6341.

(Precedent in Adams *v.* Hayes, 120 N. Car. 383.)[2]

[*North Carolina*, *Wautauga* County. } In the *Superior* Court, *Spring* Term, 1896.

Zack Adams, plaintiff, against *J. L. Hayes*, *Wm. T. Hayes*, *E. H. Dougherty* and *E. F. Lovill*, defendants. } Complaint.][3]

The plaintiff in the above entitled action, complaining of the defendants, alleges:

1. That on the *30th* day of *May*, 1888, *F. M. Hodges* and *R. A. Adams*, doing business under the style and firm of *Hodges & Adams*, executed their promissory note to *L. A. Green* for the sum of $*600*, with *J. L. Hodges*, *Wm. T. Hayes*, *E. H. Dougherty*, *E. F. Lovill* and this plaintiff as sureties on said above note.

2. The principals in above mentioned note having failed to pay off and satisfy same at maturity, suit was accordingly entered at *Spring* Term, 1891, in the *Superior* Court of *Wautauga* county by *L. A. Greene*, plaintiff, for balance due on said note, to wit, $*526* principal, and $*23.52* interest, together with $*11.40* cost of action, making a total amount of $*560.92*; and at *June* Term of *Wautauga* County *Superior* Court judgment was obtained against *F. M. Hodges* and *R. A. Adams*,

1. This is substantially the plaintiff's declaration in the case of Newcomb *v.* Gibson, 127 Mass. 396.

2. Judgment sustaining a demurrer to this complaint was overruled by the supreme court, which held that though a proper relief was not asked and the insolvency of the principals was imperfectly alleged, the cause of action will be construed, on demurrer, as equitable rather than legal.

3. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

principals, and *J. L. Hayes*, *Wm. T. Hayes*, *E. H. Dougherty*, *E. F. Lovill* and this plaintiff, *Z. Adams*, as sureties, when this plaintiff, *Z. Adams*, one of said sureties, paid off and satisfied said judgment in full.

3. That $*160.66* was paid by plaintiff as receiver of *Hodges & Adams*, out of funds of said *Hodges & Adams*, which came into his hands as said receiver, leaving a balance of $*400.32*, which amount this plaintiff was forced to pay under said execution out of his own private funds.

4. That repeated demands have been made upon *J. L. Hayes*, *Wm. T. Hayes*, *E. H. Dougherty* and *E. F. Lovill*, the co-sureties, for their contributive shares, which they have neglected and refused, and still neglect and refuse, to pay, to the great damage of this plaintiff.

Wherefore, plaintiff prays that he may have judgment against the defendants in this action for the sum of $*320.24*, with interest from *October 10*, 1895, which said amount is four-fifths of amount paid by this plaintiff, and for costs of this action, and for such other and further relief as the court may adjudge.

[*Jeremiah Mason*, Plaintiff's Attorney.][1]

2. Where Some Co-sureties are Insolvent.[2]

Form No. 6342.

(*Commencing as in Form No. 6332, and continuing down to* *.)

1. On *May 1st*, 1879, *Samuel Short*, *Leonard A. Ford*, *William West*, and the plaintiff and defendant, made and delivered to *Henry Rogers* their promissory note, of which a copy is hereto annexed, marked Exhibit *A*.

2. At the maturity of said note the plaintiff was compelled to pay and did pay all of said note.

3. That at the time plaintiff paid said note, the principal and all the other parties thereto except the plaintiff and defendant then were and ever since have been wholly insolvent, and had not then nor have they since had any property subject to execution.

4. That defendant was and is bound to pay $*1,000* to plaintiff as his contributive share.

5. On *November 1st*, 1879, plaintiff demanded of defendant said sum or contributive share of $*1,000*, which he refused to pay, and no part thereof has been repaid to plaintiff.

The plaintiff claims $*1,200* damages. (*Concluding as in Form No. 6332.*)

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. If the plaintiff, who has paid the entire debt, allege in his complaint that one or more of his co-sureties are insolvent, he may demand from the defendant the proportion he would have been bound to pay, had there been no sureties but those who remain solvent; that is, where some of the sureties are insolvent, their shares are apportioned among the rest. And it is the same where one or more of the sureties have left the state. Security F. & M. Ins. Co. *v.* St. Paul Ins. Co., 50 Conn. 233; Stothoff *v.* Dunham, 19 N. J. L. 181; Young *v.* Lyons, 8 Gill (Md.) 166; Dodd *v.* Winn, 27 Mo. 501; Liddell *v.* Wiswell, 59 Vt. 365. This was always the rule in equity, and it has now been generally adopted by courts of law.

For the substance of other bills, petitions, declarations or complaints,

3. Where Contribution is Sought from Estate of Deceased Co-surety.[1]

Form No. 6343.[2]

The State of *Ohio*, *Hamilton* County, ss. } In the Court *of Common Pleas.*

John Doe, plaintiff,
against
Richard Roe, as administrator of the estate of Samuel Short, deceased, defendant. } Petition.

John Doe, the plaintiff above named, complains of *Richard Roe, as administrator of the estate of Samuel Short, deceased*, defendant, and says:

I. That on the *twenty-fourth* day of *January*, 1889, said *Samuel Short* died intestate, said *Short* being at the time of his death a resident of the county of *Hamilton*, in the state of *Ohio*.

II. That on the *twenty-sixth* day of *April*, 1889, letters of administration on the estate of said *Samuel Short*, deceased, were duly issued to *Richard Roe*, the said defendant, by the *Probate* Court of said *Hamilton* county, in the state of *Ohio*, appointing said *Richard Roe* sole administrator of said estate; and that thereupon *Richard Roe*, the said defendant, duly qualified as such administrator, and immediately entered upon the discharge of his duties as such administrator, and ever since that time has been and now is acting as such administrator.

III. That plaintiff and defendant's intestate were sureties on the official bond of one *Leonard A. Ford*, treasurer of the school district

where some of the sureties are insolvent, see Burroughs *v.* Lott, 19 Cal. 125; Newton *v.* Pence, 10 Ind. App. 672; Lytle *v.* Pope, 11 B. Mon. (Ky.) 299; Young *v.* Lyons, 8 Gill (Md.) 162; Smith *v.* Mason, 44 Neb. 610.

1. Contribution from Heirs of Deceased Co-surety. — For forms of declarations, complaints and petitions against the heirs of deceased co-sureties see Gibson *v.* Mitchell, 16 Fla. 519; Stevens *v.* Tucker, 87 Ind. 109; Camp *v.* Bostwick, 20 Ohio Stat. 337; Glasscock *v.* Hamilton, 62 Tex. 143.

In the second of these cases the complaint alleged that the administrator of the deceased co-surety had fully settled the estate, having fully administered upon the same, and was duly and fully discharged by the court of proper jurisdiction, and that the surplus of the estate had been distributed among the heirs. The defendant demurred to this complaint on the ground that it does not sufficiently show that the estate of the deceased had been finally settled before the commencement of the action. The court overruled the demurrer, saying that though the word "final" was not used in describing it, the settlement stated constituted a final settlement.

For substance of other declarations, complaints, etc., against representatives of a deceased co-surety see the following cases: Conover *v.* Hill, 76 Ill. 342; Zollickoffer *v.* Seth, 44 Md. 359; Bachelder *v.* Fiske, 17 Mass. 464; Van Demark *v.* Van Demark, 13 How. Pr. (N. Y. Supreme Ct.) 372; Bradley *v.* Burwell, 3 Den. (N. Y.) 61; McKenna *v.* George, 2 Rich. Eq. (S. Car.) 15.

2. This form is based on the facts in Koelsch *v.* Mixer, 52 Ohio St. 207, in which case defendant answered that he was sued with the plaintiff in the suit on the alleged bond and by the verdict of a jury was relieved from liability thereon. It was held that the judgment rendered on the verdict was not conclusive between the parties in the suit for contribution.

of *Reading*, *Hamilton* county, *Ohio*, a copy of which bond is hereto annexed, marked Exhibit *A*.

IV. That at the *April* term, 1889, of the Court *of Common Pleas* of *Hamilton* county, *Ohio*, the state of *Ohio*, for the use of the village school district of *Reading*, *Ohio*, recovered a judgment, by the consideration of said court, against this plaintiff in the sum of *one thousand eight hundred and ninety* dollars and *fifty-eight* cents damages and *thirty-three* dollars and *forty-seven* cents costs of said case.

V. That on the *twenty-fifth* day of *July*, 1889, plaintiff was compelled to pay, and did pay, in satisfaction of the said judgment, the sum of *one thousand seven hundred and twenty-five* dollars and *five* cents.

VI. That the amount due plaintiff from defendant, as administrator aforesaid, as the contributive portion of said *Samuel Short*, deceased, is *eight hundred and sixty-two* dollars and *fifty-two* cents.

VII. That on the *twenty-fifth* day of *July*, 1889, said claim was presented to and rejected by said administrator.

Wherefore said plaintiff prays judgment against said defendant for said sum of *eight hundred and sixty-two* dollars and *fifty-two* cents, with interest from the *twenty-fifth* day of *July*, 1889.

Jeremiah Mason, Plaintiff's Attorney.

III. BETWEEN PARTNERS.[1]

Form No. 6344

The State of *South Carolina*, County of *Spartanburg*. } Court *of Common Pleas*.

John Doe, plaintiff, against *Richard Roe*, defendant.

The complaint of the above named plaintiff respectfully shows to this court, that on the *fourteenth* day of *October*, 1889, and for a long time prior thereto, the plaintiff and defendant were partners, carrying on business as manufacturers of boots and shoes in *Spartanburg*, in said county, under the firm name of *Doe & Roe*; that on said *fourteenth* day of *October*, 1897, said partnership was, by mutual consent, dissolved, the accounts of the firm with the partners settled, all claims collected, and all debts paid,[2] except one owing to *Samuel*

1. For a collection of authorities on the subject of contribution between partners see 3 Am. and Eng. Dec. in Eq., 192–197. From these cases it appears that the substantial allegations of the ordinary bill or complaint are these: That the plaintiff and defendant were partners; that the firm was wound up and its accounts with the partners settled; that plaintiff was compelled to pay a firm debt out of his own property; that defendant should contribute his proportional part.

See generally as to contribution between partners the title CONTRIBUTION AND EXONERATION, 7 Am. & Eng. Encycl. of L. (2d ed.), p. 360 *et seq.*

2. **Affairs of Partnership Wound Up.** — It must appear that the partnership affairs have been settled before an action for contribution can be maintained. Johnson *v.* Peck, 58 Ark. 580; Mussetter *v.* Timmerman, 11 Colo. 201. Crossley *v.* Taylor, 83 Ind. 337; Wendlandt *v.* Sohre, 37 Minn. 162; Harris *v.* Harris, 39 N. H. 45; Brown *v.* Agnew, 6 W. & S. (Pa.) 238; Kelly *v.* Kauffman, 18 Pa. St. 351; 3 Am. & Eng. Dec. in Eq., pp. 192–197.

Short, of *Pittsburg*, in the state of *Pennsylvania*; that in the settlement of said accounts the debt so due to the said *Samuel Short* was overlooked, and that on the *third* day of *December*, 1897, and after the said settlement of the partnership affairs, the said *Samuel Short* recovered judgment against this plaintiff and defendant for the sum of *five hundred* dollars in the Court *of Common Pleas* of *Spartanburg* county, in the state of *South Carolina*; and that on said day the plaintiff, in order to prevent the levying of an execution on his personal property, paid the said judgment; that defendant thereby became liable to pay to plaintiff one-half of said sum, to wit, the sum of *two hundred and fifty* dollars, but though often requested so to pay, he has hitherto failed and absolutely refused to make such payment.

Wherefore, plaintiff demands judgment against defendant for said sum of *two hundred and fifty* dollars, with interest from the *third* day of *December*, 1897.

Jeremiah Mason, Plaintiff's Attorney

IV. BETWEEN STOCKHOLDERS.[1]

Form No. 6345.

Supreme Court, *Kings* County.

John Doe, plaintiff,
against
Richard Roe, defendant.

Plaintiff complains and says:

I. That *The Ontario Wine and Fruit Company* was a corporation duly organized under the laws of the state of *New York*, and having its usual place of business in *Oswego* in said state.

II. That the plaintiff and defendant were stockholders in said corporation, the defendant owning *ten* shares of its corporate stock out of *one hundred and forty-one* issued.

III. That the corporation distilled *five thousand five hundred* gallons of brandy and spirit, upon which it was liable to pay to the government of the United States a tax of *one* dollar per gallon, and which amounted in the aggregate to *five thousand five hundred* dollars.

IV. That by chapter 74 of the Laws of 1894, stockholders in such corporations are jointly and severally liable for such tax.

V. That in 1896, the *United States of America* brought an action in the *Circuit* Court *of the United States*, *second* circuit, against the plaintiff and others, all stockholders in said corporation, to recover from them said tax.[2]

1. For statutes relating to contribution among stockholders see as follows:
Iowa. — Code (1897), § 1633.
Maine. — Rev. Stat. (1883), c. 47, § 47.
Michigan. — How. Anno. Stat. (1882), §§ 4878, 4898.
Minnesota. — Stat. (1894), § 2822.
New Hampshire. — Pub. Stat. (1891), c. 150, § 21.
Rhode Island. — Gen. Laws (1896), c. 180, § 23.

2. Inasmuch as the plaintiff and the defendant, with all other stockholders, are jointly liable by statute for the tax, it is immaterial that the complaint does not allege that the defendant in this action was one of the defendants in the suit brought by the United States, for the defendant's obligation to contribute to the amount paid by the plaintiff as a result of the suit arises, not from the judgment but from the

VI. That the said corporation was insolvent at the time and had no property, and it has continued insolvent.[1]

VII. That the *United States* recovered judgment for *two thousand two hundred* dollars, and on *January second*, 1897, an execution issued on said judgment, and was about to be levied on the plaintiff's property, when he paid the said judgment and costs in full, amounting to *two thousand three hundred and forty* dollars.[2]

VIII. That thereupon, the defendant became liable to contribute and pay to the plaintiff *ten one hundred forty-firsts* of the expense to which the plaintiff was put as a result of said suit by the *United States*.

The plaintiff prays judgment for *one hundred and seventeen* dollars.

Jeremiah Mason, Plaintiff's Attorney.

(*Verification.*)[3]

V. BETWEEN JOINT OWNERS OF PROPERTY.[4]

1. Where Plaintiff has Repaired Property.

Form No. 6346.

(*Title of court and cause as in Form No. 6345.*)

Plaintiff complains and says:

I. That the plaintiff and the defendant are tenants in common of the house numbered *97* on *West Forty-fourth* street in *New York City*.

common liability under the statute. The judgment is of importance merely as showing that the plaintiff paid the tax under compulsion. Richter *v.* Henningsan, 110 Cal. 530; Wolters *v.* Henningsan, 114 Cal. 433.

1. Plaintiff is not entitled to contribution if it appears that all the property of the corporation which was bound to reimburse him has not been first applied and exhausted. Gray *v.* Coffin, 9 Cush. (Mass.) 192.

2. Payment Involuntary. — It must not appear in the bill that the payment by the plaintiff was voluntary. Andrews *v.* Callender, 13 Pick. (Mass.) 484; Cary *v.* Holmes, 2 Allen (Mass.) 498.

3. For the form of verification in a particular jurisdiction consult the title VERIFICATIONS.

4. Contribution Between Ship-owners. — Where one joint owner of a ship, who has paid for necessary repairs, seeks contribution from his co-owners, he must declare on a contract, express or implied, for in the absence of any agreement sanctioning the repairs no right of contribution exists. Curling *v.* Robertson, 7 M. & G. 336, 49 E. C. L. 335; Brodie *v.* Howard, 17 C. B. 109, 84 E. C. L. 109; Hardy *v.* Sproule, 31 Me. 71; Pentz *v.* Clarke, 41 Md. 327; Stedman *v.* Feidler, 20 N. Y. 437. See, however, Sheehan *v.* Dalrymple, 19 Mich. 239; Story on Partnership, § 423.

Contribution to Cost of Party-Walls. — For forms of declarations by an owner of land who has built a party-wall at his own expense between his land and his neighbor's, and seeks contribution from the neighbor, see 2 Chit. Pl. (6th Am. ed.), pp. 247–251; Campbell *v.* Mesier, 4 Johns. Ch. (N. Y.) 334. In this case the substantial allegations of the bill were: that plaintiff and defendant were owners of adjoining houses; that plaintiff, being desirous of tearing down his old house and building a new one, was informed by experts that the party-wall which separated his house from his neighbor's would have to be rebuilt, owing to its ruinous condition; that the neighbor, upon request, refused to join in expense of building a new wall and forbade plaintiff's proceeding with the work; that plaintiff, nevertheless, had the wall rebuilt; that the neighbor devised his house and land to the defendant, who made use of the wall. The bill prayed that the defendant be compelled to contribute one-half of the expense of building the wall.

For a full collection of authorities on the subject of contribution in connection with party-walls see 3 Am. & Eng. Dec. in Eq., pp. 189–192.

II. That on the *fourth* day of *June*, 1897, a portion of the roof of said house was struck by lightning and broken through, leaving the room below exposed to the air, and making immediate repairs essential to the preservation of a large amount of property.[1]

III. That the plaintiff requested the defendant to join him in ordering repairs,[2] and to pay one-half of the expense thereof, which the defendant absolutely refused to do.

IV. That thereupon the plaintiff had the roof repaired and paid the entire expense thereof, amounting to *six hundred* dollars. One-half of which sum defendant was bound to contribute, but which he has refused absolutely to pay.

Wherefore plaintiff prays judgment for *three hundred* dollars with interest from the *first* day of *July*, 1897, and his costs and disbursements in this action.

Jeremiah Mason, Plaintiff's Attorney.

(*Verification.*)[3]

Form No. 6347.

(Precedent in Baltimore, etc., R. Co. *v.* Walker, 45 Ohio St. 578.)[4]

[The State of *Ohio*, *Knox* County, ss. } In the Court *of Common Pleas.*

Goshorn A. Jones as receiver of the property of the Cleveland, Mt. Vernon & Delaware Railroad Company, plaintiff, against *The Baltimore & Ohio Railroad Company*, defendant. } Petition.

The plaintiff, as receiver of the property of the *Cleveland, Mt.*

1. Unnecessary Improvements. — If the complaint sets forth mere improvements, made by plaintiff on the joint estate, as distinguished from necessary repairs, and contains no allegation of assent by his co-tenant, it states no cause of action. Bazemore *v.* Davis, 55 Ga. 504; Elrod *v.* Keller, 89 Ind. 382; Stevens *v.* Thompson, 17 N. H. 103; Beaty *v.* Bordwell, 91 Pa. St. 438.

2. Request to Defendant to Contribute. — As a general rule, one tenant in common can compel his co-tenant to contribute to the expense of necessary repairs to a house or mill belonging to them. Gardner *v.* Diedrichs, 41 Ill. 158; Alexander *v.* Ellison, 79 Ky. 148; Denman *v.* Prince, 40 Barb. (N. Y.) 213. But he must allege in his complaint that he requested his co-tenant to join in the repairs and the latter refused. Mumford *v.* Brown, 6 Cow. (N. Y.) 475; Taylor *v.* Baldwin, 10 Barb. (N. Y.) 582; Stevens *v.* Thompson, 17 N. H. 103; Kidder *v.* Rixford, 16 Vt. 172. But allegations that the co-tenant was absent and that the repairs were beneficial will supply the place of an allegation of request, for assent will be presumed. Haven *v.* Mehlgarten, 19 Ill. 91. See also Chapin *v.* Smith, 52 Conn. 260.

In *Massachusetts*, if the co-tenant does not consent to the repairs, no action at law can be maintained. Colvert *v.* Aldrich, 99 Mass. 74.

3. For the form of verification in a particular jurisdiction consult the title VERIFICATIONS.

4. While this action was pending in the court of common pleas, Jones ceased to be receiver, and one George D. Walker, who had been appointed his successor, was, by the consent of the parties and by order of the court, subscribed as party plaintiff. Thereupon the cause was submitted to the court and judgment rendered for the plaintiff. Motions for a new trial and bill of exceptions were overruled and the judgment was affirmed by the supreme court, the court saying that "the right

Vernon & Delaware Railroad Company, alleges:][1] that the said *Cleveland, Mt. Vernon & Delaware Railroad Company* is a corporation, created and organized under the laws of the state of *Ohio*, and under said corporate name, built, constructed and operated a line of road extending from *Hudson* to *Columbus*, *Ohio*, by the way of *Akron* and *Mt. Vernon*, *Ohio*, and have conducted and operated said railroad under said corporate name from about the *1st* of *July*, 1873, up to the *1st* day of *December*, A. D. 1881: That on or about the *27th* day of *September*, 1880, the said *Goshorn A. Jones* was by the judge of the court *of common pleas* within and for the county of *Summit*, *Ohio*, in a certain proceeding therein pending against said *Cleveland, Mt. Vernon & Delaware Railroad Company* appointed receiver of said railroad company, which position he accepted by executing a bond to the acceptance of said court, and entered upon the discharge of his duties as receiver; that he is still acting in the said capacity. The said plaintiff says that the said defendant, the *Baltimore & Ohio Railroad Company*, is a foreign corporation, created and organized under the laws of the state of *Maryland*, and is now and was on the *1st* day of *July*, A. D. 1873, the lessee of the *Sandusky, Mansfield & Newark Railroad Company*, a corporation created and organized under the laws of the state of *Ohio*, and as such lessee the said defendant manages, controls and operates the line and track of said *Sandusky, Mansfield & Newark Railroad Company* from the city of *Sandusky* to the city of *Newark*, in said state of *Ohio*, and through the county of *Knox*, and a portion of the city of *Mt. Vernon*, and the said defendant, the *Baltimore & Ohio Railroad Company*, runs its passenger and freight trains, locomotive engines and cars, and machinery, over and upon said track and line of road. The said plaintiff says that the railroad track of said *Cleveland, Mt. Vernon & Delaware Railroad Company*, and the railroad track of the *Baltimore & Ohio Railroad Company* on the *Lake Erie* division, a short distance southwest of *Mt. Vernon*, *Ohio*, cross each other at a common grade; that the crossing at said point was made and constructed by the said *Cleveland, Mt. Vernon & Delaware Railroad Company* about the *1st* day of *July*, A. D. 1873, that all the material used and labor performed in constructing said crossing, including the materials used and labor performed in building the watchman's house, were all furnished, supplied and paid for by the said *Cleveland, Mt. Vernon & Delaware Railroad Company*; that said crossing and house for a watchman was done, and constructed for the common interest, benefit and necessity of the *Cleveland, Mt. Vernon & Delaware Railroad Company*, and the defendant, the *Baltimore & Ohio Railroad Company*; the plaintiff says that from the *1st* day of *October*, 1873, the said *Cleveland, Mt. Vernon & Delaware Railroad Company* have kept, maintained and paid the salary of a competent watchman, who performed all the necessary work, labor and services required by the laws of *Ohio*; that the services of said

of the plaintiff to recover upon the case made in his petition is sustained by sound reason and sanctioned by authority; the judgment recovered by him should be affirmed."

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

watchman were for the mutual benefit of the said plaintiff and the said defendant, and such as was and is required by the laws of *Ohio*, to be kept and maintained at railroad crossings. The said plaintiff says that the amount of expenditure necessary to be made for the construction and repairs, and maintenance of said railroad crossing, with the amount paid the watchman, and for erection of the watchman's house, from said *1st* day of *October*, 1*873*, to the *1st* day of *December*, A. D. 1*881*, amounts, with interest, to the sum of ($*5,789.05*) *five thousand seven hundred and eighty-nine* dollars and *five* cents, an itemized statement of said account of expenditures is hereto attached, marked Exhibit "*A*" and made a part of this petition.

The said plaintiff further says, that said defendant became and was liable to bear and pay one-half of said expense, and the said defendant is now indebted to the said plaintiff in the sum of ($*2,894.52*) *two thousand eight hundred and ninety-four* dollars and *fifty-two* cents, the one-half of the said sum of $*5,789.05*, the amount paid out and expended by the said plaintiff as aforesaid, with interest included.

The plaintiff has frequently requested and demanded of the said defendant payment of the said sum due the plaintiff, which the said defendant has refused to pay, or any part thereof.

There is now due from said defendant to said plaintiff the said sum of *two thousand eight hundred and ninety-four* dollars and *fifty-two* cents, for which sum of $*2,894.52* the plaintiff prays judgment against said defendant with interest from the *1st* day of *December*, 1*881*.

[*H. H. Greer*, Plaintiff's Attorney.][1]

2. Where Plaintiff has Removed an Incumbrance from Property.[2]

Form No. 6348.[3]

State of *Illinois*, } ss. In the *Circuit* Court of *Adams* County, *June* Term, A. D. 1*882*.
Adams County. }

To the Hon. *J. H. Williams*, Judge of said Court. In Chancery Sitting.

Your orators, *Matilda A. C. Griffith* and *A. G. Griffith*, her husband, of the town of *Ashland*, in said county and state, respectfully

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. For the material allegations of bills for contribution toward taxes, filed by owners of a certain estate in land against owners of another estate in the same land, see Williams *v.* Craig, 2 Edw. Ch. (N. Y.) 297; Dikeman *v.* Dikeman, 11 Paige (N. Y.) 484.

3. This bill is based on the facts in the case of Griffith *v.* Robinson, 14 Ill. App. 377, in which case, in reversing a decree overruling a demurrer to the bill, the court remarked that the right to contribution does not arise out of any contract or agreement of the co-tenants to indemnify each other, but on the principle of equity, that where two or more persons are subject to a common burden it shall be borne according to their several interests. See also Wilton *v.* Tazwell, 86 Ill. 29; Weare *v.* Van Meter, 42 Iowa 128; Van Brunt *v.* Gordon, 53 Minn. 227; Davidson *v.* Wallace, 53 Miss. 475; Allen *v.* Poole, 54 Miss. 323; Watson's Appeal, 90 Pa. St. 426; *In re* Devlin's estate, 17 Pa. Co. Ct. Rep. 433; Wilmot *v.* Lathrop, 67 Vt. 671.

show unto your honor that your orator *Matilda A. C. Griffith* and *Martha M. Robinson* are sisters, and children of one *Jesse Robinson*, late of said county, deceased, who died on the *sixth* day of *July*, 1879, intestate, leaving him surviving his said two daughters; that the said two daughters were the only heirs of their deceased father, and as such were the owners in fee as tenants in common of certain lands owned by him in fee, at the time of his death as aforesaid, and lying in said county of *Adams*; that on the *fifth* day of *September*, 1879, letters of administration were granted on the estate of said intestate by the *County* Court of *Adams* county to *Samuel Short*, who duly qualified as such administrator, and immediately entered upon the discharge of his duties as such administrator; that claims in favor of certain creditors were presented and allowed against the administrator by said court, to the amount of *one thousand* dollars; that the personal estate was declared insolvent, and that a petition for leave to sell the real estate to pay said allowance was duly presented to said *County* Court by the administrator, to which your orator, *Matilda A. C. Griffith* and the said *Martha M. Robinson* were made defendants, and duly served with process, and that at the *April* term, 1882, an order of said court was made and entered of record, ordering the said administrator to sell said lands to pay said allowances and all costs and charges of said sale or so much as was necessary for that purpose; that thereupon, on the *first* day of *June*, 1882, to save said real estate from sale under said order and to preserve the same for said heirs, your orator *Matilda A. C. Griffith* and the said *Martha M. Robinson*, and to prevent further costs and expenses, your orator, *Matilda A. C. Griffith* paid off the said allowances and costs in full, but that the said *Martha M. Robinson* failed and refused to pay any part of the same, and her *pro rata* share was paid by your orator, *Matilda A. C. Griffith*, the said share amounting to the sum of *five hundred* dollars; that said *Martha M. Robinson*, although requested, has refused to repay the same or any part thereof. To the end therefore that the said *Martha M. Robinson* may be required to repay the share paid for her to relieve the land from the common charge, and that the same be made a lien upon her interest in the said land, and that your orator may have such other or further relief in the premises as the nature of the case may require and to your honor shall seem meet according to equity and good conscience, may it please your honor to grant unto your orators the writ of summons in chancery, directed to the sheriff of said county of *Adams* commanding him that he summon the defendant, *Martha M. Robinson*, thereby commanding her to be and appear before this honorable court on the first day of the *next* term thereof, to be held at the *court-house* in *Quincy*, in said county, on the *first* day of *October*, A. D. 1882, within and for the county of *Adams* aforesaid, then and there to stand to and perform and abide such further order, direction and decree therein as to your honor shall seem meet, according to equity and good conscience.

And your orators will ever pray, etc.

Matilda A. C. Griffith.
A. G. Griffith.

Walter Scoggin, Solicitor.

VI. BETWEEN CO-DEVISEES AND CO-LEGATEES.[1]

Form No. 6349.[2]

Commonwealth of *Massachusetts*, *Superior* Court.
Bristol, ss. In Equity.

John Doe, plaintiff,
against
Richard Roe, defendant. } Bill of Complaint.

I. *John Tomlinson* died testate on the *eleventh* day of *May*, 1885, leaving a widow, *Rachel Tomlinson*, but no children. His will was duly proved and allowed in the *Probate* Court for the county of *Bristol*, on the *fifteenth* day of *May*, 1885.

II. By said will said *John Tomlinson* gave a house on *Market* street in *Fall River* to the said *Rachel*; to the plaintiff his mill stock and bank stock; and to the defendant a house on *Whipple* street in said *Fall River*.

III. The widow duly waived the provisions of the will, and on her petition the portion of the real estate and personal estate to which she was by law entitled, to wit, *five thousand* dollars in real estate in fee, and *five thousand* dollars in personal estate absolutely, was duly set

1. **For statutes** relating to the subject of contribution between co-legatees and co-devisees see as follows:

Arizona. — Rev. Stat. (1887), § 1171.
Arkansas. — Sand. & H. Dig. (1894), §§ 7440, 7441.
Connecticut. — Gen. Stat. (1888), § 556.
Florida. — Rev. Stat. (1892), § 1935.
Indiana. — Horner's Stat. (1896), § 2568.
Maine. — Rev. Stat. (1883), c. 74, § 6.
Massachusetts. — Pub. Stat. (1882), c. 127, §§ 27–33.
Michigan. — How. Anno. Stat. (1882), §§ 5818, 5819, 5945.
Minnesota. — Stat. (1894), §§ 5920, 5928, 5932.
Montana. — Code Civ. Proc. (1895), § 2696.
New Jersey. — Gen. Stat. (1895), p. 2373, § 78.
North Carolina. — Code (1883), § 1534.
Ohio. — Bates' Anno. Stat. (1897), § 5973 *et seq.*
Rhode Island. — Gen. Laws (1896), c. 203, §§ 25 *et seq.*
Tennessee. — Code (1896), § 3998.

For substance of sufficient complaint see Cook *v.* Cook, 92 Ind. 398.

Contribution between Heirs. — Allegations that the plaintiff is an heir who has been compelled to pay the debts of his ancestor, after a deficiency in the personal assets, and that the defendants are co-heirs, are as effective in making out a case for contribution as are allegations that the parties are co-devisees or co-legatees. Taylor *v.* Taylor, 8 B. Mon. (Ky.) 419; Clowes *v.* Dickenson, 5 Johns. Ch. (N. Y.) 235.

2. This form is adapted from the bill of complaint which was filed in the case of Tomlinson *v.* Bury, 145 Mass. 346. The allegation that the plaintiff was forced to give up the property bequeathed to him on account of the wife's claim for dower (or the property to which the statute entitles her) is, of course, equivalent to an allegation that the plaintiff was forced to abandon his legacy to the claims of creditors. And an allegation to the effect that the estate of the testator was insufficient to pay the debts without calling upon the devisees or legatees is essential, and without it the complaint is demurrable. A legatee who has been compelled to pay the whole of a legacy is entitled to no contribution from his co-legatees if the estate was solvent independent of their legacies, or if it became insolvent by devastavit of the executor. Peeples *v.* Horton, 39 Miss. 406.

If, in a bill by a legatee against a co-legatee for contribution, it appears that the executor had sufficient funds originally to pay all the legacies, but that after paying some of them he squandered the residue of the fund and is unable to pay the plaintiff's legacy, the bill states no cause of action. Sims *v.* Sims, 10 N. J. Eq. 158.

off and assigned to her. The real estate so set off and assigned was the said house on *Market* street, which was devised to her and was appraised at *five thousand* dollars, and the personal estate assigned included all that bequeathed to the plaintiff. The house devised to the defendant is the only property not so assigned to the widow.

IV. The result of the waiving of the provisions of the will by the said *Rachel Tomlinson* and the assignment to her under her petition of the aforesaid property, has been to deprive the plaintiff of all the mill stocks and bank stocks bequeathed to him. Wherefore he has a right to contribution from the defendant out of the real estate devised to him; he has requested the defendant to make such contribution, but he has refused and still refuses so to contribute.

The plaintiff prays:

That the defendant may be ordered to contribute of the property devised to him such sum to the plaintiff as may be found just and reasonable toward the legacy of which the plaintiff has been deprived as aforesaid.

John Doe,
by *Jeremiah Mason*, his Attorney.

VII. BETWEEN JOINT TORT-FEASORS.[1]

Form No. 6350.[2]

1. Contribution between Joint Tort-feasors. — As a general rule, where one of two joint tort-feasors has been compelled to pay the whole damage, he can recover no contribution from the other. There are, however, exceptions to this rule. Where the party who seeks contribution acted honestly, neither knowing nor being presumed to know that the act was unlawful, he may recover contribution, and perhaps full indemnity. And where a joint liability is imposed on several by inference of law, as where the joint owners of a stage coach are held liable for the negligence of a driver, the one who is compelled to pay the entire damage can recover contribution from his fellows. 3 Am. and Eng. Dec. in Eq., pp. 198–206; Bailey *v.* Bussing, 28 Conn. 455; Nickerson *v.* Wheeler, 118 Mass. 295; Ankeny *v.* Moffett, 37 Minn. 109; Skerner *v.* Spear, 92 N. Car. 148; Horbach *v.* Elder, 18 Pa. St. 33.

If the bill, declaration, petition or complaint shows on its face that the plaintiff acted either wilfully, knowing the illegal nature of his action, or negligently, when he should have known its nature, a demurrer will be sustained in nearly all jurisdictions.

There are, however, a few states in which statutes have been passed giving wrong-doers in general a right of contribution like that of other joint obligors. See 3 Ga. Code (1895), § 3916; Burns' Anno. Prac. Code Mo. (1896), § 1179; W. Va. Code (1891), p. 861.

In Nickerson *v.* Wheeler, 118 Mass. 295, the bill alleged in substance that on a certain date one Thayer recovered judgment against the New England Lithographic Steam Printing Co. for $3,290.92 damage and $33.89 costs; that execution issued against the company, but was returned in no part satisfied; that thereupon Thayer filed his bill against the present plaintiff, who was treasurer of said corporation, and all the directors; that said officers had not deposited any certificate with city clerk of Boston as required by statute, wherefore they were jointly and severally liable for the debts of the corporation; that said Thayer recovered judgment against them and execution was levied wholly on the property of the plaintiff, whereby he was compelled to pay $3,924.39; that the other defendants in that suit, who were the defendants to this bill, were liable to contribute. The court granted the relief prayed for. But see *contra* Andrews *v.* Murray, 33 Barb. (N. Y.) 354; Baird *v.* Midvale Steel Works, 12 Phila. (Pa.) 255.

2. *Missouri.* — Burns' Anno. Prac. Code (1896), § 1179.

John Doe, plaintiff, against *Richard Roe*, defendant. } In the *Circuit* Court of *Barton* County, State of *Missouri*. To the *September* Term, 1897.

Plaintiff states that on the *first* day of *May*, 1897, *Samuel Short* recovered a judgment in the *Circuit* Court of *Barton* county, in the state of *Missouri*, against the plaintiff and the defendant, *Richard Roe*, for the sum of *one thousand* dollars damages, for the wrongful conversion by plaintiff and defendant of *one* McCormick reaper and binder and traction engine, and costs of suit, amounting to *one hundred* dollars; that on the *first* day of *June*, 1897, plaintiff, in order to avoid levy and execution on his property, paid off the said judgment and costs in full with his own means, and on said *first* day of *June* demanded of defendant, *Richard Roe*, his contributive portion of said sum, amounting to *five hundred and fifty* dollars, but defendant refused to pay said sum or any part thereof.

Wherefore, plaintiff demands judgment against defendant for said sum of *five hundred and fifty* dollars, with interest from the *first* day of *June*, 1897, and for other proper relief.

Jeremiah Mason, Attorney for Plaintiff.

CONTRIBUTORY NEGLIGENCE.

By Thomas E. O'Brien.

I. PLEA, 458.
II. ANSWER, 459.

CROSS-REFERENCES.

For Forms of Answers and Pleas setting up Matters of Defense by way of Confession and Avoidance, generally, see the title CONFESSION AND AVOIDANCE, ante, p. 37 *et seq., and the GENERAL INDEX to this work.*

For matters of Procedure, see 5 Encyclopædia of Pleading and Practice, p. 1 *et seq.*

I. PLEA.

Form No. 6351.[1]

John Doe against *Richard Roe.* } In *Washington County* Court, *September* Term, A. D. 1897.

And the said defendant, by *Daniel Webster*, his attorney, comes and

1. **Contributory negligence must be specially pleaded** in the nature of a confession and avoidance. McDonald *v.* Montgomery St. R. Co., 110 Ala. 161; Union Pac. R. Co. *v.* Tracy, 19 Colo. 331. See also the title Confession and Avoidance, *ante*, vol. 5, p. 37.

For formal parts of pleas in any jurisdiction consult the title Pleas.

For another form of plea setting up contributory negligence see Form No. 4379, *supra.*

The replication also may set up contributory negligence as a defense. For the formal parts of replications, generally, see the title Replications.

Negativing by Plaintiff — *Generally.* — In some states plaintiff must negative contributory negligence in his complaint or petition.

Illinois. — Foster *v.* Onderdonk, 54 Ill. App. 254; Calumet Iron, etc., Co. *v.* Martin, 115 Ill. 358.

Indiana. — Terre Haute St. R. Co. *v.* Tappenbeck, 9 Ind. App. 422. A general allegation of freedom from negligence, however, is sufficient. Chicago, etc., R. Co. *v.* Smith, 6 Ind. App. 262. But when the facts show that there was no contributory fault, it need not be denied in the complaint. Cleveland, etc., R. Co. *v.* Keely, 138 Ind. 600.

Maine. — Buzzell *v.* Laconia Mfg. Co., 48 Me. 113.

Michigan. — Denman *v.* Johnston, 85 Mich. 387.

Rhode Island. — Di Marcho *v.* Builders' Iron Foundry, 18 R. I. 514.

Under Statute. — In *Maryland*, in State *v.* Baltimore, etc., R. Co., 77 Md. 489, it was held that under the code, article 75, section 23, form 36, it is necessary to aver in the declaration that the person injured was using due care at the time the injury was inflicted.

In *Massachusetts*, in Fuller *v.* Boston, etc., R. Co., 133 Mass. 491, the court seems to hold that in an action against a railroad for personal injuries, under the statutes (1874), chapter 372, section 164, the declaration must aver that at the time the injury complained of

defends the force and injury, when, etc., and says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him the said defendant, because he says that before and at the time, when, etc., the said defendant was driving in and along the said highway, the carriage of said plaintiff also being driven along said highway and in the opposite direction to that in which the carriage of said defendant was being driven; yet the said defendant says at the time when, etc., that the carriage of the said plaintiff was driven and managed in a negligent, improper and careless manner in said highway, and that being near the carriage of said defendant and by reason of such careless, improper and negligent management, by accident and by failure to use due and proper care in the management thereof, and not through any default or negligence on the part of said defendant, the said carriage of plaintiff was driven upon and against the carriage of defendant, whereby the injuries in the said declaration mentioned were sustained by the plaintiff. Wherefore defendant says that whatever damage, if any, happened to said plaintiff or to his carriage was caused by said accident, and not by any default or negligence of the defendant; which are the same supposed trespasses in the said declaration mentioned. And this the said defendant is ready to verify; wherefore, he prays judgment, if the said plaintiff ought to have or maintain his aforesaid action thereof against him, and for his costs.

II. ANSWER.

Form No. 6352.

(Precedent in Missouri Pac. R. Co. *v.* Cornell, 30 Kan. 35.)[1]

[State of *Kansas*, } ss. In the *District* Court in and for the county
Anderson County. } and state aforesaid.

S. P. Cornell, plaintiff,
against
The Missouri Pacific Railway Company, defendant. } Answer.

The defendant, *The Missouri Pacific Railway Company*, for answer to plaintiff's petition, denies each, every and all the allegations in said petition contained.

was received the plaintiff was in the exercise of due care.

In Justices' Courts. — This rule held to apply in justices' courts. Cincinnati, etc., R. Co. *v.* Stanley, 4 Ind. App. 364.

Negligence of third persons need not be negatived, except in cases where such person is so identified with or under the control or direction of the party injured as to be responsible for his acts. Nappanee *v.* Ruckman, 7 Ind. App. 361.

An executor or administrator, in an action for negligently causing the death of decedent, need not negative contributory negligence on his part. Pittsburgh, etc., R. Co. *v.* Burton, 139 Ind. 357.

1. The court held in this case that upon the introduction of evidence tending to prove the facts alleged in the answer a question of contributory negligence was presented and that the trial court committed error in refusing instructions directing the jury to consider the contributory negligence of the plaintiff below.

For other forms of answers setting up contributory negligence as a defense see vol. 4, Forms Nos. 5054, 5055, 5056, 5140 and 5715; also see Evans *v.* Lake

And for a further defense to said petition the defendant alleges][1] that the plaintiff was guilty of negligence and carelessness contributing directly to the injury complained of, in this, to wit: that he permitted dead and dry grass and other combustible material to be and remain in his orchard, and permitted a continuous body of dry grass to extend from his orchard and connect with the adjacent prairie and with the right-of-way of defendant's road; and that he placed and caused to be placed around his apple trees large quantities of dry and combustible material, and carelessly and negligently so permitted it to remain; and carelessly and negligently permitted fires to come upon his premises; and thereby the injury complained of was occasioned without the fault or negligence of the defendant.

[*The Missouri Pacific Railway Company*, Defendant.
By *W. A. Johnson*, Attorney.

(*Verification.*)[2]][1]

Erie, etc., R. Co., 78 Fed. Rep. 783; Freeman *v.* Engelmann Transp. Co., 36 Wis. 572. In the Freeman case last cited the answer, among other things, alleged "that the small boats were launched, and that all passengers were invited into and urged to take them; that some passengers refused to go into the small boats and wantonly and recklessly stayed upon said steamer when it was evident she must sink; that all the passengers who entered the small boats were saved and ultimately reached the land; and that if plaintiff's intestate was drowned while on said steamer it was because of his own carelessness and recklessness in not complying with the reasonable and proper requests of the officers and crew to come into the small boat, and in his reckless and wanton determination to remain on board of a sinking ship." It was held that the averment set up in the answer constituted a proper defense of contributory negligence.

For formal parts of an answer in any other jurisdiction consult the title ANSWERS IN CODE PLEADING, vol. 1, p. 799.

Reply may set up contributory negligence as a defense. For the formal parts of a reply in any jurisdiction see the title REPLY.

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. See the title VERIFICATIONS.

CONVERSION.

See the title TROVER AND CONVERSION.

CONVICTS.

By Thomas E. O'Brien.

I. DISCHARGE OF POOR CONVICTS, 461.
1. *Application*, 461.
2. *Notice to District Attorney*, 462.
3. *Mandate for Production before Commissioner*, 462.
4. *Oath of Convict before Commissioner*, 463.
5. *Certificate of Discharge*, 463.
II. CERTIFICATE OF VOCATION, ETC., OF CONVICT, 463.
III. OATH OF COUNTY CONVICT OF INABILITY TO PAY FINE, 464.
IV. INDICTMENT FOR CRUEL AND INHUMAN TREATMENT OF CONVICT, 465.

CROSS-REFERENCES.

For Form of Indictment against Convict for Setting Fire to Penitentiary, see the title ARSON, vol. 2, p. 213.
For Forms of Actions on Bonds Given upon Hire of Convicts, see the title BONDS, ETC. (Actions on), vol. 3, p. 570 *et seq.*
See also the title ESCAPE, and the GENERAL INDEX to this work.

I. DISCHARGE OF POOR CONVICTS.[1]

1. Application.

Form No. 6353.[2]

United States of America, }
District of Columbia.[3] }

1. **Discharge of poor debtors** in the different states, for forms in proceedings relating to, consult the title Poor Debtors.

2. **In Federal Courts.** — When a poor convict sentenced by any court of the United States to pay a fine or fine and costs, whether with or without imprisonment, has been confined in prison thirty days solely for the nonpayment of such fine or fine and costs, he may make application in writing for discharge to any commissioner of the United States court in the district where he is imprisoned, setting forth his inability to pay such fine or fine and costs. U. S. Rev. Stat. (2d ed. 1878), § 1042; D. C. Comp. Stat. (1894), c. 55, § 165.

3. **Statute applies to the District of Columbia,** so held in *Ex p.* Norvell, 9 Mackey (D. C.) 348.

United States against *John Doe.* } Application for Discharge from Imprisonment under the provisions of section 1042 of the Revised Statutes of the United States.

To *James Hallett*, a Commissioner of the United States for said *District*:

I hereby make application for discharge from imprisonment in the *District* jail, under the provisions of section 1042 of the Revised Statutes of the United States; and in support thereof state that I was sentenced to pay a fine of *five hundred* dollars and costs by the *Supreme* Court of the *District of Columbia*; that I have been imprisoned for thirty days solely for nonpayment of fine and costs, and that I am unable to pay the same.

John Doe, Applicant.

This *tenth* day of *March*, 1898.

2. Notice to District Attorney.

Form No. 6354.[1]

(*Venue and title of cause as in Form No. 6353.*)

To *Jeremiah Mason*, United States Attorney, *District of Columbia*, *Washington*, *D. C.*:

Notice is hereby given that application has this day been made before *James Hallett*, a commissioner of the United States for said *District*, by *John Doe*, for a discharge from imprisonment in the jail of said *District*, under the provisions of section 1042, Revised Statutes United States, and that a hearing will be had upon said application on the *eleventh* day of *March*, 1898, at *ten* o'clock in the *fore*noon, or as soon thereafter as the case can be heard.

Oliver Ellsworth, Attorney for *John Doe*.

Dated this *tenth* day of *March*, 1898.

3. Mandate for Production before Commissioner.

Form No. 6355.

United States of America, } *District of Columbia.* }

The United States of America, to the Warden of the *District* Jail, Greeting:

Whereas, application has this day been made before me, *James Hallett*, a commissioner of the United States for said *District*, by *John Doe*, for a discharge from imprisonment in the jail of said *District*, under the provisions of section 1042 of the Revised Statutes of the United States.

This is therefore to command you to produce the body of said *John Doe* before said commissioner forthwith.

To the marshal of said *District* to execute.

1. **Notice must be given to the district attorney** of the United States, who may appear, offer evidence and be heard in the matter. U. S. Rev. Stat. (2d ed. 1878), § 1042; D. of C. Comp. Stat. (1894), c. 55, § 163.

In testimony whereof, I hereunto set my hand at my office in *Washington*, in said *District*, this *tenth* day of *March*, 1898.

James Hallett,
(SEAL) United States Commissioner for the *District of Columbia*.

4. Oath of Convict before Commissioner.

Form No. 6356.[1]

(*Venue and title of cause as in Form No. 6353.*)

District of Columbia, to wit:

I, *John Doe*, do solemnly swear that I have not any property, real or personal, to the amount of *twenty* dollars, except such as is by law exempt from being taken on civil precept for debt by the laws of the *District of Columbia*; and that I have no property in any way conveyed or concealed, or in any way disposed of, for my future use or benefit. So help me God.

John Doe.

Subscribed and sworn to before me this *tenth* day of *March*, 1898.

James Hallett,
United States Commissioner for the *District of Columbia*.

5. Certificate of Discharge.

Form No. 6357.[2]

(*Venue and title of cause as in Form No. 6353*).

It appearing to the commissioner that *John Doe*, the above named defendant, has been imprisoned in the jail of the *District of Columbia* for the period of thirty days, solely for the nonpayment of a fine and costs adjudged against him by the *Supreme* Court of the *District of Columbia*, and that he is unable to pay the same, and has complied with all the requirements of law.

It is therefore ordered that the said *John Doe* be discharged from further imprisonment and go hence without delay.

James Hallett,
United States Commissioner for the *District of Columbia*.

This *eleventh* day of *March*, 1898.

II. CERTIFICATE OF VOCATION, ETC., OF CONVICT.

Form No. 6358.[3]

1. **Statute prescribes this form** of oath as the one to be administered. U. S. Rev. Stat. (2d ed. 1878), § 1042; D. C. Comp. Stat. (1894), c. 55, § 163.

2. **A certificate of discharge** shall be given to the jailer or keeper of the jail by the commissioner. U. S. Rev. Stat. (2d ed. 1878), § 1042; D. C. Comp. Stat. (1894), c. 55, § 163.

3. *Minnesota.* — It shall be the duty of the court in which any person shall be convicted of any offense punishable in a state prison, before passing the sentence, to ascertain by examination of such convict on oath, and, in addition to such oath, by such other evidence as can be obtained, the business, if any, in which such convict has been engaged prior to such arrest and conviction, whether such convict had learned and practiced any mechanical trade, if so the nature of such trade and length of time that same has been followed, and the clerk of the court shall enter the

State of *Minnesota*, } ss. *District* Court, *Fourth* Judicial District.
County of *Hennepin*. } General Term, *December*, 1897.

No. *110*. *The State of Minnesota* }
against } Indictment for *Burglary*.
Richard Roe, defendant. }

I, *Calvin Clark*, clerk of the *District* Court in and for the county of *Hennepin*, state of *Minnesota*, do hereby certify, that after the above named defendant *Richard Roe* had been convicted in said court of the crime of *burglary*, and before passing sentence upon him, the court examined the said defendant under oath, and took the further evidence of *William West* and *Thomas Short* as to the business in which said defendant had been engaged, or the mechanical trade which he had learned and practiced prior to his arrest and conviction; and upon such evidence the court ascertained and decided the facts to be that the above named defendant is by trade a *blacksmith*, and that for the *five* years next previous to his arrest for the crime of which he now stands convicted he practiced said trade in the city of *St. Paul* in the state of *Minnesota*.

Witness my hand and the seal of said court this *twenty-second* day of *December*, 1897.

(SEAL) *Calvin Clark*, Clerk.

III. OATH OF COUNTY CONVICT OF INABILITY TO PAY FINE.

Form No. 6359.[1]

The State of *Texas*, }
County of *Freestone*. }

Before me, the undersigned authority, personally appeared *John Doe*, who, being by me duly sworn, on oath says, that in the *County* Court of *Freestone* county, on the *tenth* day of *February*, 1898, he was fined the sum of *ninety-two* dollars; and affiant further says that he is not able to pay said fine and costs, or any part thereof; and failing to pay the same he is now in the custody of the sheriff of *Freestone* county, and that he makes this affidavit that he may be hired out under the law governing the hiring of county convicts.

John Doe.

Subscribed and sworn to before me this *twenty-fifth* day of *February*, 1898.

Edward L. Walker, County Judge.

facts as ascertained and decided by the court on the minutes thereof and shall deliver a certificate fully stating the facts so ascertained to the sheriff of the county, who shall cause same to be delivered to the warden of the state prison at the same time that such convict is committed to the care of said warden pursuant to his sentence. Stat. (1894), § 7491.

1. *Texas*. — Code Crim. Proc. (1895), art. 856, providing that when a defendant is convicted of a misdemeanor and his punishment is assessed at a pecuniary fine, if he make oath in writing that he is unable to pay the fine and costs adjudged against him, he may be hired out to manual labor or be put to work in the manual labor workhouse or on the manual labor farm or public improvements of the county, etc.

IV. INDICTMENT FOR CRUEL AND INHUMAN TREATMENT OF CONVICT.

Form No. 6360.[1]

In the *Circuit* Court for the *Third* Judicial Circuit of *Florida*.

Suwannee county, *November* term, in the year of our Lord one thousand eight hundred and *ninety-seven*.

State of Florida against *Richard Roe.* } Indictment for Cruel and Inhuman Treatment of Convict.

In the name and by the authority of the state of *Florida*, the grand jurors of the state of *Florida*, impaneled and sworn to inquire and true presentment make in and for the body of the county of *Suwannee*, upon their oaths do present that *Richard Roe*, of the county of *Suwannee* and state of *Florida*, on the *first* day of *February*, in the year of our Lord one thousand eight hundred and *ninety-seven*, in the county and state aforesaid, did unlawfully, feloniously, cruelly and inhumanely treat one *John Doe*, then and there being a prisoner, duly convicted, sentenced and committed to the state prison for a term of years, according to the laws of the state of *Florida*, and contracted for as provided by the laws of the state of *Florida*, and employed under said contract by him the said *Richard Roe*, by unlawfully, knowingly, wilfully, cruelly, inhumanely, feloniously and without good cause refusing and neglecting to provide him the said *John Doe*, with adequate allowance of proper food and suitable clothing, by reason of which neglect and refusal he the said *John Doe*, being exposed to the cold and inclemency of the weather, did suffer greatly and his health and life were greatly endangered; against the peace and dignity of the state of *Florida*.

Daniel Webster, State's Attorney
for the *Third* Judicial Circuit of the State of *Florida*.

1. *Florida*. — Rev. Stat. (1892), § 3076. If any contractor or guard, or any agent or employee of such contractor, or any other person, shall be guilty of any cruel or inhuman treatment to any prisoner contracted for, by neglect or otherwise, or shall wilfully or negligently permit any prisoner to escape, he shall be punished by imprisonment in the state prison not exceeding ten years or by fine not exceeding five thousand dollars.

COPYRIGHT.[1]

By Joseph Creeden.

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I. Proceedings to Prevent Infringement.

1. Affidavit in Support of Motion for Preliminary Injunction.[2]

Form No. 6361.

(Precedent in Ladd *v.* Oxnard, 75 Fed. Rep. 705.)[3]

United States of America, District of *Massachusetts.*

On this *sixth* day of *February,* A. D. 18*96,* before me personally

1. **For statutes** relating to copyright see U. S. Rev. Stat. (1878), §§ 4958–4971; U. S. Rev. Stat. (Supp. 1891), p. 15, c. 301; 26 U. S. Stat. at Large, p. 1106, c. 565.

2. **For forms of affidavits, generally,** consult the title Affidavits, vol. 1, p. 548.

3. It was held in this case that, where a clear infringement of a copyrighted compilation of credit ratings and the financial standing of persons engaged in a particular line of business is shown, a preliminary injunction will only be granted in the event of the failure of defendant to file a bond in a specified

appeared *David M. Ladd*, who, being by me duly sworn, deposes and says that he is one of the complainants in the above entitled action; that he has during the past *seven* years had personal supervision and direction of the compiling, preparation, revision and transcribing of the manuscript copy of each of the several editions of the "*United Mercantile Agency Credit Ratings for the Marble, Granite and Stone Trade*"; that during that period his firm has continually had as subscribers, with one or two exceptions, all the leading manufacturers, quarriers, and wholesalers of marble and granite as used for both monumental and building purposes; that his firm and its representatives and agents have repeatedly consulted said subscribers with the aim and purpose in view of securing items of experience that would be of assistance in the revision and correction of said several editions of said *Credit Ratings*, and that from personal experience he has found it a matter of impossibility and impracticability to secure from said individual subscribers or members of the wholesale trade, information, corrections, or changes of reliability or value to aid him in connection with the revision of said work, except as may have related to the particular customers or patrons of such individuals or concerns, which would necessarily and naturally be of limited number and a very small minority of all the firms and parties engaged in the various lines in the several states as included in said work. Said deponent further says that he had personal charge and supervision of the *first* edition of said *Credit Ratings*, issued in *June*, 1890, and that neither the compilation of that nor any of the several editions of the same work issued since that date have been or were compiled or revised from town or city directories or trade lists, but that the information and matter contained in said books were secured through special correspondents, agents and representatives in all sections of the United States and *Canada*, and from direct correspondence with the retail dealers in marble, granite and stone in the various towns and cities of the entire country; that the original answers to such direct correspondence with dealers, and the revised lists as sent in annually by said representatives, agents and special correspondents, are now on file in the office of said complainants, and, in consequence, that if any instances occur where errors and misprints appear in both complainants' and respondents' books it cannot be explained or excused on the ground that both used the same common sources of information, unless it can be shown that complainants' agents and representatives and special correspondents also acted in the same capacity for said respondents. The deponent further says that he has made a careful comparison between the work issued by his firm in *June*, 1894, and the respondents' book, and that he finds that clerical errors and misspellings of his own making from the printed cards and letter headings, and pen signatures of various dealers, are repro-

penal sum, conditioned for the payment of any damages ultimately decreed against him; the court saying that publications of this character depend for acceptance on the reputation of the compilers and publishers, so that defendant's book would presumably not obtain much circulation to the prejudice of complainant. See also the substance of a sufficient affidavit in Thomas *v.* Lennon, 14 Fed. Rep. 850.

For defendant's affidavits in opposition to the motion see Ladd *v.* Oxnard, 75 Fed. Rep. 719 *et seq.*

duced in said respondents' book without change; that the names of the parties who were never engaged in the marble, granite or stone line, but whose names were inserted in *Credit Ratings* as detectives (or, in other words, for the purpose of enabling said complainants to discover infringements, should any be attempted), are also reproduced in the book of said respondents; that the names of towns correctly inserted in every standard atlas and gazetteer, but misspelled through error by said complainants in their books, also appear with like misspelling in the book of said respondents; that names wrongfully classified under towns of the same name in different states also appear reproduced without correction in said respondents' book, some of which are shown in the lists or tables herewith appearing, and further shown by the several letters and communications on file herewith, marked Exhibits *A1* to *Z*, inclusive, and numbers *1* to *15*, inclusive. The deponent further says that over *ten thousand* corrections and changes were made on the 1894 edition of *Credit Ratings*, as revised and issued in *June*, 1895, while said *Blue Book*, issued by respondents, in *November*, 1895, is almost identical with the *June* 1894 edition of *Credit Ratings*, issued *seventeen* months previously by the complainants, except that a few corrections were made in *Pennsylvania* and one or two other states. The deponent further says that on the states of *Alabama*, *Arizona*, *Arkansas*, *California*, *Colorado*, *Connecticut*, *Delaware*, *District of Columbia*, and *Georgia* the substance of the 1894 book of *Credit Ratings* is reproduced in the *Blue Book*, with only *five* or *six* alterations and *one* addition: while in the 1895 edition of *Credit Ratings*, issued *seven* months in advance of the *Blue Book*, several hundred changes, additions and discontinuances were made in the same states. The deponent further says that no edition of the *Credit Ratings* issued to date has contained less than *eight thousand* changes from the book of the previous year, and that no two editions of *Credit Ratings*, published in different years, bear such close resemblance or show such uniformity in composition and make-up as do the *Blue Book* of the respondents and the 1894 *Credit Ratings* issued by complainants. The deponent further says that each year since 1889 he has personally devoted *two-thirds* of his entire time, working long hours and frequently evenings in the revision of this work, constantly employing, during that period, *three* assistants in writing and mailing correspondence and lists for revision. The said deponent further says that, in such comparison of said *Blue Book* with said *Credit Ratings* of 1894 as he has been able to make (which has been thorough in the above mentioned states), he finds the similarities given in said lists or tables hereinafter appearing, as to the states of *Alabama*, *Arizona*, *Arkansas* and *California*, and says that the same similarity appears as to the states of *Colorado*, *Connecticut*, *Delaware* and *Georgia*: and from his examination of other states the deponent believes that a further specification would be simply to recopy both of said books, except that some changes appear in the states of *Pennsylvania* and *Massachusetts*. In the said list or table hereinafter appearing, the deponent has in some instances added, after the word "Note," a few words in explanation, and that the word "Note" and explanation following should not be taken as

appearing in either of said books. And the deponent further says that the following are the letters, characters and numerals and their respective significations, as appearing in the said *Blue Book* and said *Credit Ratings*: (*Here follows a list setting out the similarities in the publications of plaintiff and defendant.*)

Ending with *Wyoming*, respondents follow complainants' classification in making up the *Canadian* provinces, which is not alphabetical as in other publications, but a style original with, and peculiar to, complainants.

David M. Ladd.

Sworn to *February 6*, 1896.

2. Bill to Restrain Infringement.[1]

a. Of An Article in an Encyclopædia.

Form No. 6362.[2]

Circuit Court *of the United States* for the *Southern* District of *New York.* In Equity.

To the Honorable the Judges of the *Circuit* Court *of the United States* for the *Southern* District of *New York*, sitting as a Court of Equity:

1. For the formal parts of a bill in equity in any particular jurisdiction consult the title BILLS IN EQUITY, vol. 3, p. 417. For the formal parts of a complaint or petition in any particular jurisdiction consult the title COMPLAINTS, vol. 4, p. 1019.

2. This bill is copied from the records in the case of Black *v.* Henry G. Allen Co., 42 Fed. Rep. 618. To this bill the defendants demurred on the following grounds:

I. That said bill of complaint shows no substantial right or equity in or on behalf of said complainants nor any of them.

II. That the alleged verification of said bill of complaint is evasive and deceptive, and insufficient to support a bill praying for the extraordinary remedy of injunction.

III. That the acts of defendant alleged in said bill of complaint are not contrary to law.

IV. That said bill of complaint is uncertain and contradictory in its allegations of the alleged rights of James T. Black, Francis Black, Adam W. Black and Alexander B. McGlashen, it not appearing whether the said complainants claim as co-owners in the alleged copyright or that they are mere licensees thereunder.

V. That it does not appear that the alleged agreement between Walker and the complainants James T. Black, Francis Black, Adam W. Black and Alexander B. McGlashen, and under which the said complainants claim title, was in writing or embodied in any instrument in writing.

VI. That it is not averred in said bill of complaint that any right of the alleged authors to copyright the alleged copyright work has ever been assigned in writing to the complainants, or any of them.

VII. That the charge of infringement and of invasion of the alleged rights of complainants in the bill of complaint contained is not made upon the knowledge of any person whatever.

VIII. That the said bill of complaint contains no allegations, as of matters of fact, which, if true, would show that the ownership of any copyright, real or alleged, upon the work entitled "United States, Part III, Political Geography and Statistics," is vested in the complainants James T. Black, Francis Black, Adam W. Black and Alexander B. McGlashen, or any of them.

IX. That the bill of complaint does not aver that any substantial or material injury hath occurred to the complainants, or any of them, by reason of the alleged acts of defendant.

X. That it does not appear from the bill of complaint that any profit hath accrued to the defendant from the al-

James T. Black,[1] *Francis Black*, *Adam W. Black* and *Alexander B. McGlashen*, all of the city of *Edinburgh*, *Scotland*, and all of whom are subjects of *Her Majesty the Queen of Great Britain and Ireland*, and all of whom are aliens, and who are copartners engaged in business as publishers at the city of *Edinburgh* under the firm name of *Adam & Charles Black*, and *Francis A. Walker*, of the city of *Boston*, in the county of *Suffolk*, and state of *Massachusetts*, and a citizen of said state, and now, and at the time of, and at all times since, the taking of the copyright hereinafter mentioned, a citizen of the United States,[2] bring this their bill of complaint against the *Henry G. Allen Company*, a corporation organized and existing under and by virtue of the laws of the state of *New York*, and having its principal place of business at the city of *New York*, in said state of *New York*.

And thereupon your orators complain and say as follows, to wit:

The said firm of *Adam & Charles Black*, your orators aforesaid, are the publishers of a certain work entitled "*The Encyclopædia Britannica*, *Ninth Edition*." The said firm of *Adam & Charles Black*, at the time of the making of the agreement hereinafter mentioned, consisted of your orators *James T. Black*, *Francis Black* and *Adam W. Black*; and your orator *Alexander B. McGlashen* became a partner at a later date; and the present firm of *Adam & Charles Black* now hold and enjoy all the rights of their predecessors in respect of the said "*Encyclopædia Britannica*" and the said agreement and the copyright hereinafter mentioned, all the said rights of their predecessors having been vested in them according to law.

Your orators show that the said "*Encyclopædia Britannica*" is a well known work, of standard value and character, eight editions of which had been published, and the ninth edition of which was undertaken and has been completed, printed and published at great expense by said *Adam & Charles Black*. The said ninth edition of the "*Encyclopædia Britannica*," so printed and published, is made up

leged acts of defendant in said bill complained of.

XI. That for the matters and things complained of complainants have a full, adequate and complete remedy at law.

But the demurrer was overruled and the complaint sustained at every point.

1. Parties Plaintiff— *Assignee.* — The assignee of a copyright may sue for infringement, and the author need not be joined as co-complainant. Roberts *v.* Myers, 13 Month. L. Rep. 396.

Author and Publisher. — The author and publisher may sue jointly in some cases, as where the book is prepared by one of the plaintiffs and all the plaintiffs caused the book to be published for their joint benefit. Stevens *v.* Wildy, 19 L. J. Ch. 190.

Foreign Administrator. — A bill by a foreign administrator which shows on its face that the administrator had never taken out ancillary letters of administration in the state where suit is brought is demurrable. If the bill, however, avers simply that plaintiff is administrator, the objection can be taken only by plea or answer. Black *v.* Henry G. Allen Co., 42 Fed. Rep. 618.

Holder of Legal Title. — The holder of the legal title may sue, although the beneficial ownership be in another. Hanson *v.* Jaccard Jewelry Co., 32 Fed. Rep. 202.

2. Allegation of Citizenship. — An averment "that your orator at all times hereinafter stated was and still is a citizen of the United States and a resident therein, residing in the city, county and state of *New York*," fairly meets an objection taken by demurrer that the bill does not show that complainant at the time of producing the copyrighted article was a citizen of the United States or a resident therein. Falk *v.* Schumacher, 48 Fed. Rep. 222.

of articles or books, each of which is, in a large number of instances, a complete and independent book. None of the articles or books contained in the *twenty-third* volume of said "*Encyclopædia Britannica*," hereinafter referred to, with the exception of the copyrighted book hereinafter referred to, entitled "*United States, Part III, Political Geography and Statistics*," and two other books or articles, have been copyrighted in the United States.

And your orators further say that heretofore, and before the *thirteenth* day of *February*, 1888, your orator, said *Francis A. Walker*, was then a citizen of the United States and a resident of the city of *Boston*, in the county of *Suffolk*, and state of *Massachusetts*, was the author of a certain book entitled "*United States, Part III, Political Geography and Statistics*," the copyright of which book was by him, the said *Walker*, duly secured according to the provisions of the statute of the United States relating to copyrights; that is to say, the said *Walker*, being the author of the said book entitled "*United States, Part III, Political Geography and Statistics*," and a citizen of the United States and resident therein, did print and publish the same and did, before the publication thereof, deposit in the mail addressed to the librarian of Congress, Washington, District of Columbia, a printed copy of the title of said work, and did, on the *thirteenth* day of *February*, A. D. 1888, deliver at the office of the librarian of Congress at Washington, District of Columbia,[1] a printed copy of the title of said book, and did also, within ten days[2] from the publication of said

1. **Mailing and Deposit of Title** — *Averment in Disjunctive.* — An averment that "before the publication * * * your orator * * * delivered at the office of the librarian of Congress, or deposited in the mail, addressed to the librarian of Congress at Washington, D. C., a printed copy of the title of said photograph, * * * and * * * also within ten days from the publication thereof * * * delivered at the office of the librarian of Congress, or deposited in the mail, addressed to the librarian of Congress at Washington, D. C., two copies," is ambiguous and tenders no issue, and is not a sufficient averment of compliance with the statutory requisites. Falk *v.* Howell, 34 Fed. Rep. 739.

Variance between Title Deposited and that Published. — Where the bill showed that the title of a play deposited was "Under the Gaslight, a Romantic Panorama of the Streets and Homes of New York," and the play was published as "Under the Gaslight, a Totally Original and Picturesque Drama of Life and Love in These Times, in Five Acts," it was held that there was no material variance, and that the title of the play, within the meaning of the statute, was "Under the Gaslight," that being the title that would be given it by the public, the accompanying words being mere matter of description and not properly part of the title. Daly *v.* Webster, 56 Fed. Rep. 483.

Where the bill shows that the title deposited was "An Outline of the Political and Economic History of the United States, with Maps and Charts. I. History and Constitution. By Alexander Johnson, M. A. II. Population and Industry. By Francis A. Walker, LL.D.," and the title of one of the published books deposited to complete the copyright was "United States. Part III. Political Geography and Statistics. Copyright, 1888, by Francis A. Walker," it was held that the variance would not render the copyright invalid against one not claiming to be deceived. Black *v.* Henry G. Allen Co., 56 Fed. Rep. 764.

2. **Copies, When Deposited.** — 26 U. S. Stat. at Large, p. 1107, § 3, *amending* U. S. Rev. Stat. (1878), § 4956, requires two copies of the article copyrighted to be delivered at the office of the librarian of Congress at Washington, District of Columbia, or deposited in the mail within the United States, addressed to the librarian of Congress at Washington, District of Columbia, not later than

book, which publication was by him, the said *Walker*, made in the United States, deposit in the mail addressed to the librarian of Congress at Washington, District of Columbia, and did deliver at the office of the librarian of Congress at Washington, District of Columbia, two copies of said book,[1] each of which copies so deposited in the mail was a complete printed copy of said book of the best edition issued, and also give notice and information of the copyright thereof having been by him secured by inserting in the several copies of every edition published, on the title-page thereof, the following words, to wit: "*Copyright 1888, by Francis A. Walker.*"[2] And the said *Walker* duly

the day of the publication thereof, in this or any foreign country.

1. Deposit of Copies with Librarian. — It must be directly averred that two copies of the book were deposited in the office of the librarian of Congress within ten days (see *supra*, note 2, p. 471) after publication, and an averment that a printed title of the book was furnished to the librarian, and that "thereafter, within the time and in the manner prescribed by law, your orator did all the things required by law to be done in order to secure to himself the full enjoyment of all rights and privileges granted by the laws of the land governing copyright," is insufficient. Burnell *v.* Chown, 69 Fed. Rep. 994. But it need not be averred that the book was published within a reasonable time after the deposit of the copy of the title, where it is alleged that the plaintiff deposited, within ten days (see *supra*, note 2, p. 491) after publication, in the librarian's office at Washington, two copies of the book. Scribner *v.* Henry G. Allen Co., 49 Fed. Rep. 854.

Where the bill shows that sheets or pages containing the separate article by an American author were taken from the bound volume of a foreign encyclopædia and deposited with the librarian, a substantial compliance with the provisions of the statute is shown. Black *v.* Henry G. Allen Co., 56 Fed. Rep. 764. And so of a bill showing that two copies of the copyrighted photograph were mailed to the librarian before publication, but within ten days (see *supra*, note 2, p. 471) thereof. Falk *v.* Donaldson, 57 Fed. Rep. 32.

2. Inserting Notice of Copyright Generally. — No person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title-page or the page immediately following it, if it be a book, or if a map, chart, etc., by describing upon some portion of the face or front thereof, or on the face of the substance on which the same shall be mounted, the following words: "Entered according to act of Congress, in the year 18*98*, by *John Doe*, in the office of the Librarian of Congress, at Washington." U. S. Rev. Stat. (1878), § 4962. And by U. S. Rev. Stat. (Supp. 1891), p. 15, c. 301, it is provided that the following words may be used at the option of the person taking out the copyright, to wit: "Copyright, 18*98*, by *John Doe*." And a bill which does not aver that the plaintiff inserted such words on the title-page or page following is fatally defective. Thompson *v.* Hubbard, 131 U. S. 123; Trow City Directory Co. *v.* Curtin, 36 Fed. Rep. 829; Chicago Music Co. *v.* J. W. Butler Paper Co., 19 Fed. Rep. 758; Parkinson *v.* Laselle, 3 Sawy. (U. S.) 330; and see also Jollie *v.* Jaques, 1 Blatchf. (U. S.) 618; Wheaton *v.* Peters, 8 Pet. (U. S.) 591.

In Copy Deposited in Library of Congress. — A copy of the work deposited in the library of Congress need not contain any notice of the copyright. Osgood *v.* Aloe Instrument Co., 69 Fed. Rep. 291.

Requisites of Notice — *Name.* — The law requires that the name of the person by whom the book is copyrighted shall be stated, and in consequence a notice in the following words and figures, to wit: "Copyright, 18*91*. All rights reserved," was held insufficient. Osgood *v.* Aloe Instrument Co., 69 Fed. Rep. 291.

A notice which gives the surname of the proprietor as well as the initial letters of his christian name is sufficient. Burrow-Giles Lithographic Co. *v.* Sarony, 111 U. S. 53; Sarony *v.* Burrow-Giles Lithographic Co., 17 Fed. Rep. 591. And a notice which gives the surname alone is sufficient unless it is shown that there is someone else

complied with and fulfilled all the other requirements and provisions of the statutes in such case made and provided, and the librarian of Congress did, on the *thirteenth* day of *February*, 1888, record the name of the said book entitled as aforesaid, "*United States, Part III, Political Geography and Statistics*," and there was granted to the said *Walker* a copyright for the term of twenty-eight years from the *thirteenth* day of *February*, 1888, and the said *Walker* became entitled to and did acquire the sole liberty of printing, reprinting, publishing, completing, copying, executing and vending the said copyrighted book for the said term of twenty-eight years from the *thirteenth* day of *February*, 1888, which copyright still continues and remains in full force and effect.

And your orators further say that your orator, the said *Francis A. Walker*, having obtained the said copyright in pursuance of law, did, by an agreement made on or about the *first* day of *April*, 1888, and before the infringement hereinafter complained of, for a good and valuable consideration, assign and transfer[1] to your orators constituting the firm of *Adam & Charles Black* an interest in said copyright: that is to say, the said *Walker* did assign and transfer to your orators constituting the firm of *Adam & Charles Black* the sole and exclusive right and liberty of printing, reprinting, publishing, copying and vending during the whole term of the said copyright, the said book entitled "*United States, Part III, Political Geography and Statistics*," in connection with and as a part of their said *Encyclopædia* designated "*Encyclopædia Britannica, Ninth Edition*," and not otherwise, the said *Walker* retaining the right to print, publish, copy and vend the said copyrighted book in every form and manner, other than as a part of said "*Encyclopædia Britannica*."

And your orators say, that if the said *Francis A. Walker* did not by the said agreement made on or about the *first* day of *April*, 1888,

of the same name. Burrow-Giles Lithographic Co. *v.* Sarony, 111 U. S. 53; Bolles *v.* Outing Co., 45 U. S. App. 449.

The name "Photographische Gesellschaft," being the trade name created by complainant and extensively used by him in his business, was held to be a sufficient designation of the person taking out the copyright. Werckmeister *v.* Springer Lithographing Co., 63 Fed. Rep. 808.

Residence. — The residence of the party is not required to be stated. Burrow-Giles Lithographic Co. *v.* Sarony, 111 U. S. 53; Werckmeister *v.* Springer Lithographing Co., 63 Fed. Rep. 808; Black *v.* Henry G. Allen Co., 42 Fed. Rep. 618.

Date. — The abbreviation "'94," representing the year, has been held sufficient. Snow *v.* Mast, 65 Fed. Rep. 995.

Sufficient Notices. — The following forms of notice have been held sufficient: "1889, copyrighted by B. J. Falk, N. Y." Falk *v.* Schumacher, 48 Fed. Rep. 222.

"Copyright, 1893, by Bolles, Brooklyn." Bolles *v.* Outing Co., 45 U. S. App. 449.

"Copyright entered according to act of Congress, 1889, by F. C. Hefel, Civil Engineer." Hefel *v.* Whitely Land Co., 54 Fed. Rep. 179.

1. Description of Assignment. — It was objected that it did not appear that the assignment between the author and the Messrs. Black was in writing, but it was held that when all the legal and equitable owners are joined it is unnecessary to state the formalities or mode of conveyance by which the equitable interests became vested in the co-complainants, and if the owner of a legal title is a complainant it is immaterial whether the equitable owners became vested by an instrument in writing or by parol. Black *v.* Henry G. Allen Co., 42 Fed. Rep. 618.

assign and transfer to your orators constituting the firm of *Adam & Charles Black;* an interest in said copyright, the said agreement was an exclusive and irrevocable license to your orators constituting the firm of *Adam & Charles Black*, giving and granting them, and by which they acquired, the sole and exclusive right and liberty of printing, reprinting, publishing, copying and vending, during the whole term of said copyright, the said book entitled "*United States, Part III, Political Geography and Statistics*," in connection with, and as a part of, their said *twenty-third* volume of their said "*Encyclopædia Britannica, Ninth Edition.*" And your orators aver that your orators constituting the firm of *Adam & Charles Black* acquired by the said agreement an equitable interest in said copyright which is substantially the same whether the said agreement was and should be held to be an assignment and transfer of an interest in said copyright or an exclusive license to use the subject of the said copyright as part of said volume of said *Encyclopædia.*[1]

And your orators aver that your orators who constitute the firm of *Adam & Charles Black* have now, and have had since the making of said agreement, an equitable interest in said copyright, and have had the exclusive right of printing, publishing and vending said copyrighted book as part of their said *Encyclopædia*, and that they, your orators who constitute said firm, are greatly and directly injured by the infringements hereinafter complained of, and are equitably entitled to receive the profits which have been diverted from them by the acts of the said *The Henry G. Allen Company*, hereinafter set forth and complained of, and an account of which is hereinafter prayed for.

And your orators constituting the firm of *Adam & Charles Black*, after the said copyright had been taken by said *Walker*, exercised their rights in the premises and made use of said copyrighted book, and printed and sold the same in connection with, and as part of, their *twenty-third* volume of their said *Ninth Edition* of the "*Encyclopædia Britannica*," and continue so to use said copyrighted book; and the right so to use the same is of great value and importance to them.

And your orators say that the whole of said copyright and all the privileges of every nature and description relating thereto, with the exception of the right to use the subject thereof in said *Encyclopædia*, has always remained and continued to be the property of said *Walker*. And your orators aver that they are now well seised of said copyright, and are the owners thereof, and that the same is of great value and importance to them, and that they have the right to enjoy all the privileges secured and intended to be secured thereby; and that they now have, and have always had, since said copyright was obtained, copies of said copyrighted book exposed for sale, and that the public have been supplied with the same to their benefit and advantage and the profit of your orators.[2]

1. **Alternative Conclusions.** — It was objected that this plea was uncertain and contradictory because it did not appear whether the plaintiffs, the Messrs. Black, claimed as co-owners of the copyright or as licensees, but it was held to be the correct form in equity pleading to state the facts and to then state the conclusions therefrom in an alternative form. Black *v.* Henry G. Allen Co., 42 Fed. Rep. 618.

2. **Proprietorship.** — The bill should contain allegations which amount to an assertion of authorship in terms suffi-

And your orators further say that the said *The Henry G. Allen Company*, intending to injure your orators, and contriving to deprive them of the privileges which they were to receive from the sole and exclusive printing, publishing and vending the said book entitled "*United States, Part III, Political Geography and Statistics*," has unlawfully, and without the consent of your orators, printed, published and sold, or caused to be printed, published and sold, in said *southern* district of *New York*, since your orators' rights in the premises were acquired, as aforesaid, and since the recording of the title of said copyrighted book, a large number of copies of said copyrighted book, or a substantial part or parts thereof, which infringing books[1] so printed, published and sold by said company have been in every way substantially the same as the book which is the subject of your orators' charge, were copied and pirated from your orators' copyrighted book, and the reprinting, publishing and sale of which by said company was a piracy and infringement of your orators' said copyright, and of their rights, and the rights of each and all of them, growing out of said copyright.

And your orators say that the said piratical books so printed in violation of your orators' rights, the said *The Henry G. Allen Company* has caused to be used in connection with and as part of a so-called "reprint" of the said *Encyclopædia Britannica, Ninth Edition*, of your orators who constitute the firm of *Adam & Charles Black*, the same having been printed and used in every way as said copyrighted book had been printed and used by your orators constituting the firm of *Adam & Charles Black*, in pursuance of their rights in the premises, and as hereinbefore set forth; except that the said *The Henry G. Allen Company* has omitted the marginal notes of the original and the copyright notice applied upon the title-page of said copyrighted book, to wit: "*Copyright 1888, by Francis A. Walker.*" All of which matters and things acted and done by the said *The Henry G. Allen Company* are contrary to equity and good conscience, and a great and continuing injury to your orators and to each and all of them.

And the said company has in its possession or power a large number of copies of said infringing books, and threatens to continue and persist in publishing and selling the same in further violation of your orators' rights as aforesaid, and infringement of their said copyright.

And your orators, all and singular, do hereby expressly waive and relinquish any and every right which they may have by reason of the acts of the said *The Henry G. Allen Company*, hereinbefore complained

ciently explicit and full to establish a clear title in the plaintiff. Atwill *v.* Ferrett, 2 Blatchf. (U. S.) 39. Or if the plaintiff is not the author, such third person must show a legal title and an exclusive right to the copyright lawfully derived from the other. To allege that plaintiff owned the property without more is insufficient. Yuengling *v.* Schile, 12 Fed. Rep. 97; Chicago Music Co. *v.* J. W. Butler Paper Co., 19 Fed. Rep. 758. But in the absence of specific exception the allegation that a certain dramatic composition was "written or composed" by citizens of the United States was held to be a sufficient averment of ownership. Henderson *v.* Tompkins, 60 Fed. Rep. 758.

1. **Exhibits.**—Attaching copies of the infringed and infringing maps, etc., to a bill praying an injunction against the infringement is proper. Black *v.* Henry G. Allen Co., 42 Fed. Rep. 618.

of, to enforce against or recover of it, the said *The Henry G. Allen Company*, its successors and assigns, any penalty or penalties, forfeiture or forfeitures, under or by virtue of the statutes of the United States concerning copyrights.[1]

In consideration whereof, and because your orators are remediless in the premises by the rules of the common law, and cannot have adequate relief, save in a court of equity, where matters of this nature are properly cognizable, and to the end that the said *The Henry G. Allen Company* may answer, all and singular, the matters and things hereinbefore set forth and complained of, and that the said *The Henry G. Allen Company* be forever restrained by injunction, as well perpetually as during the pendency of this suit, from printing and from publishing and from selling or exposing for sale, or otherwise disposing of any copies of its said piratical and unlawful book; and that it may be ordered to render an account[2] of the profits arising from the sale of said piratical book, as far as any profits have been made, and required to pay over such profits to your orators; the profits resulting from the use of said piratical book as a part of said "reprint" being profits to which your orators constituting the firm of *Adam & Charles Black* are equitably entitled, and the remaining profits growing out of any other infringement of said copyright, if any there be, being profits which, of right, belong to your orator said *Francis A. Walker*; and to pay to your orators their costs and disbursements in this suit; and that your orators may have such further relief in the premises as to this honorable court may seem meet and equitable, and as the nature and circumstances of the case may require.

May it please your honors such relief fully to direct and order, the same as if the relief which equity demands were made the subject of a specific prayer or prayers; and may it please your honors to grant unto your orators a writ of subpœna according to the course of courts of equity, directed to the said *The Henry G. Allen Company*, commanding it personally to be and appear before this honorable court, then and there to answer the premises, and to stand to and abide by such order and decree therein as to this honorable court shall seem agreeable to equity and good conscience.

And your orators, as in duty bound, will ever pray, etc.

Francis A. Walker.

Rowland Cox,
Solicitor for Complainants.
Rowland Cox,
Of Counsel for Complainants.

1. Penalties and Forfeitures.—The penalties imposed by the act of congress, relating to copyright, to wit, the forfeiture of the printed copies and the sum of one dollar for each sheet unlawfully printed, cannot be enforced in a court of equity. Stevens *v.* Gladding, 17 How. (U. S.) 447. And a prayer in a bill that the plate and unsold copies of a pirated map be delivered up to an officer of the court for cancellation and destruction, is demurrable as asking for the enforcement of such forfeiture. Chapman *v.* Ferry, 12 Fed. Rep. 693.

2. Accounting.—An accounting should be prayed for if desired. Stevens *v.* Cady, 2 Curt. (U. S.) 200. But may be had under a general prayer for relief. Stevens *v.* Gladding, 17 How. (U. S.) 447; Gilmore *v.* Anderson, 38 Fed. Rep.

United States of America, District of *Massachusetts.*
County of *Suffolk*,
State of *Massachusetts.*

Francis A. Walker, being duly sworn, says he is one of the complainants named in the foregoing bill of complaint by him subscribed, that he has read the said bill and knows the contents thereof; that as to the statements contained in said bill which are within his own knowledge, they are true, and as to the statements derived from the information of others, he verily believes them to be true.[1]

Francis A. Walker.

Subscribed and sworn to before me this *twenty-fifth* day of *October*, A. D. 1889.[2]

(SEAL)

Chas. Hall Adams,
Commissioner of the State of *New York*.
Also Notary Public for the County of *Suffolk*,
State of *Massachusetts.*

b. Of a Book.[3]

Form No. 6363.[4]

Circuit Court *of the United States*, *Northern* District of *New York*, in the *Second* Circuit.

The West Publishing Company
against
The Lawyers' Co-operative Publishing Company.

To the Judges of the *Circuit* Court *of the United States* for the *Northern* District of *New York*, in the *Second* Circuit:

The West Publishing Company, a corporation duly organized under the laws of the state of *Minnesota*, having its principal office and place of business at the city of *St. Paul*, and a resident or citizen of the state of *Minnesota*, brings this its bill against the *Lawyers' Co-operative Publishing Company*, a corporation duly organized under the laws of the state of *New York*, having its principal office and place of business at the city of *Rochester*, in the *northern* district of *New York*, and a resident or citizen of said state of *New York.*

And thereupon your orator complains and says, that the defendant, the *Lawyers' Co-operative Publishing Company*, is and for *nine* years last past has been a corporation duly organized, created and established by and under the laws of the state of *New York* for the pur-

846. And the right to an accounting of profits is incident to the right to an injunction under U. S. Rev. Stat (1878), § 4970. Falk *v.* Gast Lithograph, etc., Co., 54 Fed. Rep. 890.

1. Knowledge of Affiant. — Where the bill positively avers the infringement of a copyright, it is not necessary to aver that the infringement was within the knowledge of affiant. Black *v.* Henry G. Allen Co., 42 Fed. Rep. 618.

2. Verification. — Where a bill prays for an injunction, but is not intended to be used as evidence, it need not be verified at the time it is signed. Black *v.* Henry G. Allen Co., 42 Fed. Rep. 618.

3. Precedents. — See also a bill to restrain the infringement of copyright on state law reports in Curtis' Equity Precedents, p. 38, and the substance of a bill to restrain infringement of copyright on an arithmetic in 3 Story (U. S.) 768.

4. This form is taken from the records in West Pub. Co. *v.* Lawyers' Co-operative Pub. Co., 79 Fed. Rep. 756.

pose of carrying on the business of making, editing, preparing, publishing and selling books, and that during that time it has carried on and still carries on said business at the city of *Rochester*, in the state of *New York*; that your orator is and for *ten* years last past has been a corporation duly organized, created and established by and under the laws of the state of *Minnesota* for the same purpose, and that during that time it has carried on and still carries on said business at the city of *St. Paul* in said state of *Minnesota*, where it has its principal office and place of business, and that the principal office and place of business of the defendant is located at the city of *Rochester* in the *northern* district of the state of *New York*, and that the defendant as well as your orator is and both of them are residents or citizens of the *United States*.

And your orator further alleges and shows that since the *fifteenth* day of *September*, 1891, it has, from time to time, made, edited, prepared and published and thereupon became and was the author and proprietor of a book or work, which had not then been published, entitled, "*The Federal Reporter, Vol. 47. Cases Argued and Determined in the Circuit Courts of Appeals and Circuit and District Courts of the United States. Permanent Edition. September–December, 1891,*" and generally known and labeled on the back as the *Federal Reporter, Vol. 47*, and, as such author and proprietor, your orator, desiring to secure a copyright upon the same in accordance with the statute of the United States in such case made and provided, before the publication of said book, duly deposited in the mail within the United States, to wit, at the city of *St. Paul, Minnesota*, addressed to the librarian of Congress at Washington, District of Columbia, a printed copy of the title of said book, and in accordance with the law, on the *twentieth* day of *February*, 1892, not later than the day of publication thereof, duly deposited in the mail within the United States, to wit, at the city of *St. Paul, Minnesota*, addressed to the librarian of Congress at Washington, District of Columbia, two copies of such copyright book; and that such copyright book was printed from plates made from type set within the limits of the United States. And your orator further alleges and shows that from the *fifteenth* day of *September*, 1891, until the completion and publication of said book, your orator from time to time made, edited, prepared and published and thereupon became and was the author and proprietor of certain advance sheets or pamphlet books or numbers, containing the decisions of the cases argued and determined in the *Circuit* Courts *of Appeals* and *Circuit* and *District* Courts *of the United States*, from *September*, 1891, to *December*, 1891, as they were handed down by said courts, which advance sheets or pamphlet books were and are parts of said *Federal Reporter, Vol. 47*, and are substantially identical with said volume, but were issued from time to time in pamphlet form or numbers for greater convenience and speed in promulgating said decisions and were entitled, respectively: "*Federal Reporter, Vol. 47, September 22, 1891, No. 1*"; (*Here followed a similar description of twelve other parts.*)

And your orator further alleges and shows that your orator, desir-

ing to secure a copyright upon the first advance book or number so contained in the completed and permanent edition, published prior to the completion of the entire volume and entitled "*Federal Reporter, Vol. 47, September 22, 1891, No. 1,*" in accordance with the statute of the United States in such case made and provided, before the publication of said book or advance number, duly deposited in the mail within the United States, to wit, at the city of *St. Paul, Minnesota*, addressed to the librarian of Congress at Washington, District of Columbia, a printed copy of the title of said book or advance number, and not later than and upon the day of publication of said book or advance number, deposited in the mail within the United States, to wit, at the city of *St. Paul, Minnesota*, addressed to the librarian of Congress at Washington, District of Columbia, two copies of said copyright book or advance number, printed from plates made from type set within the limits of the United States. And your orator further alleges and shows that your orator, desiring to secure a copyright upon each of the said remaining or following advanced numbers or books, so published from time to time prior to the completion and publication of the entire volume, in accordance with the statute of the United States in such case made and provided, before the publication of each other or remaining book or advance number, respectively, duly deposited in the mail within the United States, to wit, at the city of *St. Paul, Minnesota*, addressed to the librarian of Congress at Washington, District of Columbia, a printed copy of the title of said book or advance number, so that the title of each advance book or number was so deposited before the publication of its respective book or number; and respectively not later than and upon the respective and several days of publication of said book or numbers, viz.: *2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12* and *13* of said advanced books or numbers, duly deposited in the mails within the United States, to wit, at the city of *St. Paul, Minnesota*, addressed to the librarian of Congress at Washington, District of Columbia, two copies of said copyright book or advanced numbers, so that not later than the day of publication of each of said books or advance numbers two copies of each thereof were so deposited, each and every of the same having been printed from plates made from type set within the limits of the United States. * * *[1]

And your orator further alleges and shows that since the *first* day of *September*, 1891, it has, from time to time, made, edited, prepared and published and thereupon became and was the author and proprietor of a book or work, which had not then been published, entitled (*Here was set out a copy of the title-page*),[2] generally known and labeled on the back

1. Here followed similar allegations as to complete volume and separate parts of the following reports: Federal Reporter, vols. 48, 49, 50, 51; Atlantic Reporter, vols. 22, 23, 24; Northeastern Reporter, vols. 28, 29, 30, 31; Southeastern Reporter, vols. 13, 14, 15; Southern Reporter, vols. 9, 10, 11; Northwestern Reporter, vols. 49, 50, 51, 52; Southwestern Reporter, vols. 16, 17, 18, 19, 20; Pacific Reporter, vols. 27, 28, 29, 30; New York Supplement, vols. 15, 16, 17, 18, 19.

2. **The title-page** referred to was as follows: "The American Digest. (Annual, 1892.) Being Volume 6 of the United States Digest Third Series Annuals; Also, the Complete Digest for 1892. A Digest of All the Decisions of the United States Supreme

as "*American Digest, 1892, Annual*"; and as such author and proprietor your orator, desiring to secure a copyright upon the same, in accordance with the statute of the United States in such case made and provided, before the publication of said book, duly deposited in the mail within the United States, to wit, at the city of *St. Paul, Minnesota*, addressed to the librarian of Congress at Washington, District of Columbia, a printed copy of the title of said book; and, in accordance with the law, on the *second* day of *November*, 1892, not later than the day of publication thereof, duly deposited in the mail within the United States, to wit, at the city of *St. Paul, Minnesota*, addressed to the librarian of Congress at Washington, District of Columbia, two copies of such copyright book, and that such copyright book was printed from plates made from type set within the limits of the United States.

And your orator further alleges and shows that since *August*, 1891, it has, from time to time, made, edited, prepared and published and thereupon became and was the author and proprietor of a pamphlet, book or work, which had not then been published, entitled "*The American Digest, United States Digest, Third Series* (*Monthly Advance Sheets*), *No. 57, September, 1891*," and generally known as and called *The American Digest Monthly, September, 1891*; and as such author and proprietor your orator, desiring to secure a copyright upon the same in accordance with the statute of the United States in such case made and provided, before the publication of said pamphlet book, duly deposited in the mail within the United States, to wit, at the city of *St. Paul, Minnesota*, addressed to the librarian of Congress at Washington, District of Columbia, a printed copy of the title of said pamphlet book, and, in accordance with the law, not later than the day of publication thereof, duly deposited in the mail within the United States, to wit, at the city of *St. Paul, Minnesota*, addressed to the librarian of Congress at Washington, District of Columbia, two copies of such copyright pamphlet book, and that such copyright pamphlet book was printed from plates made from type set within the limits of the United States. (*Here follow similar allegations as to the monthly advance sheets Nos. 58 to 68 inclusive.*)

And your orator further alleges and shows that each and all of said permanent or complete volumes of reports, as well as each and all of said advance numbers or books, embodied in said several volumes, were prepared, arranged and reported by and under the direction of your orator, and each of said volumes and advance numbers or books contained and contains a large amount of matter

Court, all the United States Circuit and District Courts, the Courts of Last Resort of all the States and Territories, and the Intermediate Courts of New York State, Pennsylvania, Ohio, Illinois, Indiana, Missouri, and Colorado, U. S. Court of Claims, Supreme Court of the District of Columbia, etc., as Reported in the National Reporter System and elsewhere from September 1, 1891, to August 31, 1892. With Notes of English and Canadian Cases, Memoranda of Statutes, Annotations in Legal Periodicals, etc. A Table of the Cases Digested, and a Table of Cases Overruled, Criticised, Followed, Distinguished, etc., During the Year. References to the State Reports Given by an Improved Method of Topical Citation. Prepared and Edited by the Editorial Staff of the National Reporter System."

original with your orator, all of which was and is the private property of your orator as the author and proprietor thereof, and your orator applied for, and as such author and proprietor obtained, the copyrights thereon as aforesaid.

And your orator further alleges and shows that each and every one of said volumes of reports, as well as each and every of said advance numbers or books, embodied in said several volumes, were prepared and reported, as aforesaid, with great labor and expense, in many instances, from the original cases or error-books, containing the processes, pleadings, proceedings, evidence, objectings, rulings, decisions and exceptions, and from the original points or arguments of counsel, and in all cases from the opinions of the courts or judges delivering judgment, copies of which were obtained, at great expense, by your orator, immediately upon their being handed down. That each of said volumes, as well as each of said advance numbers or books embodied therein, contains a great number of the opinions and decisions of the said courts of judicature, and among other additional original matter your orator prepared for each case and decision so reported a syllabus or head-notes, containing a brief statement of the facts and points of law decided thereon, and also, in many of the cases, preliminary statements of the facts on which the decisions were made. That said syllabi or head-notes and preliminary statements of facts were, except where prepared by the court and so designated, wholly original with your orator, and were made, edited and published, as aforesaid, in said advance numbers as speedily as possible, and in most instances prior to any other publication or report of said cases within the United States. That the syllabi or head-notes to all the cases reported in each permanent or completed volume were also, by your orator, alphabetically arranged according to the subject matter and reprinted as an index at the end of such volume, with the names of the parties to the cases to which they belonged and a reference to the page where they would be found, thus making for each volume a full and complete digest of the points decided and the cases reported therein, and making said volumes or works convenient and of great value to all persons desiring to use the same.

And your orator further alleges and shows that the *American Digest Monthly* of your orator was principally composed of and compiled from the syllabi or head-notes made by your orator of the decisions of causes reported in its said reports taken from the advance numbers of books thereof from time to time as prepared, and collected and arranged under their proper subjects and headings, to which they referred in digest form. And that syllabi or head-notes, made, edited and prepared by your orator for its said system of reports and advance numbers, were made, edited and prepared also with a special reference to their fitness and adaptability for use as digest paragraphs in the index digest to each complete volume of reports, and in the monthly or advance digest sheets or pamphlets, and also in the *American Annual Digest*, or permanent digest for the year. And that the *Annual Digest* of your orator for 1892 was principally compiled from and composed of the syllabi or

head-notes of the cases originally made, edited and prepared for and published in the advance numbers of its permanent editions of its reporters, and which were from time to time reprinted in digest form in the advance numbers or monthly parts of the *Digest*, from which, and from the advance sheets of the reporters, they were afterward collected and rearranged in permanent form under their appropriate subjects and headings in the *Annual Digest* as aforesaid.

And your orator further alleges and shows that, by the original work of your orator, and in particular by the original syllabi or head-notes, said volumes of reports and said *American Annual Digest*, as well as the advanced numbers or books, and said *Monthly Digest*, became and were convenient and were of great value to all persons desiring to use the same. And your orator further alleges and shows that it has, from time to time, printed and sold a large number of said volumes and the said respective advance numbers or books to its customers and subscribers, amounting to several thousand of each of said volumes, with the advance numbers or books, and also of the *American Digest*, with its monthly advance numbers or books, and has caused to be printed and inserted in each and all of said copies or volumes, as well in the permanent and complete books or editions as in each and every advance number and book, on the back of the title-page of each and all the complete and permanent volumes or books, and on the title-page of each and all the advance numbers or books, the information and notice of such copyright as required by law; that your orator has never sold or transferred any of said copyrights of said books or works or advance numbers or books, nor any interest or share in the same or in either of them, nor authorized the defendant to publish any of said volumes of reports or any portion thereof, or extracts, excerpts or abridgements thereof; but your orator was and is the sole and exclusive owner of the stock, and the proprietor of all of the said copyrights, and has the sole and exclusive right to publish each and all of the said syllabi and head-notes and preliminary statement of facts contained in said volumes and advance numbers or books, and reprinted in said *Annual* and *Monthly Digests* as aforesaid; that your orator had and has the exclusive right to all the contents contained in each and all of said books, volumes or works, and in all of said advance numbers or books, such as the head-notes, head-lines or catch-words, preliminary statements of facts, abstracts of points or arguments of counsel, the arrangement and division of the cases into volumes, the notes of authorities added to any of the cases as reported, the indices or index-digests in and for each completed or permanent volume of reports, and of all other matter excepting merely the opinions or decisions of the said courts; and the said copyright of the said completed or permanent volumes, together with the said respective advance numbers or books thereof, as well as the said *Annual* and *Monthly Digests*, are of great value, to wit, of the value of *three hundred thousand* dollars, and the loss and damage to your orator by reason of the violations thereof is not less than the same amount.

Nevertheless, as your orator further alleges and shows, the

defendant, in its business of publishing and selling law-books, reports and digests, has for several years past and now does publish and sell a volume, annually, known as and called the *General Digest*, of which it publishes and issues advance sheets and numbers semi-monthly, which said digest and advance numbers is published and sold in competition with the said copyright books and advance numbers or books of your orator, including its *Annual* and *Monthly Digests*. That the said defendant, well knowing that the syllabi or head-notes of your orator were made, edited and prepared by your orator with special reference to their adaptability and fitness for use as digest items, and that your orator had been so using and intended so to use the said syllabi or head-notes, did, at different times during the latter portion of the year 1891, and the year 1892, without the consent of your orator, reprint, publish and sell at the cities of *Rochester*, *New York*, and elsewhere in the state of *New York*, and in the said *northern* district of *New York*, and all over the United States, and did continuously since and still does publish and expose to sale and sell in large numbers, advance numbers of their *General Digest*, containing statements of facts, syllabi and head-notes taken, copied and pirated from the said several advance numbers or books thereof of your orator, as well as from the said *Annual* and *Monthly Digests*.

And your orator further alleges and shows, on information and belief, that the defendant, in preparing its *General Digest* for the year 1892, has used and employed principally, as matter therefor, the head-notes or points issued and published in its advance numbers from time to time, which head-notes or points are largely and to a great extent copies of and piracies upon the copyright syllabi, head-notes or points of your orator, made, prepared and edited by your orator and published in its volumes and advance numbers of books, as aforesaid. And your orator further alleges and shows that the defendant has advertised, for some time since, the publication of its *General Digest* for 1892, and now threatens to and as your orator is informed and verily believes is about to issue, publish and sell the same, so containing infringements upon copies of and piracies of the original copyright matter of your orator, as aforesaid, to the great injury and irreparable damage of your orator in its business, and for which it cannot be compensated by damages in an action at law. That in preparing said *General Digest* for publication and in preparing the advance numbers thereof, the defendant has substantially copied the head-notes and syllabi, as previously prepared and published by your orator, as aforesaid, resorting to the devices, common in this sort of piracy, of transposing clauses, sentences and paragraphs, using synonyms and making colorable alterations, while always repeating the substance, often using the exact words, and frequently even entire sentences and entire head-notes verbatim from said original works of your orator, and in many instances omitting to correct even the inaccuracies and errors therein, and also in availing itself of the original work, method and ideas of your orator in making and preparing your orator's head-notes and in digesting the cases, without following the exact language used by your orator, so

that thereby, to the great damage of your orators, the defendant was and is enabled to prepare, publish and sell its pirated publications with greater ease and accuracy, and at far less expense; all of which infringements, colorable alterations, copying, piracies and transpositions, will more fully appear upon an examination and comparison of said *General Digest* and advance numbers thereof with said volumes and advance numbers or books of your orator, which your orator is ready to produce as this honorable court may direct. That the said *General Digest*, so about to be published, and the advance numbers thereof of the defendant are infringements of and piracies upon the copyrights of your orator, and the said books were made and intended by the defendant to take the place of and as far as possible supersede the said books and advance numbers of your orator, and especially the said *Annual* and *Monthly Digests* of your orator, and by means of the various arts and devices aforesaid the defendant has been and is selling large numbers of its said advance sheets of numbers of its *Digest* to persons who would otherwise have bought or would now buy the said volumes and advance numbers of your orator, and especially its *Annual* and *Monthly Digests* for 1892, to its great loss and damage; and the defendant, by means of the art and devices aforesaid, unless restrained by this honorable court, will sell large numbers of their said *General Digest* for 1892 to persons who would otherwise buy the said *Annual Digest* of your orator, to its great loss and damage; all of which acts and doings of the defendant are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator in the premises.

In consideration whereof and forasmuch as your orator is without adequate remedy, save in a court of equity, your orator prays this honorable court to issue its writ of subpœna, in due form of law and according to the course and practice of the court, directed to the said *Lawyers' Co-operative Publishing Company*, the defendant, as aforesaid, commanding it at a certain day and under a certain penalty to be therein specified to appear before this honorable court to answer all and singular the matters and things hereinbefore set forth and complained of, and especially to answer and set forth:

1. The date of the publication of each of the said advance numbers of said *General Digest*, issued since *August*, 1891, by the defendant.

2. The number of copies published of each said advance number.

3. The number of subscribers to said *General Digest* for the year 1892, and how many said advance numbers of said *Digest* have been sold and the prices at which they were severally sold.

4. How many orders for said *General Digest* have been received by the defendant, and at what price per volume.

5. How many of each of said advance numbers of said *Digest* are still in the possession and under the control of the defendant.

6. How many volumes of said complete *General Digest* have been made or prepared for publication and sale, or are now being made or prepared therefor or are now in the possession or under the control of the defendant. And to answer all the other matters herein complained of as specifically as if thereto specifically interrogated.

But the said answers to the foregoing interrogatories and to this bill of complaint need not be under oath, an answer under oath being hereby expressly waived.

And your orator prays that the defendant may be restrained by injunction from publishing, selling or exposing for sale, or causing or being in any way concerned in the publishing, selling or exposing for sale, said *General Digest* for 1892, now threatened to be issued, published and sold by the defendant, or otherwise disposing thereof, and from publishing, selling or exposing for sale, or causing or being in any way concerned in the publishing, selling or exposing for sale, or otherwise disposing of any of said advance numbers of said digest or copies thereof, hereinbefore complained of, and that all of said books published, as aforesaid, or so about to be published, issued or sold by the defendant, and the stereotype plates thereof be declared forfeited to and for the benefit of your orator, and that the defendant be required to surrender and deliver the same to your orator, and be decreed to render an account of all of said books or numbers published or about to be, and of all that have been sold, and to pay the same, besides the damages suffered from such unlawful publications and the costs of this suit to your orator, and that your orator may have such other and further relief as the nature and circumstances of the case may require and as to this court shall seem just and equitable.

Pierre E. Du Bois,
Solicitor for Complainant.
E. Countryman,
Of Counsel.

United States of America, } ss.:
District of *Minnesota*. }

Peyton Boyle, being duly sworn, says that he is the *vice-president* of the corporation complainant above named, and is familiar with its business; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Peyton Boyle.

Subscribed and sworn to before me this *twentieth* day of *December*, 1892.

Ambrose Tighe,
U. S. Commissioner, District of *Minnesota*.

c. Of a Dramatic Composition.

Form No. 6364.[1]

Circuit Court *of the United States* for the *Eastern* District of *Pennsylvania*. In Equity.

To the Honorable the Judges of the *Circuit* Court *of the United States* for the *Eastern* District of *Pennsylvania*, sitting as a Court of Equity:

Giulio Ricordi, *Luigi Erba*, *Giuseppe Piza*, *Erminie Bozotti*, *Francesco*

1. This form was obtained through the courtesy of Rowland Cox, Esq., of the New York bar. The case was not reported, as the decree and injunction were obtained by consent.
Precedent. — See also a precedent in

Guecchi, *Luigi Origoni*, *Antonio Griecchi*, *Laura Giulini*, *Antonio Ricordi*, *Amelia Ricordi*, *Giuseppe Ricordi*, *Pompeo Ricordi*, of *Milan*, in the kingdom of *Italy*, and *Emilio Ricordi*, of *Florence*, in said kingdom, copartners engaged in business at said *Milan* under the firm name of *G. Ricordi & Co.*, all of whom are subjects of the king of *Italy* and aliens, bring this their bill of complaint against *Gustav Hinrichs*, of the city of *Philadelphia*, in the county of *Philadelphia*, in the state of *Pennsylvania*, a citizen of said state and of the United States, and an inhabitant of the *eastern* district of *Pennsylvania* and hereinafter designated defendant.

And thereupon your orators complain and say that heretofore and before the *tenth* day of *January*, 1893, *Giacomo Puccini* was a subject of *His Majesty the King of Italy*, which was then a foreign state or nation which permitted to citizens of the *United States of America* the benefit of copyright on substantially the same basis as its own subjects, which condition aforesaid, to wit: the existence of reciprocal rights concerning copyrights between the *United States of America* and the *Kingdom of Italy*, was, before said *tenth* day of *January*, 1893, determined by the president of the United States by proclamation duly made and published according to law.

And your orators further say that the said *Giacomo Puccini* was before the said *tenth* day of *January*, 1893, the author, inventor, composer and proprietor of a certain dramatic composition entitled: "*Manon Lescaut Dramma Lirico in 4 Atti di Giacomo Puccini*," which was by your orator duly copyrighted by compliance in all things with the statutes of the United States relating to copyrights as hereinafter more fully set forth.

And your orators further say that before the copyrighting of the

Henderson *v.* Tompkins, 60 Fed. Rep. 765, where the court, in refusing to sustain the demurrer on the grounds stated, took occasion to quote with a special commendation the following extract from Drone on Copyright: "If it" (the matter infringed upon) "has merit and value enough to be the object of piracy, it should also be of sufficient importance to be entitled to protection."

Further discussing the demurrer, the court continues: "The bill describes the song in question as a portion of a certain dramatic composition and as an important and valuable part thereof. It does not say whether by the word 'song' is intended merely the words of the song set out in the bill, or whether it includes the music which accompanies the words, and which with the words constitutes a 'song,' in its more customary sense. The fact that it is part of a dramatic composition leads the inference in favor of the latter; but on this point the bill should be specific. The difficulty becomes a practical one on pursuing the bill further. It states, in terms, that the defendant adopted complainant's refrain and chorus, but contains no express allegation touching the music which inferentially accompanied them. As the matter stands, the court is unable to see whether or not the music formed a part of the complainant's song, and, if it did, whether the music or the words were the novel or essential feature, and whether the defendant adopted the music or only the words. Therefore the court is unable to ascertain, from the allegations of the bill, whether in fact the defendant did adopt any essential part of the complainant's dramatic composition; and the bill must be amended, to make the case clear in this particular, before we can proceed further with it. As this difficulty was not noticed by either party, neither is entitled to any consideration on the question of costs. If the complainant desires to amend, he may do so, or he may dismiss the bill, but in either case without costs to either party."

said composition and before the *tenth* day of *January*, 1893, the said *Puccini*, for a good and valuable consideration, transferred, assigned and sold the same and all his right, title and interest therein to your orator and your orator became seised of all the rights of said *Puccini* in and to the said composition, and became the proprietor thereof and entitled, under the statutes of the United States, to copyright the same.

And your orators further say that before the publication of said composition in the United States, and before the publication thereof in any foreign country, and for the purpose of copyrighting the same, your orators, being the proprietors thereof, did, on the *tenth* day of *January*, 1893, deposit in the mail within the United States, addressed to the librarian of Congress, Washington, District of Columbia, a printed copy of the title of said composition for which they desired a copyright, and did also, before the date of publication thereof in the United States, and before the date of publication thereof in any foreign country, deposit in the mail within the United States, addressed to the librarian of Congress, Washington, District of Columbia, two complete printed copies of the said composition, and that the librarian did record the title of the said composition in a book kept for that purpose in pursuance of the statutes of the United States in such cases made and provided, and did receive and accept from your orator the sum of one dollar for recording the said title, and the record of which title was by the librarian thus made on the *eleventh* day of *January*, 1893, and which title was in these words: "*Manon Lescaut Dramma Lirico in 4 Atti di Giacomo Puccini.*"

And your orators further say that the composition produced by the said *Puccini*, as aforesaid, and of which your orators became the proprietors, and which was by them copyrighted, as aforesaid, is a dramatic composition of great artistic value; that the same was published in the United States of America and elsewhere on the said *tenth* day of *January*, 1893.

And your orators further say that they gave notice of their copyright of said composition entitled as aforesaid by printing and inscribing upon some visible portion of each copy of said composition the following words: "*Copyright 1893 by G. Ricordi & Co.*"

And your orators say that having in all things complied with the conditions and provisions of the statutes of the United States in such case made and provided, as aforesaid, they acquired and obtained and there was then on said *eleventh* day of *January*, 1893, to them granted a good and valid copyright in the United States for and upon said composition whereby they became entitled and acquired and there was in them vested the sole liberty of performing, printing, reprinting, publishing, copying, executing, finishing and vending the said composition, for a period of twenty-eight years from the *eleventh* day of *January*, 1893, and which copyright thus by your orators obtained and to them granted has continued in force from the *eleventh* day of *January*, 1893, and is now in force, and that your orators are now and have always been the owners thereof.

And your orators further say, on information and belief, that the

said defendant said *Gustav Hinrichs*, intending to injure your orators and to deprive them of the privileges which they were to receive from the enjoyment of their said copyright, has unlawfully and without their consent, within said *eastern* district of *Pennsylvania*, and before the filing of this bill, and since the said *tenth* day of *January*, 1*893*, and since your orators' rights in the premises aforesaid were acquired, and since the recording of the title of said copyrighted composition, caused to be publicly performed and represented by others the said copyrighted dramatic composition of your orators and threatens and avows a purpose to continue, without your orators' consent, and in violation of their rights, to cause to be publicly performed or represented by others the said copyrighted composition, and this notwithstanding your orators' protest and demand in the premises.

And your orators say, on information and belief, that the dramatic composition by the said *Gustav Hinrichs* thus caused to be publicly performed and represented, the performance of which is hereinbefore alleged to be an infringement of your orators' copyright, is in all things substantially the same as your orators' copyrighted composition, and in all things, to all the intents and purposes, an actual copy and reproduction thereof which has been held out to the public by the said *Gustav Hinrichs* to be your orators' composition aforesaid, produced by the said *Puccini*.

And your orators further show unto your honors that forasmuch as they can have no adequate relief except in this honorable court, and to the end that the said defendant, *Gustav Hinrichs*, may answer all and singular the premises and things hereinbefore set forth and complained of, and that the said defendant, said *Gustav Hinrichs*, may be forever enjoined and restrained by injunction from in any and every form or manner, directly or indirectly, performing and representing the said copyrighted dramatic composition of your orator, and from, directly or indirectly, in any form or manner violating your orator's exclusive right under said copyright, and that he may be ordered to render an account of the profits arising from the unauthorized performance of said dramatic composition, as far as any profits have been made, and required to pay over such profits to your orator and to pay to your orators their costs and disbursements in this suit, and that your orator may have such further relief in the premises as to this honorable court may seem meet and equitable, and as the nature and circumstances of the case may require.

And your orators pray, also, for a provisional or preliminary injunction as herein prayed for in respect of a perpetual injunction, and for such further relief as the equity of the case may require and as to your honors may seem meet.

And finally, to the end that equity may be done and that the relief herein prayed for and all other relief that it may be righteous in the premises to administer may be afforded your orators, may it please your honors such relief fully to grant and to grant unto your orators a writ of subpœna ad respondendum issuing out of and under the seal of this honorable court, directed to the said *Gustav Hinrichs*, commanding him to appear and make answer to this bill of com-

plaint, and to perform and abide by such order and decree herein as to this court shall seem just.

And your orators, as in duty bound, will ever pray.

Rowland Cox,
Solicitor for Complainants.

Rowland Cox,
Of Counsel for Complainants.

d. Of an Engraving.

Form No. 6365.[1]

Circuit Court *of the United States* for the District of *New Jersey*.
In Equity.

To the Honorable the Judges of the *Circuit* Court of the *United States* for the District of *New Jersey*, sitting as a Court of Equity:

George Edward Briscoe Eyre, *W. Hugh Spottiswoode* and *Cyril A. Spottiswoode*, all of the city of *London*, *England*, copartners engaged in business at said city of *London*, under the firm name and style of *Eyre & Spottiswoode*, and all of whom are subjects of *Her Majesty the Queen of Great Britain and Ireland*, and all of whom are aliens, bring this their bill of complaint against the *American Lithographic Company*, a corporation organized and existing under and by virtue of the laws of the state of *New Jersey*, and having its principal place of business at *South Orange* in said state of *New Jersey*, and hereinafter designated the defendant.

And thereupon your orators complain and say that heretofore and before the *twenty-second* day of *September*, 1891, *Charles John Tompkins* was a subject of *Her Majesty the Queen of Great Britain and Ireland*, and was the author, inventor, designer and proprietor of a certain engraving by your orators copyrighted as hereinafter set forth, and entitled "*Little Lord Fauntleroy, an engraving in pure mezzo-tint by Chas. J. Tompkins from the original painting of James Sant, royal academician.*"

And your orators further say that before the copyrighting of the said engraving and before the *twenty-second* day of *September*, 1891, the said *Tompkins*, for a good and valuable consideration, transferred, assigned and sold the same and all his rights, title and interest therein to your orators, and your orators became seised of all the rights of the said *Tompkins* in and to the said engraving and became the proprietors thereof and entitled, under the statutes of the United States, to copyright the same.

And your orators further say that before the publication of said engraving in the United States, and before the publication thereof in any foreign country, and for the purpose of copyrighting the same, your orators, being the proprietors thereof, did on the *twenty-second* day of *September*, 1891, deposit in the mail within the United States, addressed to the librarian of Congress at Washington, District of

1. This form was obtained through the courtesy of Rowland Cox, Esq., of the New York bar. The case is not reported, as the decree and injunction were obtained by consent.

Columbia, a printed copy of the title of said engraving for which they desired a copyright, and did, also, before the date of publication thereof in the United States, and before the date of publication thereof in any foreign country, deposit in the mail within the United States, addressed to the librarian of Congress at Washington, District of Columbia, two copies of the said engraving, and that the librarian of Congress did record the title of the said engraving in a book kept for that purpose in pursuance of the statutes of the United States in such case made and provided, and did receive and accept from your orators the sum of one dollar for recording the said title, and the record of which title was by the librarian thus made on the *twenty-third* day of *September*, 1891, and which title was in these words, to wit: "*Little Lord Fauntleroy, an engraving in pure mezzo-tint by Chas. J. Tompkins from the original painting of James Sant, royal academician.*"

And your orators further say that they gave notice of their copyright of said engraving entitled as aforesaid by printing and inscribing upon some visible portion of each copy of said engraving the following words and letters, to wit: "*Copyright, 1891, by Eyre & Spottiswoode.*"

And your orators further say that having in all things complied with the conditions and provisions of the statutes of the United States in such case made and provided, as aforesaid, they acquired and obtained and there was then granted a good and valid copyright in the United States for and upon said engraving whereby they became entitled, and there was in them vested, the sole liberty of printing, reprinting, publishing, copying, executing, finishing and vending the said engraving for a period of twenty-eight years from the *twenty-third* day of *September*, 1891, and which copyright thus by your orators obtained and to them granted has continued in force from the said *twenty-third* day of *September*, 1891, and is now in force, and that your orators are now and have always been the owners thereof.

And your orators further say that the said engraving produced by the said *Tompkins*, as aforesaid, and of which they became the proprietors and which was by them copyrighted, is a work of great excellence and of great artistic value, and that the same has been, since the said copyright was obtained, for sale in the United States to the public at a reasonable price, and your orators have been and are able and desirous of supplying the public in the United States and elsewhere with copies of the said engraving.

And your orators further say that the said engraving was made from the original painting by *James Sant*, an eminent *English* painter, entitled "*Little Lord Fauntleroy*," with the knowledge and acquiescence of said *Sant*, the said *Tompkins* having been employed to produce the said engraving by reason of his exceptional talent and ability as an engraver, and the said engraving, your orators aver, is a work not only of great artistic value, but of unmistakable originality.[1]

1. **Originality of Work.** — The bill should show the existence of facts of originality of intellectual production, thought and conception, and an averment that the petitioner is "the author, inventor, designer and proprietor of a photograph" of a person, which photograph is alleged to be copyrighted, is not

And your orators further say, on information and belief, that the said defendant, *American Lithographic Company*, is engaged in business in the manufacture and sale, among other things, of lithographs, and that, well knowing the premises and the rights secured unto your orators, as aforesaid, under the statutes relating to copyrights, since your orators' rights were acquired as aforesaid, and wholly without your orators' consent and in violation of their rights in the premises aforesaid, and in violation of your orators' said copyright, the said defendant, said *American Lithographic Company*, has engraved, etched, worked, copied, printed, published and sold a large number of lithographic pictures copied from your orators' said copyrighted engraving, and has, in violation of your orators' rights in the premises aforesaid, printed, reprinted, copied, executed, finished and vended your orators' said copyrighted picture and the subject of your orators' said copyright in violation and infringement of your orators' rights in the premises arising under the statutes of the United States concerning copyrights, and in violation of the said copyright obtained and secured and owned by your orators as aforesaid, and continues so to do.

And your orator further shows unto your honors that forasmuch as he can have no adequate relief except in this honorable court, and to the end that the said defendant, said *American Lithographic Company*, may answer all and singular the premises and things hereinbefore set forth and complained of, and that the said defendant, said *American Lithographic Company*, may be forever enjoined and restrained by injunction from printing and from publishing and from importing and from selling and from exposing for sale any copy or copies of said engraving by your orators copyrighted as aforesaid and entitled "*Little Lord Fauntleroy*," etc., which it has etched, engraved, worked, copied, printed and published, and in every way from infringing your orators' said copyright and from violating your orators' exclusive rights secured by them as hereinbefore set forth, and that it may be ordered to render an account of the profits arising from the sale of said piratical copies of said engraving, as far as any profits have been made, and required to pay over such profits to your orators and to pay to your orators their costs and disbursements in this suit, and that your orators may have such further relief in the premises as to this honorable court may seem meet and equitable, and as the nature and circumstances of the case may require.

And your orators pray, also, for a provisional or preliminary injunction as herein prayed for in respect of a perpetual injunction, and for such further relief as the equity of the case may require and to your honors may seem meet.

And finally, to the end that equity may be done and that the relief

sufficient. Falk *v.* City Item Printing Co., 79 Fed. Rep. 321. But in Falk *v.* Schumacher, 48 Fed. Rep. 222, it was held that an allegation that the complainant "is the author, inventor, designer and proprietor of a certain photograph and negative thereof, known and entitled '*Photograph No. 23 of Lillian Russell, by J. B. Falk, New York,*'" is sufficient, without entering into a detailed description of the method adopted in taking the photograph, nor was the complainant required to attach a copy thereof to his bill of complaint.

herein prayed for and all other relief that it may be righteous in the premises to administer may be afforded your orators, may it please your honors such relief fully to grant and to grant unto your orators a writ of subpœna ad respondendum issuing out of and under the seal of this honorable court directed to the said *American Lithographic Company* and commanding it to appear and make answer to this bill of complaint, and to perform and abide by such order and decree herein as to this court shall seem just.

And your orators, as in duty bound, will ever pray.

Rowland Cox,
Solicitor for Complainants.

Rowland Cox,
of Counsel for Comp'ts.

United States of America,
State of *New York*,
County of *New York*. } ss.

Edwin Young, being duly sworn, deposes and says that he is a member of the firm of *E. & J. B. Young & Co.*, which firm and its predecessors have been for more than *five* years the representatives in the United States for the firm of *Eyre & Spottiswoode*, the complainants named in the foregoing bill of complaint; that he has read said bill of complaint and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated upon information and belief, and as to those matters he verily believes to be true; that the complainants herein reside in London, which is the reason why this affidavit is made by affiant.

Edwin Young.

Subscribed and sworn to before me this *second* day of *June*, 1892.
(SEAL) *Herman Gustow*,
Notary Public, *New York* County.

3. Answer Denying Infringement.[1]

Form No. 6366.[2]

United States Circuit Court, *Northern* District of *New York*.

West Publishing Company
vs.
Lawyers' Co-operative Publishing Company.

The defendant, for answer to the bill of complaint exhibited herein,

1. **For the formal parts** of an answer in a particular jurisdiction consult the titles ANSWERS IN EQUITY, vol. 1, p. 854; ANSWERS IN CODE PLEADING, vol. 1, p. 799.

Defective Answer. — An answer which alleges that a copy of complainant's book, profert of which is made in the bill, is not a true copy of the copyrighted book, but that the title-page thereof had been removed and another page substituted, does not constitute a sufficient defense unless the answer further avers that such substitution was made after publication. Osgood *v.* Aloe Instrument Co., 69 Fed. Rep. 291.

2. This form is copied from the records in the case of the West Pub. Co. *v.* Lawyers' Co-operative Pub. Co., 79 Fed. Rep. 756. The answer is good in form, for although that case was decided against the defendant it was on questions of fact put in issue by the answer, and not because of any formal defects therein.

says: It admits that the plaintiff is a corporation organized under the laws of the state of *Minnesota*, and having its principal office and place of business at the city of *St. Paul* in said state, and that the plaintiff has carried on and still carries on its business at the city of *St. Paul*, aforesaid; and that the defendant is a corporation organized under the laws of the state of *New York* for the purposes alleged in said bill of complaint, and has carried on and still carries on its business at the city of *Rochester* in said state; and that the business so carried on by the said defendant and the said plaintiff is correctly stated in said bill of complaint.

Said defendant, further answering, admits that the plaintiff has published the various books or works alleged to have been published by it in said bill of complaint, and that the same were printed from plates made from type set within the limits of the United States, but whether said plaintiff has taken the various steps to secure a copyright upon or for said works, or whether said defendant has acquired a copyright therein, or in any of the same, as stated in said bill of complaint, this defendant has no knowledge or information sufficient to form a belief, and, therefore, leaves the plaintiff to its proof.

Said defendant admits that each and all of said permanent or complete volumes of reports, as well as each and all of said advance numbers or books embodied in said volumes, were prepared, arranged and reported under the direction of the plaintiff, and that each and all of said advance numbers, volumes or books contained matter original with the plaintiff, but whether the amount of the original matter contained in said volumes, advance numbers or books is large or otherwise, or whether the same is a private property of the plaintiff as author or proprietor, and whether the plaintiff has obtained copyrights thereon, as alleged in said bill of complaint, this defendant has no knowledge or information sufficient to form a belief.

Said defendant further says that it has no knowledge or information sufficient to form a belief as to the way in which said reports, numbers or books were prepared and reported, or at what labor and expense, and, therefore, leaves the plaintiff to its proof. The said defendant admits that the syllabi and head-notes, and preliminary statements of facts, except where prepared by the court, were original with said plaintiff, and were made, edited and published as stated in said bill of complaint, and that the syllabi or head-notes of cases reported in each permanent or completed volume were by the plaintiff alphabetically arranged, and reprinted as an index at the end of such volume, as is alleged in said bill of complaint.

Said defendant further admits that the *American Digest Monthly* of said plaintiff, and the *Annual Digest* of said plaintiff for the year 1892, were principally compiled from and composed of the syllabi or head-notes of the cases originally prepared for and published in the advance numbers of its permanent edition of its reporters, and which were from time to time reprinted in the advance numbers or monthly parts of its digest; but whether the said syllabi or head-notes, made, edited or prepared by the plaintiff for its system of reports and advance numbers, were made, edited and prepared with special reference for use as digest paragraphs in the index digests to each com-

plete volume of reports and in the monthly or advance digest sheets or pamphlets, and also in the *American Annual Digest*, or permanent digest for each year, this defendant has no knowledge or information sufficient to form a belief.

Said defendant admits that the said *American Annual Digest*, and said advance numbers of said *Monthly Digest*, became and were convenient and were of value to all persons desiring to use the same, but whether of great value or of what value, this defendant has no knowledge or information sufficient to form a belief.

The defendant admits that the plaintiff has from time to time printed and sold a large number of said volumes and of said advance numbers, and of its *American Annual Digest* and of its monthly advance numbers or books, but whether to the amount of several thousands of each of said volumes, or to what amount this defendant has no knowledge or information sufficient to form a belief.

It admits that the plaintiff has caused to be printed and inserted in its copies or volumes, and in the permanent and completed books or editions, and in each advance number or book, and in each of the complete and permanent volumes or books, notice that the same were copyrighted, as required by law, as alleged in said bill of complaint. Whether the plaintiff has ever sold or transferred any of said copyrights this defendant has no knowledge or information sufficient to form a belief.

It admits that the plaintiff has never authorized this defendant to publish any of said volumes of reports, or the syllabi or head-notes thereof, or extracts, excerpts or abridgments thereof, except such right as was conferred upon the defendant and upon the public at large to make use of such publication, by reason of the publication thereof. The defendant has no knowledge or information sufficient to form a belief as to whether the plaintiff is the exclusive owner and proprietor of all the said copyrights, or whether it has the sole and exclusive right in each and all of the syllabi, head-notes and preliminary statements of facts contained in said volumes, in advance numbers or books, and reprinted in said *Annual* or *Monthly Digests*, as aforesaid; or whether it has the exclusive right to the head-notes, head-lines or catch-words, preliminary statements of facts, abstracts of arguments of counsel, arrangements and division of the cases into volumes, notes of authorities added to any of the cases reported, indices or index digests in and for each complete volume of reports, and of all matter, excepting the opinions and decisions of said courts, or any of the matters in said bill of complaint stated.

The defendant denies that the value of said advance numbers, books, annual digests and monthly digests, mentioned in the said bill of complaint, is *$300,000*, or any like sum, or that the loss or damage to the plaintiff by the violation of any of its rights mentioned or alleged in said bill of complaint is of that or any similar amount; but as to what is the value of said books, advance numbers and digest, this defendant has no knowledge or information sufficient to form a belief, and it denies that the plaintiff has sustained any loss or damage by reason of violation of any of its rights alleged in said bill of complaint.

This defendant admits that in its business of publishing and selling law-books, reports and digests, it does and has for several years past published and sold annually a volume known and called the *General Digest*, of which it publishes and issues advance sheets semi-monthly, and that said digest and advance sheets or numbers are published and sold in competition with the advance numbers or books of the plaintiff, including its annual or monthly digest.

Said defendant, further answering said bill of complaint, says, that it denies each and every allegation in said bill of complaint charging this defendant with using or intending to use the syllabi or head-notes of the plaintiff, or any of them, or reprinting, publishing or selling in large numbers, or any numbers, in advance numbers of its *General Digest*, or otherwise, statements of facts, syllabi or head-notes, taken, copied or pirated from the volumes of reports of the plaintiff, or from the advance numbers or books thereof, or from its annual or monthly digest, or that it has used or employed, principally or at all, in preparing its *General Digest* for 1892, the head-notes or points issued and published by the plaintiff, or that said head-notes or points issued and published by the defendant are largely, or at all, copies of and piracies upon the head-notes or points of the plaintiff, made, prepared and edited by it, and published in its volumes, advance numbers or books, as charged in said bill of complaint.

The said defendant denies that, in preparing its *General Digest* for publication, and the advance numbers thereof, it has substantially, or at all, copied the head-notes and syllabi previously prepared and published by the plaintiff, or that it has resorted to any of the devices in reference thereto charged in said bill of complaint, or that it has availed itself of the original work, method and ideas of the plaintiff, in making and preparing its head-notes, or in digesting cases, as charged in said bill of complaint; and it denies that any of its publications are pirated from, either wholly or in part, the publications of the said plaintiff.

The defendant denies that its *General Digest* for 1892, or the advance numbers thereof, are infringements of or piracies upon the copyrights, if any, of the plaintiff.

The defendant admits that its publications were made and intended to take the place of, and, as far as possible in legitimate business competition, supersede the books and advance numbers of the plaintiff; but it denies that it has resorted to any of the arts or devices to secure the object inconsistent with legitimate business competition, and it denies, upon information and belief, that it has been and is selling large numbers of its advance sheets or numbers of its digest to persons who would otherwise have bought the volumes and advance numbers of the plaintiff, or its annual or monthly digest for 1892; and it denies that the plaintiff has sustained loss and damage by any act of this defendant; and it denies that it has or will sell large, or any, numbers of its *General Digest* for 1892 to persons who would otherwise buy the *Annual Digest* of the plaintiff, to its loss or damage, which sales were procured, or will be procured, by means of any of the wrongful or illegal arts or devices charged in said bill of complaint; and it denies that it has done any act contrary to equity

and good conscience, and which tends to the wrong and injury of the plaintiff.

The defendant denies each and every allegation in said bill of complaint not hereinbefore specifically answered unto, and prays that it may be hence dismissed, with costs.

Lawyers' Co-operative Publishing Co.,
By *James E. Briggs.*
Cogswell, Bentley & Cogswell,
Defendant's Solicitors.
William F. Cogswell,
Of Counsel.

4. Replication.[1]

Form No. 6367.[2]

Circuit Court *of the United States, Northern* District of *New York.*

The West Publishing Company, complainant, vs. *The Lawyers' Co-operative Publishing Company*, defendant. } In *Equity.*

The replication of the *West Publishing Company*, complainant, to the answer of the *Lawyers' Co-operative Publishing Company*, defendant.

This replicant saving and reserving unto itself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto says that it will aver, maintain and prove its said bill of complaint to be true, certain and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this replicant. Without this that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied is true. All which matters and things this replicant is and will be ready to aver, maintain and prove as this honorable court shall direct, and humbly prays as in and by its bill it has already prayed.

Pierre E. Du Bois,
Solicitor for Complainant.

5. Decrees.[3]

a. For Permanent Injunction.

1. **For the formal parts** of a replication or reply in a particular jurisdiction consult the title REPLICATIONS.

2. This form is copied from the record in West Pub. Co. *v.* Lawyers' Co-operative Pub. Co., 79 Fed. Rep. 756.

3. **For forms of decrees, generally,** consult the title DECREES.

Precedent. — See also a decree reversing the decision of the circuit court dismissing a bill and directing an injunction and accounting in Stevens *v.* Gladding, 17 How. (U. S.) 455.

Form No. 6368.[1]

At a *Stated* Term of the *Circuit* Court *of the United States* for the *Southern* District of *New York*, held at the *United States Circuit* Court Room, in the *Post-office Building* in the City of *New York*, in said District, on the *sixteenth* day of *May*, 1893.

Present: Hon. *William K. Townsend*, Judge.

James T. Black, Francis Black, Adam W. Black and Francis A. Walker, complainants,
v.
The Henry G. Allen Company, defendant.
In Equity.
No. *4718.*

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows:

I. That the certain copyright having relation to and being for a certain book entitled "*United States, Part III, Political Geography and Statistics*," and granted to *Francis A. Walker* on the *thirteenth* day of *February* 1888, and in the bill of complaint herein mentioned is a lawful copyright secured and existing under and in pursuance of the statutes of the United States, and good and valid in law, whereby there was secured to and acquired by the said *Francis A. Walker*, his heirs and assigns, the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the said book for the term of twenty-eight years from the time of recording the title thereof, to wit, from the said *thirteenth* day of *February*, 1888.

II. That the defendant herein has infringed the said copyright and the rights of the complainants thereunder by reproducing, copying, publishing and selling, and causing to be reproduced, copied, published and sold, without the complainants' consent, copies of said copyrighted book entitled "*United States, Part III, Political Geography and Statistics*," as part of the *twenty-third* volume of a certain reprint of a certain book or publication entitled "*Encyclopædia Britannica, Ninth Edition.*"

III. That an injunction issue herein, perpetually enjoining and restraining defendant herein, *The Henry G. Allen Company*, its officers, agents, servants and workmen, from in any form or manner, directly or indirectly, reproducing, and from printing and from reprinting and from copying and from in any form or manner, directly or indirectly, offering to reproduce, and from offering to print and from offering to reprint and from offering to copy and from in any manner whatsoever offering to sell any copy or copies whatsoever of said copyrighted book entitled "*United States, Part III, Political Geography and Statistics*," or any part or parts thereof; and from directly or indirectly, in any form or manner, reproducing, printing, reprinting, completing, copying, executing, finishing, vending, or selling, and from directly or indirectly, in any form or manner,

1. This form is copied from the records in the case of Black *v.* Henry G. Allen Co., 42 Fed. Rep. 618.

offering to reproduce, print, reprint, complete, copy, execute, finish, vend or sell any copy or copies whatsoever of the book or publication entitled "*Encyclopædia Britannica, Ninth Edition,*" or any other book or publication which shall contain or consist in part of said copyrighted book entitled "*United States, Part III, Political Geography and Statistics.*" But nothing herein contained shall in any wise prohibit the sale by the said defendant of any book whatsoever published or issued by the owners of said copyright or their representatives.

IV. That the complainants do recover of the defendant the costs and disbursements of this suit.

Wm. K. Townsend, Judge.

b. For Permanent Injunction and Directing Reference to Master.

Form No. 6369.

(Precedent in Myers *v.* Callaghan, 5 Fed. Rep. 735.)

[(*Caption as in Form No. 6368.*)][1]

This cause coming on for final hearing on the bill, answers and testimony, and the court being fully advised, finds:

That the complainant is the owner of the copyright or exclusive right of publication of the volumes described in said bill of complaint, and known as volumes *thirty-two* (*32*), *thirty-three* (*33*), *thirty-four* (*34*), *thirty-five* (*35*), *thirty-six* (*36*), *thirty-seven* (*37*), and *thirty-eight* (*38*), of the *Illinois Reports.*

That said defendants *Bernard Callaghan, Andrew Callaghan, Andrew P. Callaghan, Sheldon A. Clark,* violated said copyright of said complainant, as to said volumes *32, 33, 34, 35, 36, 37,* as *38,* by publishing, offering for sale, and selling copies thereof, and the said *Marshall D. Ewell* and *V. B. Denslow* in editing the same.

Wherefore, it is ordered and decreed that all said defendants be perpetually enjoined from further publishing or selling, transferring or removing, any of said books.

And as it does not appear what number of said volumes have been published by said defendants *Bernard Callaghan, Andrew Callaghan, Andrew P. Callaghan,* and *Sheldon A. Clark,* or the value of said complainant's volumes before the illegal publication and sale by the said defendants of the copies thereof, it is ordered that this matter be referred to *Henry W. Bishop,* one of the masters of this court, to ascertain and report what number of each of said volumes have been printed, and what number have been sold, and at what price, by said last named defendants, and that the defendants last named may be examined in regard thereto, and that they may be required to produce their account-books and papers, and that said master also ascertain and report what was the market value of each of said books of complainant prior to the said illegal publication of said books by the defendants last named.

And also what was the actual cost or value of reprinting and bind-

1. The words and figures to be supplied within [ ] will not be found in the reported case.

ing each of said volumes; and that, upon the making of such report, said complainant have leave to apply for a further order in regard to the damages to be allowed for the said illegal publication and sale of said volumes.

And the solicitor for complainant having made application herein, upon the suggestion that since the filing of the bill in this cause said defendants last named have proceeded to publish and sell copies of the books described in said bill as volumes numbers *39*, *41*, *42*, *43*, *44*, *45*, and *46*, of said *Illinois Reports*, and upon the further suggestion that such publication is in violation of the rights of said complainant, it is ordered that he have leave to file a supplemental bill herein in regard thereto.

[(*Signature as in Form No. 6368.*)][1]

6. Injunction.[2]

Form No. 6370.[3]

The President of the United States of America to *The Henry G. Allen Company*, your officers, agents, servants and workmen, Greeting:

Whereas, it has been represented to us in our *Circuit* Court *of the United States* for the *Southern* District of *New York*, in the *Second* Circuit, on the part of *James T. Black*, *Francis Black*, *Adam W. Black* and *Francis A. Walker*, complainants, that they have lately exhibited their bill of complaint in our said *Circuit* Court of the *United States* for the *Southern* District of *New York*, against you, the said *The Henry G. Allen Company*, defendant, to be relieved touching the matters therein complained of; and that the certain copyright having relation to and being for a certain book entitled "*United States, Part III, Political Geography and Statistics*," and granted to *Francis A. Walker*, on the *thirteenth* day of *February*, 1*888*, and in the bill of complaint herein mentioned, is a lawful copyright secured and exist-

1. The words and figures to be supplied within [ ] will not be found in the reported case.

2. For writs of injunction, and restraining orders generally, consult the title INJUNCTION.

Injunction in English Courts. — In view of the present international copyright law, the practice of the English courts in regard to enjoining infringement becomes of some interest. Forms for injunction in various cases of infringement may be found in the English reports, as follows:

Tonson *v.* Walker, 3 Swanst. 681; Lewis *v.* Fullarton, 2 Beav. 14; Delf *v.* Delamotte, 3 Kay & J. 581; Ward *v.* Beeton, L. R. 19 Eq. 211; Hogg *v.* Kirby, 8 Ves. Jr. 215; Ainsworth *v.* Bentley, 14 W. R. 630; Chappell *v.* Sheard, 2 Kay & J. 117; Warne *v.* Seebohm, 39 Ch. Div. 82. See 1 Seton (5th ed.) 574; Clement *v.* Maddick, 1 Giff. 98; Prowett *v.* Mortimer, 2 Jur. N. S. 414; Ingram *v.* Stiff, 5 Jur. N. S. 947; Buxton *v.* James, 5 DeG. & Sm. 80; Prince Albert *v.* Strange, 2 DeG. & Sm. 652; Bogue *v.* Houlston, 16 Jur. 372; Campbell *v.* Scott, 11 Sim. 31; Colburn *v.* Simms, 2 Hare 543; Kelly *v.* Morris, L. R. 1 Eq. 697; Morris *v.* Ashbee, L. R. 7 Eq. 34; Tinsley *v.* Lacy, 32 L. J. Ch. 535; Stannard *v.* Harrison, Pemb. Judg. (1st ed.) 288; Hotten *v.* Newsagents, etc., Co., 1 Seton (5th ed.) 573; Kelly *v.* Hodge, 1 Seton (5th ed.) 572; Hole *v.* Bradbury, 12 Ch. Div. 886; Smith *v.* Chatto, 23 W. R. 290; 1 Seton (5th ed.) 571; Warne *v.* Lawrence, 1 Seton (5th ed.) 574; Boucicault *v.* Ward, 1 Seton (5th ed.) 575; Pollard *v.* Moll, 1 Seton (5th ed.) 576; Dicks *v.* Jackson, Pemb. Judg. (4th ed.) 468; Lewis *v.* Fullarton, 2 Beav. 6; Faden *v.* Stockdale, 8 Jur. 185, note.

3. This form is copied from the record in the case of Black *v.* Henry G. Allen Co., 42 Fed. Rep. 618.

ing and in pursuance of the statutes of the United States, and good and valid in law, whereby there was secured to and acquired by the said *Francis A. Walker*, his heirs and assigns, the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the said book for the term of twenty-eight years from the time of recording the title thereof, to wit, from the said *thirteenth* day of *February*, 1888; and that you, the said *The Henry G. Allen Company*, defendant herein, have infringed the said copyright and the rights of the complainants thereunder, by reproducing, copying, publishing and selling, and causing to be reproduced, copied, published and sold, without the complainants' consent, copies of said copyrighted book entitled "*United States, Part III, Political Geography and Statistics*," as part of the *twenty-third* volume of a certain book or publication entitled "*Encyclopædia Britannica, Ninth Edition.*"

Now therefore, we do strictly command and perpetually enjoin you, the said *The Henry G. Allen Company*, your officers, agents, servants and workmen, under the pains and penalties which may fall upon you and each of you in case of disobedience, that you forthwith and forever hereafter, desist and refrain from in any form or manner, directly or indirectly, offering to reproduce, and from offering to reprint, and from offering to copy and from in any manner whatsoever offering to sell any copy or copies whatsoever of the said copyrighted book entitled "*United States, Part III, Political Geography and Statistics*," or any part or parts thereof; and from directly or indirectly, in any form or manner, reproducing, printing, reprinting, copying, executing, finishing, vending or selling, and from directly or indirectly, in any form or manner, offering to reproduce, print, reprint, complete, copy, execute, finish, vend or sell, any copies whatsoever of the book or publication entitled "*Encyclopædia Britannica, Ninth Edition*," or any other book or publication which shall contain or consist in part of said copyrighted book entitled "*United States, Part III, Political Geography and Statistics.*" But nothing herein contained shall in anywise prohibit the sale by you, the said *The Henry G. Allen Company*, of any book whatsoever published or issued by the owners of said copyright, or their representatives.

Witness, the Honorable *Melville W. Fuller*, Chief Justice of the United States of America, at the city of *New York*, in said *Southern* District of *New York*, this *nineteenth* day of *May*, in the year of our Lord one thousand eight hundred and *ninety-three*.

(SEAL) *John A. Shields*, Clerk.

Rowland Cox,
Complainants' Solicitor.

II. ACTION FOR STATUTORY PENALTIES.

1. On Copies of Infringing Photograph.

Form No. 6371.[1]

1. This complaint is copied from the records in Falk *v.* Schumacher, 48 Fed. Rep. 222. The action is brought under U. S. Rev. Stat. (1878), § 4965. The penalty prescribed by this section of one dollar for every sheet found in possession of defendant is affixed only when the sheets are shown to

Circuit Court *of the United States* for the *Southern* District of *New York.*

Benjamin J. Falk
against
Schumacher and Ettlinger.

The complainant complains and alleges:

First. That complainant is a citizen of the United States and a resident therein and resides in the city, county and state of *New York* and is the author, inventor, designer and proprietor of a certain photograph and the negative thereof known as and entitled "*Photograph No. 23 of Lillian Russell by B. J. Falk, N. Y.*"

Second. That before the publication of said photograph and for the purpose of copyrighting the same, complainant, in conformity with the provisions of the Revised Statutes of the United States, on the *twenty-sixth* day of *February*, 1889, deposited in the mail addressed to the librarian of Congress at Washington, District of Columbia, a printed copy of the title of said photograph for which he desired a copyright, and that he also, within ten days[1] from the publication thereof, to wit, on the *fourteenth* day of *March*, 1889, deposited in the mail addressed to the librarian of Congress at Washington, District of Columbia, two complete printed copies of such photograph of the best edition issued, and at the time of mailing such printed copy of the title of said photograph, he forwarded to said librarian of Congress at Washington, District of Columbia, the sum of *fifty* cents for recording the title of said photograph, and that said librarian of Congress did record the title of such copyrighted photograph in a book kept for that purpose as required by section 4957 of the Revised Statutes of the United States.

Third. That complainant gave notice of his copyright of said photograph entitled "*Photograph No. 23 of Lillian Russell by B. J. Falk, N. Y.*" by printing and inscribing upon some portion of the face or front of each of the several copies of said photograph the following words: "*1889, Copyrighted by B. J. Falk, New York.*"

Fourth. And complainant having in all things complied with the conditions and provisions of the Revised Statutes of the United States in such case made and provided, as aforesaid, thereby obtained a copyright of the United States for said photograph in due form of law, and there was granted and secured to him and he had sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the same for the term of twenty-eight years from the time of recording the title thereof by the librarian of Congress as above set forth.

Fifth. On information and belief that the said defendant is a corporation created and existing under the laws of the state of *New York*, having its principal place of business in the city of *New York* and does a general lithographic business; that said defendant, well knowing the premises and the rights so secured to the complainant, and without the consent of complainant, the proprietor of said copy-

have been discovered or detected in the possession of the defendant prior to the bringing of the suit. Bolles *v.* Outing Co., 45 U. S. App. 449.

1. See *supra*, note 2, p. 471.

right, first obtained in writing signed in the presence of two or more witnesses, and within two years next before the commencement of this action, and after the recording of the title of said photograph as aforesaid, did engrave, etch, work, copy, print, publish and import in whole and in part copies of said copyrighted photograph entitled as aforesaid, and knowing the same to be so printed, published and imported, did sell and expose to sale great numbers contrary to the statute in such case made and provided, contrary to sections 4952 and 4965 of the Revised Statutes of the United States and to the great damage of the complainant, whereby and by force of the statute said defendant forfeited to the complainant, the proprietor of said copyright, every sheet thereof, to wit, *twenty thousand* thereof so sold and exposed for sale, and that the value of said sheets of said copy is *two hundred* dollars. And that by reason of the premises said defendant also further forfeited *one* dollar for every sheet of the same found in its possession either printing, printed, copied, published, imported or exposed for sale, and the complainant avers that there were so found in possession of the defendant at the time of the commencement of this suit *twenty thousand* of such copies, whereby there accrued to the said complainant *twenty thousand* dollars, for the aggregate of which said several sums, to wit, for the sum of *twenty thousand two hundred* dollars, the complainant demands judgment against the defendant with costs.

Isaac N. Falk,
Attorney for Complainant,
5 Beekman Street, *New York City*.

State of *New York*,
City and County of *New York*. } ss:

Benjamin J. Falk, being duly sworn, deposes and says, that he is plaintiff in this action; that he has read the foregoing complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

B. J. Falk.

Sworn to before me this *first* day of *April*, 1891.
(SEAL) *F. Goodwin*,
Notary Public, *N. Y.* Co.

2. For Falsely Imprinting Notice.

Form No. 6372.[1]

Circuit Court *of the United States* for the *Southern* District of *New York*.

1. This form is copied from the records in Rigney *v.* Raphael Tuck, etc., Co., 77 Fed. Rep. 173. For the statute under which this action is brought see 26 U. S. Stat. at Large, p. 1106. See also the complaint in Rigney *v.* Dutton, 77 Fed. Rep. 176.

For allegations in a similar case, where, however, the matter falsely marked was not subject to copyright, see Rosenbach *v.* Dreyfuss, 2 Fed. Rep. 217.

In an action on a statute of this character, the party prosecuting must

William J. Rigney[1] against *Raphael Tuck & Sons Company.* } Complaint.

The plaintiff, by *A. Bell Malcomson*, his attorney, complains of the defendant and says as follows:

I. That plaintiff is a citizen of the United States, residing in the city of *Brooklyn*, *New York*, and is entitled to recover from defendant the amounts hereinafter set forth, by virtue of the statutes of the United States in such case made and provided, the facts in relation to which are hereinafter stated.

II. That defendant is a corporation formed under the laws of the state of *New York* and carrying on the business in the city of *New York* and elsewhere of printing and publishing books, prints and other articles.

III. That as a first cause of action, upon information and belief, plaintiff alleges that heretofore and on or about the *first* day of *May*, 1896, the defendant, at the city of *New York*, in the state of *New York*, did publish and issue a certain book entitled "*Father Tuck's Nursery Rhymes*," and in and upon said book did knowingly insert and impress a false and untruthful notice that the same was copyrighted, which notice was in the following words: "*Copyright 1896 by Raphael Tuck & Sons, Ltd.*"[2]

allege every fact necessary to make out his title and his competency to sue. Ferrett *v.* Atwill, 1 Blatchf. (U. S.) 151.

1. The penalty imposed by section 11 of the Copyright act of February 3, 1831 (4 U. S. Stat. at Large, 438), for putting the imprint of a copyright upon a work not legally copyrighted, and given by the act to "the person who shall sue for the same," cannot be recovered in the name of more than one person. And a declaration for such penalty in the name of two persons is bad on general demurrer. Ferrett *v.* Atwill, 1 Blatchf. (U. S.) 151.

2. The allegations of this paragraph were held sufficient on demurrer, the court ruling as follows:

"The first ground of the demurrer is that the use which is alleged to have been made of the notice of copyright is consistent with a proper use of such notice, and that it is not alleged with sufficient clearness to have been a wrongful use. For example, a book may be made up of a quantity of maps, or of musical compositions, or of engravings or photographs, each one of which was, before they were embodied in book form, the subject of a separate copyright, and is entitled to a copyright notice. The position of the defendant is that it does not appear in the complaint that the use which the defendant made of the notice of copyright was not the proper use which it might have made. The allegations in regard to the untruthfulness of the notice and wrongful use which the defendant made of it state the case in the language of the statute, and recite the facts which constitute a statutory cause of action, and it was not necessary for the pleader to negative all the supposable matters of defense. The second ground of demurrer is that the complaint does not allege that the fictitious notice was inserted or impressed at any particular place, and that, for aught that appears, the book might have been printed in Canada and have been brought here for sale. The complaint alleges that at the city of New York the defendant did publish and issue a book, called "Father Tuck's Nursery Rhymes," and did knowingly insert and impress in and upon said book false and untruthful notice. The obvious meaning of the allegations is that the publication and insertion of the notice was at the city of New York. The assertion contained in the whole complaint is that the defendant, at New York, published a book which it had not copyrighted, and in or upon which it knowingly inserted a false notice of copyright. The third ground of demurrer is that the complaint does

IV. That the said book, being a proper subject of a copyright, was not copyrighted by the said "*Raphael Tuck & Sons, Ltd.*," or by "*Raphael Tuck & Sons Company*," or by the defendant [or by any other person or persons and assigned to defendant];[1] and that the notice impressed thereon by defendant was and is false and contrary to the statutes of the United States in such case made and provided, and more particularly to section 4963 of the Revised Statutes of the United States.

V. That by reason of the premises and by force of the statute in such case made and provided, and more particularly section 4963 of the Revised Statutes of the United States, an action hath accrued to the plaintiff to demand and have from the defendant the sum of *one hundred* dollars forfeited as aforesaid by virtue of said statute, the said *one hundred* dollars being part and parcel of the sum herein demanded.

VI. That as a second cause of action, upon information and belief, plaintiff alleges, that heretofore and on or about the *fifteenth* day of *May*, 1896, the defendant, at the city of *New York*, in the state of *New York*, did publish and issue a certain book entitled "*Father Tuck's Nursery Rhymes*," and in and upon said book did knowingly insert and impress a false and untruthful notice that the same was copyrighted, which notice was in the following words: "*Copyright 1896 by Raphael Tuck & Sons, Ltd.*"[2]

VII. That the said book, being a proper subject of a copyright, was not copyrighted by the said "*Raphael Tuck & Sons, Ltd.*," or by "*Raphael Tuck & Sons Company*," or by the defendant [or by any other person or persons and assigned to defendant];[1] and that the notice impressed thereon by defendant was and is false and contrary to the statutes of the United States in such case made and provided,

not allege that the false notice was inserted on the title-page or the page immediately following. Section 4963 does not seem to require that the false notice must be inserted upon one of the pages named in section 4962. It is true that the owner of the copyright cannot maintain an action for infringement unless he inserted his notice at a specified place, but it does not appear from section 4963 that a false notice of copyright cannot be punished if it is placed upon the second page after the title-page, or is placed upon the cover of the book, and is only punishable when placed upon the title-page or the page which immediately follows. The language of the section is more broad, and seeks to prevent the insertion of a false notice 'in or upon' a book."

1. The addition of the words enclosed by [ ] remedies the only objection to the complaint sustained by the circuit court. On this point the court ruled: "Another objection to the complaint is that there is no averment that the defendant had not obtained a copyright. There is an averment that the book was not copyrighted by the defendant corporation under either of its names, but that allegation is not equivalent to the averment that it had not obtained a copyright. If the book was copyrighted, and if the defendant was the owner of the copyright by assignment, such a state of facts was consistent with the averments of the complaint. It is true that there is an averment that the defendant inserted a false and untruthful notice that the book was copyrighted, 'which notice was in the following words,' etc.; but when the pleader states wherein the falsehood consisted he does not state that it consisted in the fact that the book was not copyrighted, but that it was not copyrighted by the corporation which was mentioned in the notice. The objection is a narrow one, but it should be removed by amendment."

2. See *supra*, note 2, p. 503.

and more particularly to section 4963 of the Revised Statutes of the United States.

VIII. That by reason of the premises and by force of the statute in such case made and provided, and more particularly section 4963 of the Revised Statutes of the United States, an action hath accrued to the plaintiff to demand and have from the defendant the sum of *one hundred* dollars forfeited as aforesaid by virtue of said statute, the said *one hundred* dollars being part and parcel of the sum herein demanded.

IX. That as a third cause of action, upon information and belief, plaintiff alleges that heretofore and on or about the *first* day of *June*, 1896, the defendant, at the city of *New York*, in the state of *New York*, did publish and issue a certain book entitled "*Father Tuck's Nursery Rhymes*," and in and upon said book did knowingly insert and impress a false and untruthful notice that the same was copyrighted, which notice was in the following words: "*Copyright 1896 by Raphael Tuck & Sons, Ltd.*"[1]

X. That the said book, being a proper subject of a copyright, was not copyrighted by the said "*Raphael Tuck & Sons, Ltd.*," or by "*Raphael Tuck & Sons Company*," or by the defendant [or by any other person or persons and assigned to defendant];[2] and that the notice impressed thereon by defendant was and is false and contrary to the statutes of the United States in such case made and provided, and more particularly to section 4963 of the Revised Statutes of the United States.

XI. That by reason of the premises and by force of the statute in such case made and provided, and more particularly section 4963 of the Revised Statutes of the United States, an action hath accrued to the plaintiff to demand and have from the defendant the sum of *one hundred* dollars, forfeited as aforesaid by virtue of said statute, the said *one hundred* dollars being part and parcel of the sum herein demanded.

XII. That as a fourth cause of action, upon information and belief, plaintiff alleges that heretofore and on or about the *fifteenth* day of *June*, 1896, the defendant, at the city of *New York*, in the state of *New York*, did publish and issue a certain book entitled "*Father Tuck's Nursery Rhymes*," and in and upon said book did knowingly insert and impress a false and untruthful notice that the same was copyrighted, which notice was in the following words: "*Copyright 1896 by Raphael Tuck & Sons, Ltd.*"[1]

XIII. That the said book, being a proper subject of a copyright, was not copyrighted by the said "*Raphael Tuck & Sons, Ltd.*," or by "*Raphael Tuck & Sons Company*," or by the defendant [or by any other person or persons and assigned to defendant];[2] and that the notice impressed thereon by defendant was and is false and contrary to the statutes of the United States in such case made and provided, and more particularly to section 4963 of the Revised Statutes of the United States.

XIV. That by reason of the premises and by force of the statutes

1. See *supra*, note 2, p. 503.

2. See *supra*, note 1, p. 504.

in such case made and provided, and more particularly section 4963 of the Revised Statutes of the United States, an action hath accrued to the plaintiff to demand and have from the defendant the sum of *one hundred* dollars, forfeited as aforesaid, by virtue of said statute, the said *one hundred* dollars being part and parcel of the sum herein demanded.

XV. That as a fifth cause of action, upon information and belief, plaintiff alleges that heretofore and on or about the *twenty-fifth* day of *June*, 1896, the defendant, at the city of *New York*, in the state of *New York*, did publish and issue a certain book, entitled "*Father Tuck's Nursery Rhymes*," and in and upon said book did knowingly insert and impress a false and untruthful notice that the same was copyrighted, which notice was in the following words: "*Copyright 1896 by Raphael Tuck & Sons, Ltd.*"[1]

XVI. That the said book, being a proper subject of a copyright, was not copyrighted by the said "*Raphael Tuck & Sons, Ltd.*," or by "*Raphael Tuck & Sons Company*," or by the defendant [or by any other person or persons and assigned to defendant];[2] and that the notice impressed thereon by defendant was and is false and contrary to the statutes of the United States in such case made and provided, and more particularly to section 4963 of the Revised Statutes of the United States.

XVII. That by reason of the premises, and by force of the statutes in such case made and provided, and more particularly section 4963 of the Revised Statutes of the United States, an action hath accrued to the plaintiff to demand and have from the defendant the sum of *one hundred* dollars forfeited as aforesaid by virtue of said statute, the said *one hundred* dollars being part and parcel of the sum herein demanded.

Wherefore, plaintiff demands judgment against the defendant for the sum of *five hundred* dollars, together with the costs of this action.

A. Bell Malcomson, Attorney for Plaintiff.

State of *New York*, }
City and County of *New York*. } ss.

William J. Rigney, being duly sworn, deposes and says: That he is the plaintiff herein; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

William J. Rigney.

Subscribed and sworn to before me this *first* day of *July*, 1896.

Edmund Congar Brown,
Notary Public, *Kings* Co.

III. ACTION FOR VIOLATION OF COMMON-LAW RIGHT IN UNPUBLISHED MANUSCRIPT.

Form No. 6373.[3]

1. See *supra*, note 2, p. 503.
2. See *supra*, note 1, p. 504.
3. This complaint is taken from the records in Press Pub. Co. *v.* Monroe, 164 U. S. 105. It will not be found in the reported case.

[*Circuit* Court *of the United States* for the *Southern* District of *New York.*

Harriet B. Monroe, plaintiff,
against
The Press Publishing Co., defendant. } Complaint.

The complainant, by *George H. Yeaman*, her attorney, complains of the defendant and says as follows:][1]

Now, and at all the times hereinafter to be mentioned, the plaintiff is and has been a citizen of the state of *Illinois*, and a resident therein, to wit, in the city of *Chicago.*

The defendant now is and at all the times hereinafter to be mentioned has been a citizen of the state of *New York*, and a resident therein, to wit, in the city of *New York*, that is to say, the defendant is and at all times aforesaid has been, a corporation aggregate, created and existing by force of and under the laws of the aforesaid state of *New York*, and doing business therein, and having its chief place of business in the aforesaid city.

The business of this defendant now is and at all the times hereinafter to be mentioned has been that of editing, publishing, selling and distributing a news-sheet or news-paper, called the *World.* Now and at all times aforesaid, and for many years past, this news-paper has had a very large and widely extended circulation, particularly it has and has had a great number of purchasers and readers in the city of *Chicago.*

Prior to *September*, 1892, this plaintiff had composed and written out in manuscript, but had not published, a certain lyrical ode or song, the work of her intellect and imagination, which was of value to her as a literary product. On or about the *twenty-third* of *September* aforesaid, a certain society or committee styled the "*Committee on Ceremonies of the World's Columbian Exposition*," and composed of certain members of the Chicago Directory and certain members of the National Commission, the two bodies jointly governing said exposition, made an agreement with the plaintiff, wherein and whereby, for a good consideration, they were licensed by her to use and were given exclusive use of said ode for the following purposes, and these only: That is to say, to have the same read or declaimed or sung, or partly read and partly sung, on the public occasion of the dedicatory ceremonies of the World's Columbian Exposition, which ceremonies were to be performed in the city of *Chicago*, on the *twenty-first* day of *October next thereafter.*

This exclusive right of use was limited by the occasion aforesaid, and by the time and place aforesaid.

The general ownership of the literary product remained in the plaintiff, who had the right of unlimited publication from and after the date aforesaid and the right of publication or of representation on said *twenty-first* day of *October* in other cities than *Chicago.*

The right of publication and of public representation was of great value to this plaintiff, not only because the ode was, in itself, a pro-

1. The matter within [ ] does not appear in the printed record of the case, but has been added to render the form complete.

duction worthy to bestow honor and profit upon its author, but because it had been greatly distinguished in having been chosen as the commemorative ode to be read and sung on an occasion of such celebrity as were the dedicatory ceremonies of the Columbian Exposition.

The ode had been composed or written months before, and as early as *May* preceding. During the *ten* days preceding the *twenty-third* day of *September* aforesaid, the date when the plaintiff granted the aforesaid license to the Columbian committee, she delivered to the same the manuscript of her ode, for the purposes expressed in the contract of license, and with the injunction that the manuscript should be held secret, in order that the plaintiff's right of property in the literary product should be preserved inviolate, and especially that premature publication should be avoided. The utmost care was taken both by the plaintiff and by the committee on ceremonies to prevent or forestall piratical attempts on the part of news-papers.

Nevertheless, this defendant, through its agents and servants, some time between *September 14* and *September 23*, 1892, got access to the room or rooms of this committee, and stole or otherwise unlawfully procured the manuscript aforesaid, or a copy thereof, and sent the same to its publication bureau in the city of *New York*.

As soon as it was made known to the plaintiff that the *World* possessed a copy and intended to publish the poem, she sent or caused to be sent to the *World* office in the city of *New York*, that is to say, to the chief bureau of the defendant, where its editors and publishers and responsible officers were, and to all other news-papers in correspondence with said *Associated Press*, a message by way of the telegraph, which message distinctly announced that this ode, and every manuscript copy thereof, were the exclusive property of the author; that it would be a gross violation of the author's rights to prematurely publish the same, and other cautions of the same import. This message was received by the defendant, which quickly acknowledged the same, utterly defying the plaintiff's right and saying in part what follows:

"We (that is, the defendant) will take our chances on it. Explain to her (this plaintiff) that the *World* could not miss an opportunity to give the public such a grand poem."

Accordingly, on *September 25th* aforesaid, this defendant published, in what is styled a "*Sunday Edition*," the aforesaid ode, or what purported to be the same, to the great and irreparable harm of the plaintiff, to wit, there appeared at the head of the first column, on the first page of the aforesaid "*Sunday Edition*" an announcement which read as follows:

"The World's Fair Ode.

A Tribute to Columbia which will be Read and Sung at the Dedication Ceremonies."

This was followed by what purported to be an analysis of the poem, which analysis was grotesquely incorrect and calculated to produce a false and even ludicrous impression of the work. Next followed the aforesaid ode, or rather a caricature of it, through nearly four columns of the printed sheet. This piratical publication

contained no less than *sixty-two* errors, some of them so important as to make portions of the poem appear meaningless.

This piratical publication appeared nearly one month before the occasion of the public ceremonies in *Chicago*. It was published throughout the whole country, as was hereinbefore alleged, on the *twenty-fifth* day of *September*. On this day, as defendant itself boasted, there was a sale of *one-half million* of copies of its journal.

As a consequence of this piratical and premature publication, the rehearsal of the ode on the anniversary festival awakened much less interest than it would otherwise have done, and the ode itself was much less favorably received than it would have been, if it had been correctly presented for the first time on so distinguished an occasion. This result was emphasized and deepened by the fact that the publication was so full of errors that, in itself, it reflected upon the original work great discredit.

Another consequence of the defendant's misdeeds was that the plaintiff was deprived of opportunity to license the reading or singing of the ode in other large cities than *Chicago* on the same anniversary and on subsequent days, because the acts of the defendant herein complained of had made the ode common property. The aforesaid wrongful acts of the defendant have deprived the plaintiff of gains she would otherwise have received in the sale of her ode.

These aforesaid wrongful acts have also afflicted damage upon the plaintiff's reputation as an author. Prior to the date of the aforesaid piratical publication she had written and published many essays, both in prose and verse, and she enjoyed a favorable and worthy reputation, some of her poems having been published and widely circulated.

As a further element of damages, this plaintiff insists that the printing and publication aforesaid, and the false descriptive sketch, and the absurd analysis of the poem which accompanied it, was a wilful, wanton, defiant and unlawful trespass on the rights of this plaintiff.

Over this offensive and vulgar notoriety, which was thus flagrantly thrust upon her, the plaintiff was subjected to much shame and mortification and great personal annoyance.

Wherefore, the plaintiff alleges damages in the sum of *twenty-five thousand* dollars, and prays that she may have judgment against the defendant to the amount, besides costs.

[*George H. Yeaman*,
Attorney for Plaintiff.][1]

[(*Verification.*)][2]

1. The matter within [ ] does not appear in the record of the case, but has been added to complete the form.

2. For form of verification to complaint in the United States circuit court consult the title VERIFICATIONS.

CORAM NOBIS.

See the title ERROR, WRIT OF.

CORAM VOBIS.

See the title ERROR, WRIT OF.

CORONER'S INQUESTS.

By Francis X. Hennessy.

I. Certificate that Inquest is Unnecessary, 510.
1. *By Coroner*, 510.
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CROSS-REFERENCES.

For Forms connected with the subject of Bail and Recognizance, see the title BAIL AND RECOGNIZANCE, vol. 3, p. 1.

For Forms of Pleadings in Actions on a Bail Bond or Recognizance, see the title BONDS AND UNDERTAKINGS (ACTIONS ON), vol. 3, p. 528.

For matters of Practice, see the title CORONER'S INQUESTS, 5 Encyclopædia of Pleading and Practice, p. 38.

I. Certificate that Inquest is Unnecessary.

1. By Coroner.

Form No. 6374.

(N. J. Gen. Stat. (1895), p. 898, § 6.)

I, *John Smith*, one of the coroners of the county of *Bergen*, having notice of the death of *John Doe*, and having viewed the dead body of the said *John Doe*, and made inquiry respecting his death, do

hereby certify, that I am satisfied no guilt attaches to any person or persons by reason of the said death, and that an inquest is unnecessary.[1]

John Smith, Coroner.

2. By Medical Examiner.

Form No. 6375.

(Conn. Gen. Stat. (1888), § 2006.)

I, the undersigned, *John Smith*, medical examiner, having notice of the death of *John Doe*, a white (or *colored*) male, *twenty-three* years old, late of the city of *Bangor*, state of *Maine*,[3] who on the *eighth* day of *May*, A. D. 1897, was found dead (or *died*) in the town of *Middlesex*, having viewed the body of said deceased, and made immediate inquiry concerning his death, do hereby certify that said *John Doe* died in *Middlesex* on the *eighth* day of *May*, A. D. 1897, from natural cause,[4] and that I am satisfied that the said death was not caused by the criminal act, omission or carelessness of any other person or persons, and that an inquest is unnecessary. In accordance with the statute I have delivered the body of said deceased to his friends (or *to the town authorities*) for burial.

Dated *May 8*, 1897.

John Smith, Medical Examiner.

II. VENIRE.[5]

Form No. 6376.

(Fla. Rev. Stat. (1892), p. 913.)

State of *Florida*, }
Leon County. }

In the name of the State of *Florida* — To any constable of said county:

Whereas, I have been notified that the dead body of *John Doe* is

1. In cases where it shall have become necessary for the coroner to bury the dead body, the certificate shall continue and say, "That the said deceased has no friends who appear to take charge of and bury his (or *her*) body, nor, as I can ascertain, has he (or *she*) left property, sufficient and within reach of the overseers of the poor, to defray the expenses thereof; I have therefore buried the same."

2. This certificate must be mailed or delivered to the county coroner immediately after the medical examiner is satisfied that the death has not been caused by the fault of another. Conn. Gen. Stat. (1888), § 2006.

3. Or, if an unknown person, state that fact and carefully describe the body, its clothing, and articles found on or near it which may be of service in its identification, always stating sex, color, apparent age, color and cut of hair, beard, color of eyes, and all special marks or deformities of body.

4. Or suicide or accident, as the case may be, stating manner of suicide or nature of accident.

5. **Requisites of Venire.** — The form of venire prescribed in various states is substantially like that set out *infra*, Forms Nos. 6376 to 6379. For statutes relating to the venire see as follows:

Arizona. — Pen. Code (1887), § 2309.

California. — Pen. Code (1897), § 1510.

Colorado. — Mills' Anno. Stat. (1891), § 870.

Connecticut. — Gen. Stat. (1888), § 2009.

Delaware. — Laws (1893), p. 261.

Florida. — Rev. Stat. (1892), § 3011.

Idaho. — Rev. Stat. (1887), § 8377.

lying at (*Here describe the place where the body is found*), in said county, and I have good reason to believe that his death was caused by the criminal act or negligence of another (*Here set out the grounds of such opinion*);[1] you are hereby required to forthwith summon a jury of good and lawful men of said county, not less than *six* in all, to

Illinois. — Starr & C. Anno. Stat. (1896), p. 981, par. 13.
Iowa. — Code (1897), § 515.
Kansas. — Gen. Stat. (1889), § 1780.
Kentucky. — Stat. (1894), § 528.
Maine. — Rev. Stat. (1883), c. 139, § 1.
Maryland. — Pub. Gen. Laws (1888), art. 22.
Michigan. — How. Anno. Stat. (1882), §§ 9584, 9595.
Mississippi. — Anno. Code (1892), § 816.
Missouri. — Rev. Stat. (1889), § 2442.
Montana. — Pen. Code (1895), § 2790.
Nebraska. — Comp. Stat. (1897), §§ 2198, 2199.
Nevada. — Gen. Stat. (1885), § 2256.
New Hampshire. — Pub. Stat. (1891), c. 262, § 3.
New Jersey. — Gen. Stat. (1895), p. 898, § 7.
North Carolina. — Code (1883) § 657.
North Dakota. — Rev. Codes (1895), §§ 2009, 2010.
Oregon. — Hill's Anno. Laws (1892), § 1660.
South Carolina. — Crim. Stat. (1893), § 580.
Utah. — Rev. Stat. (1898), §§ 1223, 1224.
Virginia. — Code (1887), § 3938.
West Virginia. — Code (1887), p. 932, § 1.
Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 4866.
Wyoming. — Rev. Stat. (1887), § 1879.

Oath of Jurors. — The statutes prescribing the form and method of administering the oath of the jurors are as follows:
Alabama. — Crim. Code (1886), § 4803.
Arizona. — Pen. Code (1887), § 2310.
California. — Pen. Code (1897), § 1511.
Colorado. — Mills' Anno. Stat. (1891), § 871.
Connecticut. — Gen. Stat. (1888), § 3264.
Delaware. — Laws (1893), p. 261.
Florida. — Rev. Stat. (1892), § 3015.
Idaho. — Rev. Stat. (1887), § 8378.
Illinois. — Starr & C. Anno. Stat. (1896), p. 982, par. 16.
Iowa. — Code (1897), § 519.
Kansas. — Gen. Stat. (1889), § 1781.
Kentucky. — Stat. (1894), § 528.
Maine. — Rev. Stat. (1883), c. 139, § 3.
Michigan, — How. Anno. Stat. (1882), §§ 9585, 9595.
Mississippi. — Anno. Code (1892), § 819.
Missouri. — Rev. Stat. (1889), § 2446.
Montana. — Pen. Code (1895), § 2791.
Nebraska. — Comp. Stat. (1897), § 2201.
Nevada. — Gen. Stat. (1885), § 2258.
New Hampshire. — Pub. Stat. (1891), c. 262, § 7.
New Jersey. — Gen. Stat. (1895), p. 899, § 10.
North Carolina. — Code (1883), § 657.
North Dakota. — Rev. Codes (1895), § 2011.
Oregon. — Hill's Anno. Laws (1892), § 1661.
South Carolina. — Crim. Stat. (1893), § 583.
Tennessee. — Code (1896), § 7278.
Utah. — Rev. Stat. (1898), § 1226.
Virginia. — Code (1887), § 3941.
West Virginia. — Code (1891), p. 949, § 3.
Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 4869.
Wyoming. — Rev. Stat. (1887), § 1880.

Charge to Jurors. — For statutes relating to the coroner's charge to the jurors see as follows:
Florida. — Rev. Stat. (1892), § 3016.
Georgia. — 3 Code (1895), § 1262.
Maine. — Rev. Stat. (1883), c. 139, § 8.
Mississippi. — Anno. Code (1892), § 821.
Missouri. — Rev. Stat. (1889), § 2447.
New Jersey. — Gen. Stat. (1895), p. 899, § 11.
New Hampshire. — Pub. Stat. (1891), c. 262, § 9.
South Carolina. — Crim. Stat. (1893), § 584.

1. Grounds for Inquest. — Unless there shall appear to the satisfaction of the coroner, after considering the circumstances attending the cause of death, that he has good reason to believe that the death was caused by the criminal act and negligence of another, no inquest shall be held nor shall any compensation be allowed for a jury, and if in the opinion of the coroner an inquest ought to be held, he shall include the grounds of that opinion in the order for the jury. Fla. Rev. Stat. (1892), § 3010.

appear before me immediately at the place where said body is lying in said county, to inquire, upon a view of the said body, how and in what manner and by whom he came to his death.

Given under my hand and seal this *tenth* day of *May*, A. D. 1897.

Charles Poe. (SEAL)
Coroner.

Form No. 6377.

(Iowa Code (1897), § 517.)

State of *Iowa*, }
Allamakee County. }

To any peace officer of said county:

In the name of the state of *Iowa* you are hereby required to summon forthwith *three* electors of your county, to appear before me at (*name the place*), at (*name the day and hour or say forthwith*), then and there to hold an inquest upon the dead body of *John Doe*, there lying, and find by what means he died.

Witness my hand this *tenth* day of *June*, A. D. 1897.

George Jones,
Coroner of *Allamakee* County.

Form No. 6378.

(Me. Rev. Stat. (1883), c. 139, § 1.)[1]

(SEAL) To either of the constables in the town of *Paris*,[2] in the county of *Oxford*, Greeting:

In the name of the State of *Maine*, you are hereby required immediately to summon *six* good and lawful men of said town of *Paris*, to appear before me, one of the coroners of said county of *Oxford*, at the dwelling-house of *John Smith*, within said town, at the hour of *eleven* A. M., then and there to inquire upon and view the body of *John Doe*, there lying dead, how and in what manner he came to his death. Fail not herein at your peril.

Given under my hand and seal, at *Oxford*, the *ninth* day of *April*, A. D. 1897.

Charles Francis.

1. **In New Hampshire** the coroner issues a summons, directed to three reputable persons, one of whom must be a justice of the peace. The form set out in N. H. Pub. Stat. (1891), § 3, is as follows:

"The State of *New Hampshire*.

Strafford, ss. To *John Doe*, *Richard Roe* and *Frank Smith*:

(SEAL) In the name of the state of *New Hampshire*, you are hereby required to appear before me, *John Ray*, one of the coroners of the county of *Strafford*, at the dwelling-house of *Ralph Jones*, in the town of *Madbury*, on the *tenth* day of *April*, at *ten* o'clock in the *fore*noon, then and there to inquire, upon a view of the body of *John Smith* (or *a person unknown*), there lying dead, how and in what manner he came to his death. Fail not of appearance at your peril.

Given under my hand and seal, at *Madbury*, in said county, the *ninth* day of *April*, 1897.

John Ray, Coroner."

2. The same or an adjoining town in the same county. Me. Rev. Stat. (1883), c. 139, § 1.

Form No. 6379.

(N. J. Gen. Stat. (1895), p. 898, § 7.)[1]

Bergen county, to wit: The state of *New Jersey* to any of the constables of the said county:

You are required immediately upon sight hereof, to summon *six*[2] good and lawful men of the said county of *Bergen* to be and appear before me, *John Smith*, one of the coroners (or *justices*)[3] of the county aforesaid, at *31 Pearl* street, *Hackensack*, in the said county, on the *second* day of *June*, 1897, at the hour of *nine* o'clock in the *fore*noon of the same day, then and there to inquire of, do and execute all such things as, on behalf of the state, shall be lawfully given them in charge touching the death of *John Doe* (or *a person unknown*). And be you then there to certify what you shall have done in the premises, and further to do and execute what, in behalf of the said state, shall be then and there enjoined upon you.

Given under my hand and seal, at *Hackensack*, in said county, the *first* day of *June*, in the year of our Lord one thousand eight hundred and *ninety-seven*.

(SEAL) *John Smith*, Coroner.

III. SUBPŒNA.[4]

1. Missouri. — Substantially the same form, drawn under Mo. Rev. Stat. (1889), § 2442, is given in Mo. Rev. Stat. (1889), p. 2263, No. 151. This form, however, is not under seal.

2. The jury shall consist of six jurors. N. J. Gen. Stat. (1895), p. 903, § 37.

3. A justice of the peace is only authorized to act as a coroner when a coroner cannot be had in due time to take the inquest. If the condition of the dead body should be such that it be manifestly improper, in the judgment of ordinary men, to defer its burial long enough to notify a coroner, in such case the justice would be authorized to act. The fact that a justice may be more conveniently located, that he has received first notice, that he has performed in good faith the first official act believing that a coroner could not be had in due time — no one of these facts, or all of them together, will authorize a justice to act when it appears plainly that a coroner might have been had in due time. Chadwick *v.* Errickson, 40 N. J. L. 159.

4. For forms of subpœna, generally, consult the title SUBPŒNA, and for statutes relating especially to the coroner's subpœna see as follows:

Arizona. — Pen. Code (1887), § 2311.

Arkansas. — Sand. & H. Dig. (1894), § 761.

California. — Pen. Code (1897), § 1512.

Colorado. — Mills' Anno. Stat. (1891), § 872.

Connecticut. — Gen. Stat. (1888), § 2016.

Delaware. — Laws (1893), p. 262.

Florida. — Rev. Stat. (1892), § 3018.

Idaho. — Rev. Stat. (1887), § 8379.

Illinois. — Starr & C. Anno. Stat. (1896), p. 982, par. 18.

Iowa. — Code (1897), § 520.

Kansas. — Gen. Stat. (1889), § 1782.

Maine. — Rev. Stat. (1883), c. 139, § 5.

Michigan. — How. Anno. Stat. (1882), §§ 9586, 9595.

Mississippi. — Anno. Code (1892), § 818.

Missouri. — Rev. Stat. (1889), § 2449.

Montana. — Pen. Code (1895), § 2792.

Nebraska. — Comp. Stat. (1897), § 2203.

Nevada. — Gen. Stat. (1885), § 2259.

New Hampshire. — Pub. Stat. (1891), c. 262, § 8.

New Jersey. — Gen. Stat. (1895), p. 899, § 12.

North Dakota. — Rev. Codes (1895), § 2012.

Ohio. — Bates' Anno. Stat. (1897), § 1221.

Oregon. — Hill's Anno. Laws (1892), § 1662.

Form No. 6380.

(Mo. Rev. Stat. (1889), p. 2263, No. 153.)[1]

State of *Missouri*, } ss.
County of *Barton.* }

The State of *Missouri* to *John Ren*, *John Smith* and *John Pen*, Greeting:

You are hereby commanded to appear forthwith before me, *Henry C. Collins*, coroner of the county of *Barton*, and an inquest now sitting at *Lamar*, in said county, to be examined, and to declare your knowledge concerning the manner in which *John Jones* (or *a certain person unknown*), there lying dead, came to his death, and all other matters on which you shall be examined; and hereof fail not at your peril.

Given under my hand, this *tenth* day of *March*, 1898.

Henry C. Collins, Coroner

Form No. 6381.

(Cook's N. Y. Code Crim. Proc. (1891), p. 481, No. 271.)

State of *New York*, } ss.
County of *New York.* }

In the name of the People of the State of *New York*.

The People of the State of *New York* to *Charles Jones*, *George Davis* and *William Ross*:

We command you and each of you, that all excuses and business being laid aside, to appear in your proper persons before the undersigned, one of the coroners of said county of *New York*, No. *316 Sixth* avenue, in the city of *New York*, in said county, on the *tenth* day of

South Carolina. — Crim. Stat. (1893), § 587.
Rhode Island. — Gen. Laws (1896), c. 287, § 18.
Tennessee. — Code (1896), § 7279.
Utah. — Rev. Stat. (1898), § 1227.
Virginia. — Code (1887), § 3939.
West Virginia. — Code (1891), p. 949, § 1.
Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 4870.
Wyoming. — Rev. Stat. (1887), § 1881.

Oath of Witnesses. — For statutes relating to the oath to be administered to witness see as follows:
Arkansas. — Sand. & H. Dig. (1894), § 753.
Colorado. — Mills' Anno. Stat. (1891), § 873.
Florida. — Rev. Stat. (1892), § 3018.
Iowa. — Code (1897), § 520.
Kansas. — Gen. Stat. (1889), § 1783.
Michigan. — How. Anno. Stat. (1882), §§ 9587, 9595.
Mississippi. — Anno. Code. (1892), § 818.
Missouri. — Rev. Stat. (1889), § 2450.
Nebraska. — Comp. Stat. (1897), § 2204.
New Hampshire. — Pub. Stat. (1891), c. 262, § 11.
New Jersey. — Gen. Stat. (1895), p. 899, § 12.
North Dakota. — Rev. Codes (1895), § 2013.
Ohio. — Bates' Anno. Stat. (1897). § 1221.
South Carolina. — Crim. Stat. (1893), § 590.
Utah. — Rev. Stat. (1898). § 1228.
Virginia. — Code (1887), § 3942.
West Virginia. — Code (1891), p. 950, § 4.
Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 4871.
Wyoming. — Rev. Stat. (1887), § 1882.

1. *Missouri.* — Rev. Stat. (1889), § 2449.

May, 1897, at *nine* o'clock *A.* M. on that day, to give evidence concerning the death of *John Roe.* Hereof fail not at your peril.

Dated at *New York* this *ninth* day of *May*, 1897.

John Smith, Coroner.

IV. EXAMINATION OF WITNESS.

Form No. 6382.

(Cook's N. Y. Code Crim. Proc. (1891), p. 483, No. 279.)[1]

State of *New York*, } ss.
County of *New York.* }

Examination of witnesses produced, sworn and examined on this *eleventh* day of *May*, at No. *213 Sixth* avenue, *New York City*, before *John Smith*, coroner, *George Jones*, *Frank Ross*, (*Here set forth the names of the jurors*), good and lawful men of said county, duly summoned and sworn by the said coroner to inquire how and in what manner and when and where *John Doe* came to his death and who such person was, and into all the circumstances attending such death, and to make true inquisition according to the evidence or arising from the investigation of the body.

Richard Roe, being produced and sworn, says that: (*Here insert his testimony*).

Richard Roe.

Subscribed and sworn before me this *eleventh* day of *May*, 1897.

John Smith, Coroner.

(*Add also evidence of other witnesses in a similar manner.*)

I do hereby certify that the testimony of the several witnesses appearing upon the foregoing inquest was reduced to writing by me, and the same subscribed by said witnesses in my presence, and that the said testimony is the whole of the testimony taken on such inquest, and that the same is correctly stated as given by the witnesses respectively.

Dated at *New York* this *eleventh* day of *May*, 1897.

John Smith, Coroner.

V. INQUISITION.[2]

Form No. 6383.

(Cook's N. Y. Code Crim. Proc. (1891), p. 483, No. 278.)

State of *New York*, } ss.
City and County of *New York.* }

An inquisition taken at No. *213 Sixth* avenue in the city of *New*

1. This examination is to be annexed to the inquisition and filed therewith by the coroner, or under his direction, in the office of the clerk of the court of sessions in the county, or of a city court having power to inquire into the offense by the intervention of the grand jury. N. Y. Code Crim. Proc., § 778.

2. The form of inquisition prescribed in many of the states is substantially like that set forth *infra*, in Forms No. 6383 to 6385. For the various statutes relating to the inquisition see as follows:

California. — Pen. Code (1897), § 1514.

York, in the county of *New York*, on the *tenth* day of *May*, 1897, before me, *John Smith*, one of the coroners of said county aforesaid, on the view of the body of *John Doe* then and there lying dead, upon the oaths and affirmations of (*Here set forth the names of the jurors*), good and lawful men of the state of *New York*, duly chosen, who being then and there duly sworn and charged to inquire, on behalf of the people of said state, where, when, how and after what manner the said *John Doe* came to his death, do, upon their oaths and affirmations, say that the said *John Doe* (*Here state the findings of the jury with particularity*).[1]

Colorado. — Mills' Anno. Stat. (1891), § 875.
Delaware. — Laws (1893), p. 262.
Florida. — Rev. Stat. (1892), § 3020.
Iowa. — Code (1897), 521.
Kansas. — Gen. Stat. (1889), § 1785.
Maine. — Rev. Stat. (1883), c. 139, § 9.
Michigan. — How. Anno. Stat. (1882), § 9590.
Minnesota. — Stat. (1894), § 850.
Montana. — Pen. Code (1895), § 2794.
Nebraska. — Comp. Stat. (1897), § 2206.
Nevada. — Gen. Stat. (1885), § 2261.
North Carolina. — Code (1883), § 657.
Oklahoma. — Stat. (1893), § 1751.
Oregon. — Hill's Anno. Laws (1892), § 1664.
Rhode Island. — Gen. Laws (1896), c. 287, § 19.
Tennessee. — Code (1896), § 7286.
Utah. — Rev. Stat. (1898), § 1231.
Virginia. — Code (1887), § 3943.
West Virginia. — Code (1891), p. 950, § 5.
Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 4874.
Wyoming. — Rev. Stat. (1887), § 83.

1. Statement of Finding — *Generally.* — The inquisition must set forth who the person killed or wounded is, and when, where and by what means he came to his death or was wounded, and, if he was killed or wounded or his death occasioned by the act of another by criminal means, who is guilty thereof insofar as by such inquisition they have been able to ascertain. N. Y. Code Crim. Proc., § 777.

Bullet Wound. — "Came to his death by a bullet fired by a certain *Richard Roe* on the *tenth* day of *May*, 1897, at the corner of *23rd* street and *Sixth* avenue in the city of *New York*, and that said bullet was fired under the following circumstances, to wit: That on the said *tenth* day of *May*, 1897, at said corner of *23rd* street and *Sixth* avenue in the city of *New York*, the said *Richard Roe*, being then and there a police officer of the city of *New York*, saw the said *John Doe* running along *23rd* street in the city of *New York* with a parcel under his arm; that the said *Richard Roe* called to the said *John Doe* and shouted to him to stop, and that as the said *John Doe* did not stop running and paid no heed to the shouts and cries of said officer to stop, the said *Richard Roe* aimed his revolver and fired at the said *John Doe*, who was then about *thirty* feet away from the said *Richard Roe*, and that thereupon the said *John Doe* fell mortally wounded from the effect of the bullet so fired by the said *Richard Roe* then and there, and that the said *John Doe* thereafter languished from the effect of the said bullet wound so inflicted and died at *Bellevue Hospital* in the city of *New York* after the expiration of *four* hours.

And the jury further say upon their oaths and affirmations that the said *Richard Roe* in firing the said bullet and mortally wounding and causing the death of the said *John Doe* far exceeded his duty and that the death of the said *John Doe* was and is murder by the said *Richard Roe*."

Drowning. — "Came to his death from drowning in the *East* river in the state of *New York*, and that the body of the said *John Doe* was found floating in the said *East* river on the *tenth* day of *May*, 1897.

And the jury further say upon their oaths and affirmations that the said *John Doe* was a well known, respectable and wealthy citizen of the city of *New York*, and that when last seen on the *ninth* day of *May*, 1897, the said *John Doe* had with him a large sum of money, a gold watch and other articles of value, and that when the body of the said *John Doe* was found as aforesaid, in the said *East* river on the *tenth* day of *May*, 1897, there was no money, or watch, or any article in the clothes or upon the person of the said *John Doe*.

Dated at *New York* this *eleventh* day of *May*, 1897.

(*Signatures of all the jurors.*)

John Smith, Coroner.[1]

Form No. 6384.

(Sand. & H. Dig. Ark. (1894), § 760.)

State of *Arkansas*, }
County of *Clark*. }

An inquisition, taken on the *tenth* day of *May*, 1897, at *Arkadelphia*,

And the jury further say upon their oaths and affirmations that the removal of the said money, watch and other valuables from the clothes and person of the said *John Doe* is an indication that the said *John Doe* came to his death and came to be so floating in the said *East* river by foul play at the hands of some person or persons unknown."

Justifiable Homicide. — "Came to his death from a blow on the head inflicted by a certain *Richard Roe* on the *tenth* day of *May*, 1897, at *213 Sixth* avenue in the city of *New York*.

And the jury further say upon their oaths and affirmations that the said *Richard Roe* is and was a policeman of the said city of *New York*, and that the said *Richard Roe* having arrested the said *John Doe* at the said No. *213 Sixth* avenue in the city of *New York* on the *tenth* day of *May*, 1897, for felony committed by burglariously breaking into the premises of a certain *William Smith* at the said No. *213 Sixth* avenue in the city of *New York*, the said *John Doe* then and there violently broke away from the said *Richard Roe* and then and there violently attacked the said *Richard Roe* and that said *Richard Roe*, in self-defense and justifiably in the execution of his duty as a police officer of the city of *New York*, did then and there at No. *213 Sixth* avenue in the city of *New York* on the *tenth* day of *May*, 1897, strike such blow with his club on the head of the said *John Doe* and that said blow inflicted a mortal wound, from which said *John Doe* languished and died after the expiration of *two* days at *Bellevue Hospital* in the city of *New York*.

And the jury further say upon their oaths and affirmations that the said *Richard Roe* was and is in no way to blame for said death and should be and is exonerated from all guilt in connection with such death."

Knife Wound. — "Came to his death from a knife wound in the left side, which wound was inflicted by a certain *Richard Roe* of the county of *New York* on the *tenth* day of *May*, 1891, at No. *213 Sixth* avenue, by means of a certain knife then and there held in the hands of the said *Richard Roe*, and that the said knife wound then and there inflicted on the left side of the said *John Doe* was a mortal wound.

And the jury further say upon their oaths and affirmations that the said knife wound was so inflicted on the said *John Doe* by said *Richard Roe* while the said *John Doe* was endeavoring to apprehend the said *Richard Roe*, who was then committing a burglary on the premises of the said *John Doe* at No. *213 Sixth* avenue, *New York* city."

Poison. — "Came to his death from swallowing a certain poison known as arsenic, which was administered and given to the said *John Doe* on the *tenth* day of *May*, 1897, at No. *213 Sixth* avenue in the city of *New York* by a certain *Richard Roe*, of the said *city and* county of *New York*.

And the jury further say on their oaths and affirmations that the said *Richard Roe* gave the said arsenic to the said *John Doe* in a cup of coffee on the said *tenth* day of *May*, 1897, with the premeditated design and intention to then and there cause the death of the said *John Doe* by means of the said arsenic, and that the said *Richard Roe* wilfully and deliberately mixed the said arsenic in the said cup of coffee, well knowing that the said arsenic was deadly poison and would cause the death of the said *John Doe*.

And the jury further say upon their oaths and affirmations that the killing of the said *John Doe* by said *Richard Roe* on the said *tenth* day of *May*, 1897, at the said No. *213 Sixth* avenue by means of said arsenic was wilful murder."

1. Where the inquest was signed by the coroner and duly certified to by him and the jurors signed by making their marks and the whole was certified to by the coroner, who was a sworn officer, his certificate of the signatures of the jurors was sufficient. State *v.* Evans, 27 La. Ann. 297.

in said county of *Clark*, before *John Smith*, coroner of said county, upon the view of the dead body of (*Here insert the name of the deceased, if known, or, if unknown, a description of the person, by his apparent age, size, clothes, etc.*), by the oaths of (*Here insert the jurors' names*), good and lawful jurors of said county, who, being in due form sworn, say that the said (*describing deceased as above*) came to his death (*Here insert the time, cause, manner and circumstances of the death as found*).

In testimony whereof, as well the said coroner as the said jurors, have hereunto set their hands, the day and year first aforesaid.

(*Signatures of coroner and jurors.*)

Form No. 6385.

(Precedent in U. S. L. Ins. Co. *v.* Vocke, 129 Ill. 561.)

State of *Illinois*, } ss.
County of *Cook*. }

An inquisition was taken for the People of the State of *Illinois*, at *38 Grant* place, in the city of *Chicago*, in said county of *Cook*, on the *18th* day of *January*, A. D. 1*885*, before me, *Henry L. Hertz*, coroner in and for said county, upon view of the body of *Otto W. Kielgast*, then and there lying dead, upon the oaths of *six* good and lawful men of the said county, who, being duly sworn to inquire, on the part of the People of the State of *Illinois*, into all the circumstances attending the death of the said *Otto W. Kielgast*, and by whom the same was produced, and in what manner and when and where the said *Otto W. Kielgast* came to his death, do say, upon their oaths as aforesaid, that the said *Otto W. Kielgast*, now lying dead at *38 Grant* place, in said city of *Chicago*, county of *Cook*, State of *Illinois*, came to his death on the *17th* day of *January*, A. D. 1*885*; and we, the jury, find that *O. W. Kielgast* came to his death on the night of *January 17*, 1*885*, by a pistol-shot fired by his own hand, while laboring under a fit of temporary insanity.

In testimony whereof, said coroner and the jury of this inquest have hereunto set their hands the day and year aforesaid.

Douglas Barstow, Foreman. *Louis Gasselin*,
O. W. Haynie, *H. M. Gillette*,
Angelo Faiel, *M. J. Shute*.

Henry L. Hertz, Coroner.
P. Knoff, Deputy.

VI. WARRANT OF ARREST.[1]

1. Requisites of Warrant.— For statutes relating to the coroner's warrant of arrest see as follows:

Alabama. — Crim. Code (1886), § 4809.
Arizona. — Pen. Code (1887), §§ 2316, 2317.
Arkansas. — Sand. & H. Dig. (1894), §§ 764, 765.
California. — Pen. Code (1897), §§ 1517, 1518.
Colorado. — Mills' Anno. Stat. (1891), §§ 877–880.
Delaware. — Laws (1893), p. 263.
Idaho. — Rev. Stat. (1887), §§ 8384, 8385.
Iowa. — Code (1897), § 524.
Kansas. — Gen. Stat. (1889), §§ 1787–1790.
Kentucky. — Stat. (1894), § 529.
Maine. — Rev. Stat. (1883), c. 139, § 10.
Michigan. — How. Anno. Stat. (1882), §§ 9592, 9595.
Mississippi. — Anno. Code (1892), § 822.

Form No. 6386.

(Precedent in State *v.* Bailey, 32 Kan. 85.)[1]

State of *Kansas*, }
Reno County. }

The State of *Kansas* to *J. M. Hedrick*, Sheriff of *Reno* County:

Whereas, on the *21st* day of *May*, 18*83*, notice was given me, the undersigned, *A. W. McKinney*, a coroner in and for said county, that the dead body of a man had been found at the *N. W. 1-4*, sec. *9*, town *24 S.*, range *5 west*, in said county, supposed to have died by unlawful means; thereupon I issued a summons for *six* citizens of said county, and directed the same to *J. M. Hedrick*, sheriff of said county, returnable forthwith. Summons returned at *10* o'clock.

The following jurors appeared: *A. M. Switzer*, *J. Q. Robertson*, *J. C. Moore*, *J. Peter Klein*, *George L. Wainner*, *Edward Dennis*, who were duly sworn. The jurors having inspected the body, heard the testimony, and made all needful inquiries, returned to me their inquisition in writing under their hands, as follows:

"State of *Kansas*, *Reno* County. — An inquisition, holden at the residence of *J. P. Bailey*, on section *9*, town *24*, range *5*, in said county, on the *21st* day of *May*, 18*83*, before me, *A. W. McKinney*, coroner of said county, on the body of *J. P. Bailey*, there lying dead,

Whereas, a coroner's jury duly summoned and sworn to determine the cause of the death of *J. D. Tennison*, held on *June 27th*, 18*87*, and *July 11th*, 18*87*, returned a verdict thereon on *July 11th*, 18*87*, that the said *J. D. Tennison* came to his death by means of poisoning, being arsenic feloniously administered, as they the jurors believe, by *Mrs. J. D. Tennison* and others to said jurors unknown; this, therefore, is to command you forthwith to arrest said *Mrs. J. D. Tennison* and take her to some justice of the peace of said county then and there to answer to the charge of feloniously administering the said poison and causing the death of the said *J. D. Tennison*. In witness whereof, I have hereunto set my hand this *July 11th*, 18*87*.

Dr. *Thomas Hamill*, Coroner."

The defendant submitted to a preliminary examination on this warrant and did not question the sufficiency of the charge therein contained, but after the information was filed sought to have the prosecution abated because the warrant was void. The court ruled that although the charge as stated in the warrant is not as full and precise as it should have been, it was too late to challenge its sufficiency after the preliminary examination was concluded and the defendant bound over for trial.

Montana. — Pen. Code (1895), §§ 2797, 2801.

Nebraska. — Comp. Stat. (1897), § 2207.

New Jersey. — Gen. Stat. (1895), p. 899, § 14.

Nevada. — Gen. Stat. (1885), §§ 2263, 2264.

North Dakota. — Rev. Codes (1895), §§ 2016, 2018.

South Carolina. — Crim. Stat. (1893), § 598.

Tennessee. — Code (1896), §§ 7289, 7290.

Utah. — Rev. Stat. (1898), § 1234.

Virginia. — Code (1887), § 3945.

West Virginia. — Code (1891), p. 950, § 7.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 4876.

Wyoming. — Rev. Stat. (1887), § 1884.

1. It was held in this case that the facts are not set forth in exhaustive detail nor as fully as they should be, nor with perfect accuracy, yet the proceedings thereafter are not so irregular for these reasons as to be utterly void. State *v.* Bailey, 32 Kan. 83.

In State *v.* Tennison, 39 Kan. 726, the defendant was arrested upon the following warrant:

"State of *Kansas*, }
Johnson County. } ss.

To the Sheriff of *Johnson* County, *Kansas*:

by the jurors whose names are hereunto subscribed. The said jurors, upon their oaths, do say he came to his death by being hit upon the head with a piece of iron water-pipe in the hands of *J. I. Bailey*.

Given under our hands, this day of inquisition.

A. M. Switzer. *J. C. Moore.*
J. Q. Robertson. *Geo. I. Wainner.*
J. Peter Klein. *Edward Dennis.*"

You are therefore required to arrest the said *J. I. Bailey*, and bring him forthwith before *George D. Barclay*, at his office in *Hutchinson*, in said county, to answer said charge, and then and there return this writ.

Witness my hand, in *Reno* county, this *21st* day of *May*, 1*883*.

A. W. McKinney.
Coroner of *Reno* County.

Form No. 6387.

(Cook's N. Y. Code Crim. Proc. (1891), p. 484, No. 280.)[1]

State of *New York*, } ss.
County of *New York*. }

In the name of the People of the State of *New York*:

To any sheriff, constable, marshal or policeman in this county:

An inquisition having been this day found by a coroner's jury before me, stating that *John Doe* has come to his death by the act of *Charles Davis*, by criminal means as found by the inquisition.

You are therefore commanded forthwith to arrest the above named *Charles Davis* and bring him before me, or in the case of my absence or inability to act, before the nearest or most accessible coroner in this county.

Dated at the City of *New York* this *eleventh* day of *May*, 1*897*.

John Smith,
Coroner of the County of *New York*.

VII. WARRANT OF COMMITMENT.[2]

Form No. 6388.

(Del. Laws (1893), p. 263.)[3]

Kent County, ss.

The state of *Delaware* to the sheriff of said county:

It having been found by an inquisition taken the *eleventh* day of *May*, A. D. 1*897*, before *John Smith*, coroner of the county aforesaid,

1. *New York*. — Code Crim. Proc., §§ 780, 781.

2. **For forms of commitment**, generally, consult the title COMMITMENT AND DISCHARGE, vol. 4. p. 926. See also the following statutes:

Arkansas. — Sand. & H. Dig. (1894), § 768.

Illinois. — Starr & C. Anno. Stat. (1896), p. 984, par. 26.

South Carolina. — Crim. Stat. (1893), § 599.

3. See also a form in Matter of Collins, 11 Abb. Pr. (N. Y. Oyer & T. Ct.) 408.

upon view of the dead body of *John Doe*, that the said *John Doe* came to his death (*set forth as found by the inquisition*): We do therefore, herewith, send to you the said *Charles Jones* and command you to receive and safely keep him for trial, or until he shall be lawfully discharged.

Witness the hand and seal of the said coroner, the *11th* day of *May*, 1897.

(SEAL) *John Smith*, Coroner.

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By C. A. Molloy.

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CROSS-REFERENCES.

For Form of Plea in Abatement in Actions by or against Corporations, see the title ABATEMENT, PLEAS IN, vol. 1, *Forms Nos. 60, 61, 76, 77, 78, 96.*

For Form of Bill in Equity against Promoters, see the title ACCOUNTS AND ACCOUNTING, vol. 1, *Form No. 491.*

For Form of Bill in Equity against Organizers of a Corporation and Vendors of Property thereto, see the title ACCOUNTS AND ACCOUNTING, vol. 1, *Form No. 489.*

For Form of Affidavit by Officer of Corporation, see the title AFFIDAVITS, vol. 1, *Form No. 958 et seq.*

For Form of Answer Denying Corporate Existence, see the title ANSWERS IN CODE PLEADING, vol. 1, *Form No. 1495.*

For Form of Answer Setting Up Failure to Comply with Statutory Regulations, see the title ANSWERS IN CODE PLEADING, vol. 1, *Form No. 1396.*

For Form of Verification by Officer of Corporation, see the title ANSWERS IN CODE PLEADING, vol. 1, *Form No. 1439.*

For Form of Petition by or against Corporation upon a Promissory Note, see the title BILLS AND NOTES, vol. 3, *Forms Nos. 4140, 4149.*

For Form of Plea that Defendant Signed Draft as Officer of Corporation, see the title BILLS AND NOTES, vol. 3, *Form No. 4252.*

For Formal Parts of Pleadings in Actions by and against Corporations, see the titles ANSWERS IN CODE PLEADING; ANSWERS IN EQUITY; BILLS IN EQUITY; COMPLAINTS; DECLARATIONS; PLEAS; etc., and the GENERAL INDEX to this work.

For Forms in Actions upon Bonds and Undertakings of Corporations or Affecting the Rights of Corporations, see the title BONDS AND UNDERTAKINGS (ACTIONS ON), vol. 3, *Forms Nos. 4395, 4453 et seq.*

For Forms in Actions by and against or relating to a Particular Kind of Corporations, see the titles CARRIERS, vol. 4, p. 192; *ELEVATED RAILROADS; NATIONAL BANKS; RELIGIOUS SOCIETIES; etc., and the GENERAL INDEX to this work.*

For Forms in Actions by and against Officers of Corporations, see the title DIRECTORS, ETC.

For Forms of Indictments for Conspiring to Hinder Business of a Corporation, see the title CONSPIRACY, Forms Nos. 6154, 6155.

For Forms in Actions against Corporations for False Imprisonment, see the title FALSE IMPRISONMENT.

For Forms in Proceedings to Foreclose Mortgages, see the title FORECLOSURE, ETC.

For Forms in Actions by or against or relating to Foreign Corporations, see the title FOREIGN CORPORATIONS.

For Forms in Actions against Corporations for Libel, see the title LIBEL.

For Forms relating to Public Corporations, generally, see the title MUNICIPAL CORPORATIONS.

For Forms in Proceedings for Change of Name of Corporations, see the title NAMES.

For Forms of Service of Process on Corporations, see the title SERVICE OF WRITS AND PAPERS.

For Forms in Proceedings to Sequester Corporate Property, see the title SEQUESTRATION.

For Forms in Actions by and against Shareholders and Stockholders or concerning Shares of Stock, see the title STOCK AND STOCKHOLDERS.

For other Forms in Actions and Proceedings affecting Corporations or the Property of Corporations, see the titles CERTIFIED CASES; CERTIORARI; COMMERCIAL AGENCIES; CREDITORS' SUITS; DEATH BY WRONGFUL ACT; DEPOSITS; DIVIDENDS; EMINENT DOMAIN; INJUNCTIONS; INSOLVENCY; INSURANCE; MANDAMUS; NUISANCES; PERSONAL INJURIES; QUO WARRANTO; RAILROADS; RECEIVERS; and the GENERAL INDEX to this work.

For matters of Procedure, see ENCYCLOPÆDIA OF PLEADING AND PRACTICE, *titles CORPORATIONS; WINDING UP.*

For matters of Substantive Law, see AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW, *titles CONSOLIDATION OF CORPORATIONS; CORPORATIONS (PRIVATE); DISSOLUTION OF CORPORATIONS; REORGANIZATION OF CORPORATIONS.*

I. IN GENERAL.[1]

1. Actions by and against Corporations. — Every corporation, both foreign and domestic, may sue and be sued, both at law and in equity, whenever the corporate property or rights are involved, exactly as an individual might under similar circumstances. 5 Encycl. of Pl. and Pr. 54. Hence the forms in actions by and against corporations generally will be found under their proper tiltes in this work. There are certain actions, however, affecting peculiarly corporations and corporate interests. These latter only are treated in this title.

Statutes exist in every state providing for the formation, control and existence of corporations, defining their powers and prescribing their restrictions. The following is a list of the statutory provisions relating to corporations generally:

Alabama. — Civ. Code (1886), § 1521 *et seq.*; Acts (1890–1891), Nos. 325, 403, 430.

Arizona. — Rev. Stat. (1887), § 329 *et seq.*

Arkansas. — Sand. & H. Dig. (1894), c. 47.

California. — Civ. Code (1897), § 283 *et seq.*

Colorado. — Mills' Anno. Stat. (1891), c. 30; Laws (1891), p. 95.

Connecticut. — Gen. Stat. (1888), § 1905 *et seq.*; Laws (1889), p. 138; Laws (1893), pp. 224, 263; Laws (1895), pp. 467, 571.

Delaware. — Rev. Stat. (1893), c. 70; 17 Laws, c. 147.

District of Columbia. — Comp. Stat. (1894); c. 15.

Florida. — Rev. Stat. (1892), § 2119 *et seq.*

Georgia. — 2 Code (1896), §§ 1835 *et seq.*, 1879 *et seq.*, 1903, 1986, 2000, 2008, 2147, 2159, 2167, 2180, 2339, 2349 *et seq.*

Idaho. — Rev. Stat. (1887), § 2575 *et seq.*

Illinois. — Starr & C. Anno. Stat. (1896), p. 985 *et seq.*, p. 1011, par. 25, p. 1028, par. 50 *et seq.*, p. 1036, par. 80 *et seq.*; Laws (1897), p. 281.

Indiana. — Horner's Stat. (1896), §§ 3001 *et seq.*, 1141, 3556, 3951, 3965 *et seq.*

Iowa. — Code (1897), § 1607 *et seq.*

Kansas. — Gen. Stat. (1897), c. 66.

Kentucky. — Stat. (1894), c. 32; Acts (1896), c. 31; Acts (1897), c. 14.

Louisiana. — Rev. Laws (1897), p. 134 *et seq.*

Maine. — Rev. Stat. (1883), c. 46; Laws (1891), c. 99, 140; Laws (1893), c. 212; Laws (1897) c. 192, 225.

Maryland. — Pub. Gen. Laws (1888), p. 280 *et seq.*

Massachusetts. — Pub. Stat. (1882), c. 105, 106.

Michigan. — How. Anno. Stat. (1882), §§ 3343 *et seq.*, 4247 *et seq.*, 4860 *et seq.*; Pub. Acts (1891), pp. 16, 143, 277; Pub. Acts (1895), p. 326.

Minnesota. — Stat. (1894), c. 34, § 2714 *et seq.*

Mississippi. — Anno. Code (1892), c. 25.

Missouri. — Rev. Stat. (1889), c. 42.

Montana. — Civ. Code, § 390 *et seq.*, Code Civ. Proc., § 2190 *et seq.*

Nebraska. — Comp. Stat. (1897), c. 16.

Nevada. — Gen. Stat. (1885), c. 8.

New Hampshire. — Pub. Stat. (1891), c. 147 *et seq.*

New Jersey. — Gen. Stat. (1896), p. 904 *et seq.*

New Mexico. — Comp. Laws (1884), § 192 *et seq.*; Laws (1897), c. 1, 19, 29.

New York. — Birds. Rev. Stat. (1896), p. 647 *et seq.*

North Carolina. — Code (1883), c. 16; Laws (1885), c. 19, 190; Laws (1889), c. 170; Laws (1891), c. 257; Laws (1893), c. 244.

North Dakota. — Rev. Codes (1895), §§ 2850, 3265, 5775 *et seq.*; Laws (1897), p. 63.

Ohio. — Bates' Anno. Stat. (1897), § 3232 *et seq.*

Oklahoma. — Stat. (1893), c. 17.

Oregon. — Hill's Anno. Laws (1892), §§ 354 *et seq.*, 3217, 3271.

Pennsylvania. — Bright. Pur. Dig. (1894), p. 403 *et seq.*

1. Incorporation.[1]

a. Application.

Form No. 6389.

To the Honorable *John Marshal, Associate* Judge of the *Superior* (or *Circuit*) Court of the County of *Kent* (or *Albemarle*), State of *Delaware* (or *Virginia*):[2]

Under and pursuant to the requirements of (*Here properly indicate and refer to the laws under which it is sought to incorporate*), we, the undersigned (*names of the proposed incorporators*),[3] desiring for ourselves, our associates and successors, to form and be incorporated as a corporation (or *joint stock company*), do hereby make, sign and acknowledge this certificate in writing, certifying as follows:

Rhode Island. — Gen. Laws (1896), c. 176 *et seq.*

South Carolina. — Rev. Stat. (1893), § 1499 *et seq.*

South Dakota. — Dak. Comp. Laws (1887), § 2889 *et seq.*

Tennessee. — Code (1896), § 2024 *et seq.*

Texas. — Rev. Stat. (1895), art. 638 *et seq.*

Utah. — Rev. Stat. (1898), §§ 314 *et seq.*, 3623, 3661 *et seq.*

Vermont. — Stat. (1894), c. 164 *et seq.*

Virginia. — Code (1887), c. 46, 47.

Washington. — Ballinger's Codes & Stat. (1897), § 4250 *et seq.*

West Virginia. — Code (1891), c. 52 *et seq.*

Wisconsin. — Sanb. & B. Anno. Stat. (1889), §§ 1764, 1777, 1788, 1833.

Wyoming. — Rev. Stat. (1887), §§ 501 *et seq.*, 3093 *et seq.*; Const. (1890), art. 10; Laws (1890), p. 21 *et seq.*; Laws (1895), p. 223.

See also lists of statutes cited *infra*, note 1, p. 538, note 2, p 658, note 1, p. 735.

1. The instrument by which a private corporation is formed is variously designated. It is called "agreement" in *Utah* and *West Virginia*; "articles of incorporation" in *Arizona*, *Arkansas*, *California*, *Connecticut*, *Dakota*, *Florida*, *Idaho*, *Iowa*, *Kentucky*, *Michigan*, *Minnesota*, *Missouri*, *Nebraska*, *North Carolina*, *Ohio*, *Oklahoma*, *Oregon*, *Vermont*, *Washington*, *Wisconsin*; "articles of association" in *Indiana* and *New Hampshire*; "certificate of incorporation" in *Colorado*, *Delaware*, *District of Columbia*, *Maine*, *Maryland*, *Montana*, *Nevada*, *New Jersey*, *New York*, *Virginia*, *Wyoming*; "charter" in *Louisiana*, *Massachusetts*, *Mississippi*, *Pennsylvania*, *Tennessee*, *Texas*; "declaration" in *Alabama*, *Georgia*, *South Carolina*, and "license" in *Illinois*. See list of statutes cited *supra*, note 1, p. 527.

Application to courts is the proper method of incorporation in only a few of the states.

Alabama. — Civ. Code (1886), § 1660.

Delaware. — 17 Laws, c. 147 (Rev. Stat. (1893), p. 574 *et seq.*).

Georgia. — 2 Code (1895), §§ 2349, 2350.

North Carolina. — Code (1883), § 677.

Virginia. — Code (1887), § 1145.

And even in these states the proceeding is only quasi judicial in its nature, the court acting in a legislative rather than in a judicial capacity. Gas-Light Co. *v.* West, 78 Ga. 318. The forms of this method of incorporation are given in this article.

In the other states, however, the forms of incorporation are in no way connected with court proceedings, and are omitted as not properly being pleading or practice forms.

2. Must be presented, in *Alabama*, to the judge of probate. Ala. Civ. Code (1886), § 1660. In *Delaware*, to the associate judge of the county. 17 Del. Laws, c. 147 (Rev. Stat. (1893), p. 574). In *Georgia*, to the superior court. 2 Code (1895), § 2350. In *North Carolina*, to the clerk of the superior court. N. Car. Code (1883), § 677. In *Virginia*, to the circuit or corporation court. Va. Code (1887), § 1145.

3. Must be presented by not less than three persons in *Alabama*, *Delaware* and *North Carolina*. Ala. Laws (1887), p. 103; 17 Del. Laws, c. 147 (Rev. Stat. (1893), p. 574); N. Car. Code (1883), § 677. In *Georgia* the petition may be made by any number of persons. 2 Code (1895), § 2350. In *Virginia* the petition may be made by not less than five persons. Va. Code (1887), § 1145.

I. The corporate name of said corporation (or *company*) shall be *The Dover Brick Company.*[1]

II. The purposes and object for which this corporation (or *company*) is organized are (*Here set out the object and purposes of the corporation*), and generally to do all things necessary or proper for carrying on said business, and for those purposes to have, possess and enjoy all the rights, benefits, privileges and immunities incident to, and given under the laws of this state to, a corporation (or *company*) of such character.[2]

III. The amount of the capital stock shall be (or *shall not be less than*) *one hundred thousand* dollars, to be divided into shares of the par value of *one thousand* dollars each, and the amount to be paid in to commence business shall be *twelve thousand* dollars, being more than *ten* per centum of the said capital stock.[3]

[IV. The period at which said corporation shall commence and terminate shall be as follows: It shall commence on the *first* day of *March, eighteen hundred and ninety-eight*, and shall terminate on the *first* day of *March, nineteen hundred and eighteen.*][4]

V. The value or amount of real estate of which said corporation may become seised and possessed shall not exceed in value (or *in amount*) the sum of *two hundred and fifty thousand* dollars (or *fifty acres of land*), [and the value of the personal estate of which said corporation may become seised and possessed may be the sum of *one hundred thousand* dollars.][5]

1. Corporate name must be stated.

Alabama. — Civ. Code (1886), § 1660.

Delaware. — 17 Laws, c. 147 (Rev. Stat. (1893), p. 574).

Georgia. — 2 Code (1895), § 2350.

North Carolina. — Code (1883), § 677.

Virginia. — Code (1887), § 1145.

2. Object of incorporation must be stated.

Alabama. — Civ. Code (1886), § 1660.

Delaware. — 17 Laws, c. 147 (Rev. Stat, (1893), p. 574).

Georgia. — 2 Code (1895), § 2350; *In re* Deveaux, 54 Ga. 673.

North Carolina. — Code (1883), § 677.

Virginia. — Code (1887), § 1145.

Where petition does not designate the purposes of the corporation, but the name of the same indicates its business and the object thereof appears, the charter is not invalid. Van Pelt *v.* Home Bldg., etc., Assoc., 79 Ga. 439. Also, a statement of the objects of the corporation in the judge's order cures the defect of failing to state them in the petition. Redwine *v.* Gate City Loan, etc., Assoc., 54 Ga. 474.

3. Amount of capital stock, number and par value of shares, and the amount to be paid before commencing business, which shall not be less than a certain per centum of the whole capital stock, must be stated.

Delaware.—17 Laws, c. 147 (Rev. Stat. (1893), p. 574). Similar statutes exist in:

Alabama. — Civ. Code (1886), § 1660.

Georgia. — 2 Code (1895), § 2350.

North Carolina. — Code (1883), § 677.

Virginia. — Code (1887), § 1145.

Amount with which to commence business must be stated.

Delaware. — 17 Laws, c. 147 (Rev. Stat. (1893), p. 574).

Georgia. — 2 Code (1895), § 2350.

Amount actually paid in must be stated.

Georgia. — 2 Code (1895), § 2350.

4. Time of commencement and termination must be stated.

Delaware.—17 Laws, c. 147 (Rev. Stat. (1893), p. 574).

Georgia. — 2 Code (1895), § 2350.

North Carolina. — Code (1883), § 677.

5. Value of real property which the corporation may own must be stated.

Delaware. — 17 Laws, c. 147 (Rev. Stat. (1893), p. 574).

Virginia. — Code (1887), § 1145.

Value of personal property which individuals may own must be stated.

Delaware. — 17 Laws, c. 147 (Rev. Stat. (1893), p. 574).

VI. The location of the principal place of business or the chief office of said corporation (or *company*) will be at the city of *Dover* (or *Charlottesville*), in the county of *Kent* (or *Albemarle*), in the state of *Delaware* (or *Virginia*).[1]

VII. The names and residences of the original subscribers to the capital stock are as follows: (*Here list names and residences of subscribers, and amounts subscribed by them respectively.*)[2]

[VIII. The day on which the annual election referred to in *section 23 of the act* hereinbefore mentioned shall be the *first Tuesday* in *March* in each and every year.]

In witness whereof we, the undersigned, the original subscribers to the capital stock of the corporation, have hereunto set our hands and seals this *first* day of *February*, 1898.

(*Signatures, seals, witnesses and acknowledgments, as in the case of ordinary conveyances.*)[3]

Form No. 6390.[4]

1. Principal place of business must be stated.

Alabama. — Civ. Code (1886), § 1660.

Delaware. — 17 Laws, c. 147 (Rev. Stat. (1893), p. 574).

Georgia. — 2 Code (1895), § 2350.

North Carolina. — Code (1883), § 677.

Virginia. — Code (1887), § 1145.

Chief business to be transacted must be stated.

Virginia. — Code (1887), § 1145.

2. Names and residences of original subscribers and original incorporators must be stated.

Alabama. — Civ. Code (1886), § 1660.

Delaware. — 17 Laws, c. 147 (Rev. Stat. (1893), p. 574).

North Carolina. — Code (1883), § 677.

Names and residences of officers who for the first year are to manage the affairs of the company must be stated.

Virginia. — Code (1887), § 1145. Hence, instead of paragraph VII in the text, insert the following: "VII. The names and residences of the officers who shall manage the affairs of the company for the first year are as follows:" (*listing the names and residences of the president and secretary, directors, etc.*)

Other provisions or articles not inconsistent with law as may be deemed proper must be stated.

Alabama. — Civ. Code (1886), § 1660.

Delaware. — 17 Laws, c. 147 (Rev. Stat. (1893), p. 574 *et seq.*).

3. Provisions for signing, sealing and acknowledging the articles or petition are set out in the statute.

Alabama. — Civ. Code (1886), § 1660.

Delaware. — 17 Laws, c. 147 (Rev Stat. (1893), p. 574 *et seq.*).

Georgia. — 2 Code (1895), § 2350.

North Carolina. — Code (1883), § 677.

Virginia. — Code (1887), § 1145.

Publication of the petition, articles or certificate must be made in the manner provided by law.

Delaware. — 17 Laws, c. 147 (Rev. Stat. (1893), p. 574 *et seq.*).

Georgia. — 2 Code (1895), § 2350 *et seq.*

North Carolina. — Code (1883), § 679.

4. *Georgia.* — 2 Code (1895), § 2350.

Petition for incorporation of a company for the purpose of keeping a hose with which to extinguish fires is set out in Screven Hose Co. *v.* Philpot, 53 Ga. 626, and is as follows:

"State of *Georgia* — *Chatham* County. To the Honorable the Judge of the *Superior* Court of *Chatham* County:

The petition of *Isaac Russell* and others respectfully showeth that your petitioners, in connection with other parties, have entered into an association under the name of '*The Screven Hose Company of Savannah, Georgia*,' and that the object of their association is to keep on hand a suitable hose carriage and hose in the city of *Savannah*, county of *Chatham*, and state of *Georgia*, and with said hose carriage and hose, and their personal exertions, to assist in the extinguishment of fires in said city of *Savannah*, and in the protection of the property of their fellow-citizens; and that under the provisions of the charter applied for in this petition no capital stock is required to be paid in, the incorporation proposing

To the Honorable *Superior* Court of the County of *Pulaski*, in the State of *Georgia*.[1]

The petition of (*names of incorporators*) respectfully shows the following facts:

I. Petitioners, under and pursuant to the requirements of the Civil Code of Georgia, chapter 2, article 8, section 1, desire for themselves, their associates and successors to be constituted a body corporate.

II. (*Like paragraph I in Form No. 6389.*)

III. (*Like paragraph II in Form No. 6389.*)

IV. The capital stock of said corporation shall be *one hundred thousand* dollars, to be divided into *one hundred* shares of *one thousand* dollars each, all of which is to be paid in before commencing business, and petitioners desire the right to increase said capital stock to any amount not exceeding *two hundred thousand* dollars, by a direct vote of three-fourths of the stock, at a special meeting called for that purpose.[2]

V. (*Like paragraph IV in Form No. 6389.*)

VI. (*Like paragraph VI in Form No. 6389.*)

VII. The business of said corporation shall be managed by a board of directors consisting of *five* stockholders, who shall be elected annually at the annual meeting of said corporation, to be held on the *first Tuesday* in *March* of each and every year; but the first board of such directors shall be elected at a meeting to be held for the organization of said corporation immediately after the granting of a charter.

VIII. The said board of directors shall elect from its members a president, a secretary and a treasurer, and may make such rules and by-laws as may be proper for the government of said corporation and not in conflict with the laws of the state.

Wherefore, your said petitioners pray the court to grant an order declaring this application granted, and that they be incorporated as the corporation aforesaid for a term of *twenty* years, with the privilege of renewal according to law in such case made and provided.

Oliver Ellsworth, Attorney for the Petitioners.

b. Granting Application.

Form No. 6391.[3]

Georgia — *Pulaski* County.

In the matter of the application of (*names of incorporators*) for a charter for the (*name of corporation*). } In the *Superior* Court of *Pulaski* County, *Special March* term, 1898.

not to act upon capital stock, but only for the purposes first aforesaid. And your petitioners pray that they, with the other members of their association, may, for the purpose aforesaid, be incorporated by the name and style of '*The Screven Hose Company of Savannah, Georgia*,' for the space of *twenty* years, with the privileges incident to corporations created by courts, as provided by the statutes of the state, and your petitioners will ever pray," etc.

1. **Must be presented** to the superior court. 2 Ga. Code (1895), § 2350.

2. **Amount of capital** to be employed and paid in must be specified. *In re* Deveaux, 54 Ga. 673. The amount of capital actually paid in must be stated as a condition precedent to the granting of the charter. Hendrix *v.* Academy of Music, 73 Ga. 440.

3. *Georgia*.— 2 Code (1895), § 2350, providing for the judge's order to be passed declaring the application granted.

Upon the hearing of the application of (*names of the incorporators*), all of the county of *Pulaski*, state of *Georgia*, heretofore on the *first* day of *February*, 1898, filed in the office of the clerk of the *Superior* Court of said county, asking for a charter for the organization and incorporation of a certain corporation to be known as *The Hawkinsville Poultry Association*, for the purpose of (*Here set out the purpose of the corporation as stated in the petition*); and the said (*names of incorporators*) having complied with all the requirements of the law relating to the incorporation of such a corporation, the court is satisfied that said application is legitimately within the purview and intention of

An order for incorporation is set out in Screven Hose Co. *v.* Philpot, 53 Ga. 626, and is as follows:

"*Superior* Court of *Chatham* County,
May Term, 1874.

State of *Georgia* — *Chatham* County:

On reading the foregoing petition, the court being satisfied that the application is legitimately within the purview and intention of the statutes of the state of *Georgia* in that behalf made and provided, and that the terms of the law have been complied with: It is ordered that the said application be granted, and that the petitioners, with the other members of the association and their successors, be and they are hereby incorporated and made a body corporate and politic, by the name and style of '*The Screven Hose Company of Savannah, Georgia*,' for and during the term of *twenty* years, with the privilege of renewal at the expiration of that time, according to the provisions of the laws of *Georgia*. And it is further ordered that the said corporation shall have power to make and pass such constitution, by-laws, rules and regulations for the management of the affairs and business of the company, which may be deemed needful, as may be framed and adopted by the officers and members of the same, not inconsistent with law. And further, to exercise all corporate powers and privileges incident to corporations created by courts, as provided by law. And it is further ordered that a certified copy of this petition and order, under the seal of the court, be furnished by the clerk of the court to the petitioners.

Savannah, June 6th, 1874.

William Schley,
Judge *Superior* Court,
Eastern Circuit."

Alabama. — Upon filing the declaration, the judgment of probate must issue to two or more subscribers a commission authorizing them as commissioners to open books of subscription. Ala. Civ. Code (1886), § 1661. This commission may be as follows:

"The State of *Alabama*, *Jefferson* County. } In the office of *John Pomeroy*, Judge of the *Probate* Court.

To *John Doe* and *Samuel Short*, of the city of *Birmingham*, county and state aforesaid:

Please take notice that in pursuance of the declaration of incorporation by you and your associates this day duly filed in my office in accordance with the statutes of the state of *Alabama* in such case made and provided, I, *John Pomeroy*, *probate* judge of said county and state, hereby authorize you as commissioners to open books of subscription to the capital stock of the (*name of corporation*) at such time and place and upon such notice as you may appoint.

In witness whereof I have hereunto set my hand and affixed the seal of said court this *fifth* day of *March*, 1898.

(SEAL) *John Pomeroy*,
Probate Judge."

After the opening of books of subscription and other compliance with the provisions of the law, and upon proper affidavit filed, the judge of probate must issue to the subscribers, their associates and their successors, a certificate of incorporation. Ala. Civ. Code (1886), § 1663. Such certificate may be as follows:

"The State of *Alabama*, *Jefferson* County. } ss. In the *Probate* Court.

To *John Doe* (*naming the other subscribers*):

Please take notice that whereas, it appears that you have been in all respects duly organized according to the laws of the state of *Alabama*, as appears from the declaration, report of the commissioners appointed to open books of subscription, the minute entry of the organization of your corporation, as

the civil code of the state of *Georgia*. Whereupon it is ordered, that said application be and the same is hereby granted, and that the above named persons (*naming them*), their associates and successors, be and they are hereby incorporated for and during the term of *twenty* years, under the name and style of *The Hawkinsville Poultry Association*, with the privilege of renewal at the expiration of that time, according to the provisions of the civil code of the state of *Georgia*, vested with all the rights, privileges and immunities by law given to and subject to all the restrictions and liabilities by law placed upon such a corporation.

C. C. Smith, Judge of the *Superior* Court of *Pulaski* County, *Georgia*.

2. Amending Certificate of Incorporation.[1]

well as by the affidavit of the persons authorized to receive subscriptions, all of which have been duly filed in my office, you and your associates and successors are hereby duly organized as a corporation under the name and style of (*name of corporation*), and for the purposes expressed in the declaration, having the powers, capacity and authority conferred by law upon such a corporation.

In witness whereof I have hereunto set my hand and affixed the seal of said court this *twenty-fifth* day of *March*, 1898.

(SEAL) *John Pomeroy*,
Probate Judge."

Delaware. — The approval of the judge must be indorsed upon the application and the same transmitted, so indorsed, to the secretary of the state, and a copy of the same furnished and certified by said secretary, under his hand and seal of office, shall be recorded in the recorder's office of the county in which the application is made. 17 Del. Laws, c. 147 (Rev. Stat. (1893), p. 574).

North Carolina. — Formerly the clerk issued the certificate of incorporation, Code (1883), § 679; but under the Public Laws (1893), c. 318, after the articles of agreement have been recorded the clerk shall send a copy, certified under the seal of the court, to the secretary of state, who shall record the same, and shall issue letters patent under the great seal of the state, declaring the signers of the articles a corporation, which letters patent shall be recorded in the clerk's office where the articles of agreement are recorded.

Virginia. — Code (1887), § 1145, providing that the court or judge in vacation shall have discretion to grant or refuse a charter of incorporation upon the terms set forth in the certificate, or granted upon such other terms as may be adjudged reasonable. The order granting charter may be as follows:

"It appearing from the foregoing certificate in writing made, signed, sealed and acknowledged in due course of law and this day presented to me, *John Marshall*, judge of the *Circuit* Court of *Albemarle* county, state of *Virginia*, that (*names of incorporators*) desire to form a joint stock company under the provisions of the code of the state of *Virginia*, title 18, chapter 47, for the purposes set forth in said certificate, which said certificate is hereby made a part of the record of this order, a charter of incorporation is by me hereby granted to the said (*names of incorporators*), their associates, successors and assigns, and they are hereby made and created a body corporate by the name of *The Albemarle Horse Breeders' Association*, with all the powers, privileges and immunities by law conferred upon such a corporation and subject to all provisions and restrictions imposed by law upon such a corporation according to the terms and conditions and for the purposes set out in said certificate of writing.

Given under my hand this *first* day of *March*, 1898.

John Marshall,
Judge of the *Circuit* Court
of *Albemarle* County."

1. Amendment of charter of corporation may be by a proceeding similar to the original incorporation proceeding.

Alabama. — Acts (1889), p. 17.

Delaware. — 17 Laws, c. 147 (Rev. Stat. (1893), p. 574).

Georgia. — 2 Code (1895), § 2350.

a. Notice to Attorney-General.[1]

Form No. 6392.[2]

In the matter of the application of the *Northport Company* to amend its original certificate of incorporation.

To *Daniel Webster*, Esq., Attorney-General of the State of *New York*:

You will please take notice that upon the petition and upon all the papers on file in this proceeding, including the original certificate of incorporation as well as the proposed amended certificate of incorporation, copies of all of which have herewith been served upon you, the undersigned, at the *special* term of the *Supreme* Court of *New York*, to be held at *Riverhead*, in the county of *Suffolk*, state of *New York*, on the *twenty-fifth* day of *March*, 1898, at *ten* o'clock in the *fore*noon of that day, or as soon thereafter as counsel can be heard, will make application to said court under and by virtue of the New York Laws of 1890, chapter 563, as amended by New York Laws of 1892, chapter 687, for an order amending said original certificate of incorporation of the said *Northport Company*, which fails to express the true objects and purpose of the corporation, so as to truly set forth such object and purpose as set forth in said application, and for such other and further relief as to the court may seem proper and just.

Dated the *fifth* day of *March*, 1898.

Yours, etc.,
Oliver Ellsworth,
Attorney for the *Northport Company*.

b. Petition.[3]

Form No. 6393.[4]

Supreme Court, County of *Suffolk*.

In the matter of the application of the *Northport Company* to amend the original certificate of incorporation.

To the *Supreme* Court of the State of *New York*:

Your petitioner, the *Northport Company*, by its petition here to the court, says:

North Carolina. — Laws (1885), c. 19; Laws (1893), c. 380.

Virginia. — Code (1887), § 1145.

Consult also the statutory provisions referred to *supra*, note 1, p. 527.

For change of name of a corporation by amendment or otherwise see the title NAMES.

1. **For forms of notices of motions** or applications, generally, consult the title MOTIONS.

2. *New York.* — The supreme court may, upon due cause shown and proof made, and upon notice to the attorney-general and to such other persons as the court may direct, and upon such terms and conditions as it may impose, amend any certificate of incorporation which fails to express the true object and purpose of the corporation, so as to truly set forth such object and purpose. N. Y. Laws (1890), c. 563, § 7, as *amended* Laws (1892), c. 687 (Birds. Rev. Stat. (1896), p. 651, § 7). Consult also list of statutes cited *supra*, note 1, p. 527

3. **For formal parts** of petitions of this character, generally, see the title PETITIONS.

4. *New York.* — N. Y. Laws (1890), c. 563, as *amended* Laws (1890), c. 687 (Bird's Rev. Stat. (1896), p. 651, § 7).

I. That it now is, and since the *second* day of *January*, 1898, has been, a corporation duly incorporated, organized and existing under and by virtue of the laws of the state of *New York*.

II. That on said *second* day of *January*, 1898, the original certificate of incorporation of said *Northport Company* was filed and recorded in the office of the secretary of the state of *New York* as by law in such cases required.

III. That on the *fifth* day of *January*, 1898, a certified copy of said original certificate of incorporation was filed and recorded in the office of the clerk of *Suffolk* county, state of *New York*, as in such cases by law required.

IV. That a copy of said original certificate of incorporation of the *Northport Company* is hereto annexed, marked Exhibit *A* and made a part of this petition.

V. That said original certificate of incorporation fails to express the true object and purpose of said corporation, the said *Northport Company*.

VI. That the true object and purposes of the said corporation, the said *Northport Company*, was at the time of its said incorporation, and ever since has been and still is, as follows, to wit: (*Here set out the true object and purpose of the corporation.*)

Wherefore, in accordance with and under the provisions of the New York Laws of 1890, chapter 563, section 7, as amended by the New York Laws of 1897, chapter 687, your petitioner, the said *Northport Company*, prays for an order of the court upon such terms and conditions as it may impose, directing the amendment of the said original certificate of incorporation of said corporation, the said *Northport Company*, so as to truly set forth the object and purpose of said corporation, in such manner that the amended certificate of incorporation may conform to and be in the words and figures as set out in a certain proposed amended certificate of incorporation heretofore by your said petitioner made and executed, and duly signed and acknowledged by the directors of said corporation, which said proposed amended certificate of incorporation is hereto annexed, marked Exhibit *B* and made a part of this petition, and for such other and further relief as to the court may seem just and proper.

The Northport Company,
By *John Doe*, President.

(SEAL)

State of *New York*, }
County of *Suffolk*. } ss.

I, *John Doe*, being first duly sworn, upon oath say that I am the president of *The Northport Company*, the petitioner named in the foregoing petition; that the foregoing petition is true of my own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters I believe it to be true; that I have affixed the corporate seal of said corporation to said petition and signed the name of said corporation to said petition on behalf of said corporation by authority of its board of directors.

John Doe.

Sworn to before me this *second* day of *March*, 1898.

(SEAL) *Norton Porter*, Notary Public.

Form No. 6394.[1]

In the matter of the petition of the *Grand Lodge of the Order of United Workmen of Pennsylvania* for certain amendments and alterations in the charter of said order.	In the Court *of Common Pleas* No. *1*, of *Allegheny* County, of the *October and November Term*, 1885. No. *91*.

To the Honorable Judges of the Court *of Common Pleas* of *Allegheny* County:

The petition of the *Grand Lodge of the Ancient Order of United Workmen of Pennsylvania* respectfully represents:

That the petitioner, the *Grand Lodge of Ancient Order of United Workmen of Pennsylvania*, is an association incorporated by act of assembly, approved March 9, 1871, which said act reads as follows: (*Here was set out the act*); that said corporation is embraced in corporations of the first class, specified in section two of the act of April 29, 1874, entitled "An Act to provide for the incorporation and regulation of certain corporations," and its supplements; that the corporation, in pursuance of the said act of 1874, being desirous of altering and amending the articles and conditions of its said act of incorporation, duly adopted, at the regular annual session, held in *January*, 1885, the following amendments: (*Here was set out specifically the amendments adopted.*)[2]

Your petitioner therefore prays the honorable court to order a decree that the amendments and alterations above specified be approved, and made a part of the charter of the said *Grand Lodge of Ancient Order of United Workmen of Pennsylvania.*

In witness whereof, the corporate seal of said corporation has been hereto affixed, duly attested, this *twenty-fifth* day of *October*, 1885.

(SEAL) *Joseph C. Smith*, Grand Master Workman.

Attest: *Joseph M. McNair*, Grand Recorder.

(*Acknowledgment.*)

c. Decree.[3]

(1) Interlocutory.

Form No. 6395.[4]

(Precedent in *In re* First Presb. Church, 111 Pa. St. 157.)[5]

1. *Pennsylvania.* — P. L. (1874), p. 73 (Bright. Pur. Dig. (1894), p. 409, § 24). Consult also list of statutes cited *supra*, note 1, p. 527.

This petition is based on the facts in *In re* Grand Lodge, etc., 110 Pa. St. 613.

2. **Petition should state all facts** necessary to enable the court to act understandingly; nothing should be left to inference. The petition in *In re* Grand Lodge, etc., 110 Pa. St. 613, was defective for this reason.

3. **For the formal parts of decrees** or orders, generally, consult the titles Decrees and Orders.

4. *Pennsylvania.*— P. L. (1869), p. 82. *Compare* P. L. (1874), p. 73 (Bright. Pur. Dig. (1894), p. 409, § 24), providing for a similar decree in cases of amendment of charter of an ordinary corporation. Consult also list of statutes cited *supra*, note 1, p. 527, for similar provisions in other jurisdictions.

5. **Another Precedent.**—In *In re* Grand Lodge, etc., 110 Pa. St. 615, the following decree amending the charter of incorporation is given: "And now, to wit, *March 9th*, 1885, the foregoing amendments and alterations of the

In the Court *of Common Pleas* No. *2*, of *Allegheny* County.

In the matter of the application of *First Presbyterian Church of Bloomfield* for amendment of charter and change of name.

And now, *November 17th*, 1884, the foregoing petition exhibited in open court, and it appearing to the court that due notice of this application and these proceedings were given to the *Auditor-General* of *Pennsylvania*, on the *15th* day of *November*, 1884 (proof thereof being filed in this court); and the court, upon consideration thereof, being of opinion that said amendment of the charter and change of name of said corporation will be lawful, beneficial, and not injurious to the community, do direct said petition, or writing, to be filed in the office of the prothonotary of the court, and that notice thereof be inserted in one newspaper printed in said county for *three* weeks, setting forth that said application has been made, and that a decree will be made on the *5th* day of *January*, 1885, at *10* o'clock *A.* M. conformably to the prayer of the petition, unless sufficient reason be shown why the same should not be made.

By the court,
Christopher Magee, Judge.

(2) Final.

Form No. 6396.[1]

(Precedent in *In re* First Presb. Church, 111 Pa. St. 159.)[2]

(*Title of court and cause as in Form No. 6395.*)

And now, to wit, *June 27th*, 1885, it appearing to the court that the order of the court made *November 19th*, 1884, as to the notice to be inserted in a newspaper printed in the county for *three* weeks, setting forth that said application had been made, and that a decree would be made on the *fifth* day of *January*, 1885, at *ten* o'clock *A.* M. conformably to the prayer of the petition unless sufficient reason be

Act of Incorporation of the *Grand Lodge of the Ancient Order of United Workmen of Pennsylvania* having been duly presented to this court, in order that the same might be deemed and taken to be a part of the Act of Incorporation or Charter of said *Grand Lodge*, and it appearing to the court that such amendments are lawful and beneficial, and do not conflict with the requirements or the Act of the General Assembly of this commonwealth, entitled 'An Act to provide for the Incorporation and Regulation of certain Corporations,' approved the 29th day of April, 1874, nor with the constitution of this state, it is hereby ordered and decreed that notice thereof shall be given by publication, in accordance with the statute in such case made and provided, in the *Chronicle*, *Telegraph*, and the *Commercial Gazette*; and that the same will be granted on *April 4th*, 1885, unless exceptions are filed thereto before said date."

See also *In re* First Presb. Church, 107 Pa. St. 544, for another order of this character.

1. *Pennsylvania.* — See *supra*, note 1, p. 527. See also *In re* First Presb. Church, 107 Pa. St. 543, for another order of this character.

2. In this case it was held that the court of common pleas might change the name of a corporation to that of another corporation, but that the change did not invest the corporation under its new name with any property, trusts or charter rights of the corporation whose name it had taken. *In re* First Presb. Church, 111 Pa. 156.

shown why the same should not be done, has been complied with, and no sufficient reason having been shown why the said amendment of the charter and change of name of the said corporation should not be made, it is now ordered, adjudged and decreed that the name of said corporation shall be the *Fourth Presbyterian Church of Pittsburgh*, and that said amendment and change of name shall be deemed and taken (when duly recorded) to be a part of the charter of said corporation; and it is further ordered that said amendment shall be recorded in the office for the recording of deeds, in and for the said county of *Allegheny*.

By the Court:
Christopher Magee, Judge.

II. CONSOLIDATED CORPORATIONS.[1]

1. Proceedings by or on Behalf of.[2]

1. For statutory provisions relating to the consolidation of corporations, generally, consult the following:

Colorado. — Mills' Anno. Stat. (1891), § 625 *et seq.*

Illinois. — Starr & C. Anno. Stat. (1896), p. 1036, pars. 80–82.

Maryland. — Pub. Gen. Laws (1888), art. 23, § 39.

Maine. — Laws (1891), c. 84.

Nevada. — Gen. Stat. (1885), §§ 1075, 1076.

Pennsylvania. — Bright. Pur. Dig. (1894), p. 413, § 38.

Tennessee. — Code (1896), §§ 2024–2544.

Utah. — Rev. Stat. (1898), § 340.

See also list of statutes cited *supra*, note 1, p. 527.

For statutory provisions relating to the consolidation of railroad corporations consult the following:

Alabama. — Civ. Code (1886), § 1580.

Arizona. — Rev. Stat. (1887), § 317.

Arkansas. — Sand. & H. Dig. (1894), §§ 6188, 6189.

California. — Civ. Code (1897), §§ 361, 473.

Colorado. — Mills' Anno. Stat. (1891), § 604 *et seq.*

Connecticut. — Gen. Stat. (1888), § 3443 *et seq.*

Florida. — Rev. Stat. (1892), § 2248.

Georgia. — 2 Code (1895), § 2173 *et seq.*

Illinois. — Starr & C. Anno. Stat. (1896), p. 3236, par. 23; p. 3240, par. 32; p. 3241, par. 33 *et seq.*

Indiana. — Horner's Stat. (1896), §§ 3556, 3951, 3965–3979.

Kansas. — 1 Gen. Stat. (1897), pp. 761–763.

Maryland. — Laws (1890), c. 553.

Michigan. — How. Anno. Stat. (1882), § 3343 *et seq.*; Pub. Acts (1891), p. 277.

Minnesota. — Rev. Stat. (1894), § 2715 *et seq.*

Missouri. — Rev. Stat. (1889), § 2567.

Montana. — Civ. Code (1895), §§ 911–924.

Nebraska. — Comp. Stat. (1897), § 1764 *et seq.*

New Jersey. — Gen. Stat. (1896), pp. 2635–2719.

New Mexico. — Comp. Laws (1885), § 2702 *et seq.*

New York. — Birds. Rev. Stat. (1896), pp. 2530, 2531, 2552–2558.

Ohio. — Bates' Anno. Stat. (1897), § 3386 *et seq.*

Oklahoma. — Stat. (1893), § 1016 *et seq.*

Pennsylvania. — Bright. Pur. Dig. (1894), p. 1801, § 107 *et seq.*

South Carolina. — Rev. Stat. (1893), § 1615 *et seq.*

South Dakota. — Dak. Comp. Laws (1887), § 2986.

Tennessee. — Code (1896), §§ 2024–2544.

Texas. — Rev. Stat. (1895), § 4529.

Utah. — Rev. Stat. (1898), § 435.

Washington. — Ballinger's Codes & Stat. (1897), § 4304.

West Virginia. — Code (1887), c. 54, § 53.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 1833.

Wyoming. — Rev. Stat. (1887), § 562.

2. Proceedings by and against corporations, generally, see *supra*, note 1, p. 527.

Sufficiency of Averment of Consolidation. — In the Matter of Minneapolis,

a. To Enforce Consolidation Agreement.[1]

(1) Bill in Equity.

Form No. 6397.[2]

The Philadelphia and Reading Railroad Company, plaintiff, against *The River Front Railroad Company*, defendant. } In the Court *of Common Pleas*, No. 4, for the *City and* County of *Philadelphia*. Of the *December* Term, 1889. No. *367*. Sitting in Chancery.

To the Honorable Judges of the said Court:

Your orator complains and says that:

I. The plaintiff, the *Philadelphia and Reading Railroad Company*, was incorporated under the act of assembly of this *commonwealth*, entitled "An Act to authorize the governor to incorporate the Philadelphia and Reading Railroad Company," approved April 4, 1833, under which it constructed and now owns the railroad extending

etc., R. Co., 36 Minn. 481, where petitioner instituted proceedings to condemn a crossing at grade over the right of way of another company, it was held that the allegation set forth as the petitioner's creation and existence as a consolidated corporation was sufficient. These allegations were as follows: "Your petitioner, the *Minneapolis and St. Louis Railway Company*, avers that on the *first* day of *June*, A. D. 1881, it was constituted a corporation for railway purposes, under the corporate name of the *Minneapolis and St. Louis Railway Company*, and vested with and now owns and possesses all the rights, properties and franchises of the *Minneapolis and St. Louis Railway Company* (that certain corporation created by and existing under chapter 66 of the Special Laws of the legislature of the *territory* of *Minnesota*, entitled 'An act to incorporate the Minnesota Western Railroad Company,' approved March 3, 1853, and the several acts amendatory thereof), the *Minneapolis and Duluth Railway Company* (a corporation duly created and existing under the laws of the state of *Minnesota*), the *Minnesota and Iowa Southern Railroad Company* and the *Fort Dodge and Fort Ridgely Railroad Company* (each a corporation for railway purposes, duly organized and existing under the general incorporation laws of the state of *Iowa*), by and through certain consolidation proceedings and agreements entered into between said companies severally, pursuant to the laws aforesaid, the general laws of this state and similar general laws in the state of *Iowa*."

After consolidation is completed by the filing of the certificate with the secretary of state, the new corporation succeeds to the rights, powers and franchises of the original corporation upon the election of a board of directors. In a pleading by the new corporation, all these facts must be affirmatively alleged. Mansfield, etc., R. Co. *v.* Brown, 26 Ohio St. 223.

Must be Sued in Name of Consolidated Corporation. — An action by or against a corporation, brought prior to its consolidation with another corporation, cannot after consolidation be prosecuted by or against it or in its original name. Kansas, etc., R. Co. *v.* Smith, 40 Kan. 192. The new corporation may be substituted in place of the original. See California Cent. R. Co. *v.* Hooper, 76 Cal. 404. But *compare* Cunkle *v.* Interstate R. Co., 54 Kan. 194, as to the time of substitution. The new corporation by adopting a petition in error of one of the constituent corporations thereby becomes substitute as a party in the court below on a new trial therein. Wichita, etc., R. Co. *v.* Quinn, 57 Kan. 737.

1. For forms relating to specific enforcement of contracts, generally, consult the title Specific Performance.

2. This bill is based upon the facts of the case of Philadelphia, etc., R. Co. *v.* River Front R. Co., 168 Pa. St. 358.

For formal parts of bills in equity, generally, consult the title Bills in Equity, vol. 3, p. 417 *et seq.*; of complaints and petitions, consult the title Complaints, vol. 4, p. 1019 *et seq.*

from the city of *Philadelphia* to various points in the interior of this state; that the terminus of the road is in the city of *Philadelphia* at a point known as *Port Richmond*, the southern boundary of the property of said company at that place being *Cumberland* street, in the *eighteenth* ward of said city.

II. That by a supplement to said act of assembly, approved April 12, 1864, entitled (*Here was set out title of the act*),[1] the right to make lateral or branch roads, leading from the main line of its railroad to places or points in any of the counties into or through which the said main line may pass, was conferred upon the *Philadelphia and Reading Railroad Company.*

III. That the defendant, the *River Front Railroad Company*, was incorporated on the *fifteenth* day of *May*, 1876, under the provisions of an act of assembly, approved April 4, 1868, entitled (*Here was set out title of the act*).[2]

IV. That by the twelfth section of said act of April 4, 1868, it is provided that "no corporation formed thereunder shall enter upon or occupy any street, lane or alley in any incorporated city without the consent of such city being first obtained."

V. That in 1877 the *River Front Railroad Company* and the *Philadelphia and Reading Railroad Company* each proposed building a branch railroad upon the same streets in the city of *Philadelphia*, and it was agreed between them that the two companies should build and own jointly a single line between *Callowhill* and *Cumberland* streets, and an ordinance of the city of *Philadelphia* was passed and approved May 21, 1877, entitled (*Here was set out title of ordinance*).[3]

VI. That the legal effect of the ordinance was to give the consent of the city of *Philadelphia* to both of said railroad companies to enter on and occupy the streets named therein.

VII. That in accordance with the agreement aforesaid, and the provisions of the ordinance mentioned, the two railroad companies did construct jointly in the year 1881 a double track railroad extending from the south side of *Cumberland* street along *Beach* street to *Shackamaxon* street; thence through private property to *Delaware* avenue and along *Delaware* avenue to *Callowhill* street, in the *eleventh* ward of the said city, and the cost of construction was borne equally

1. **The title of the act referred to** in the text was as follows: "An Act extending so much of the provisions of the act to incorporate the Pennsylvania Railroad Company, approved April 13th, 1846, as relates to the making of lateral or branch railroads to the Lebanon Valley and Philadelphia and Reading Railroad Companies."

2. **The title of the act referred to** in the text was as follows: "An Act to authorize the formation and regulation of railroad companies, for the purpose of constructing, operating, and maintaining a railroad for public use for the conveyance of persons and property to be located in the city and county of Philadelphia and to extend from the point of connection with the Pennsylvania Railroad as then located, constructed, and in use at Delaware avenue and Dock street, by such route as should be approved by the select and common councils of the city of Philadelphia, to a point of connection with the Philadelphia and Trenton Railroad at its Kensington depot grounds at Harrison and Leib streets."

3. **The title of the ordinance referred to** in the text was as follows: "An ordinance to authorize the River Front Railroad Company and the Philadelphia and Reading Railroad Company to severally and jointly occupy and use certain streets for railroad purposes."

by the said two companies, and the same is owned by them as equal tenants in common.

VIII. That the said railroad until *May 1, 1889*, was maintained and operated by both the said companies jointly under the terms of an agreement, a copy of which, marked Exhibit *D*, is annexed as part of the bill.[1]

1. Agreement for joint control of track, marked Exhibit *D* and referred to in the text, was as follows:

"Agreement between *Philadelphia and Reading Railroad Company* and the *River Front Railroad Company*.

Rules for the government of the Railroad on *Delaware* avenue, *Philadelphia*, between *Cumberland* street and *Callowhill* street. Taking effect *May 1st*, 1882.

There shall be appointed a Joint Dispatcher, whose sole duty shall be the traffic management of the line between *Cumberland* and *Callowhill* streets, on *Delaware* avenue.

The maintenance of the line shall be divided between the two interests in such a manner that the Engineer's department of the *Reading's* interest shall have charge of the maintenance of the line for *twelve* (*12*) months at a time, and that of *River Front Railroad* for like periods, neither interest, except by an agreement, to retain charge for a longer continuous period than *one* year, it being understood that the first year's management, dating from *May 1st*, 1882, and terminating *April 30th*, 1883, shall be assumed by the *River Front Railroad Company*.

The intention of the joint ownership is, that the cost of maintaining the line, and all other expenses, except the pay of the Dispatcher, shall be borne in proportion to the actual tonnage represented by the two interests, but the strict enforcement of the actual tonnage method may, by mutual consent, be suspended and instead an estimated weight, to be agreed upon, may be applied to each loaded car, which until the removal of the actual weight method shall become the basis for determining the proportion of expenses chargeable to the respective interests, or in lieu of either of the foregoing methods, having in view more especially the avoidance of the expense that would be incurred in keeping an accurate account of cars moved, and so long as it shall be mutually satisfactory, it may be proper to assume that there has been an equal division of the tonnage between the respective interests of the parties to this agreement, and the expenses may be so adjusted, subject, however, to an immediate restoration of the tonnage basis whenever a desire that such be done be expressed by either interest.

The adjustment of the tonnage, and all other accounts appertaining to the operation and maintenance of the line, shall be made quarterly through such officers as shall be designated by the respective interests.

The pay of the Dispatcher shall be fixed by the joint interests, and each shall bear an equal share of the same, each interest paying direct to the Dispatcher their proportion of the salary, the purpose of this method being that the Dispatcher shall keep in constant mind, that as between the two interests he is a joint representative of a joint ownership; it is also agreed that under no circumstances will it be proper for either interest to pay to the Dispatcher more than one-half of the agreed salary, and that an expression of dissatisfaction from either interest shall be considered a good and sufficient reason for the Dispatcher's removal.

The charge for tolls and motive power, applying from *May 1st*, 1882, which each interest shall make and collect from Consignees or Shippers upon cars delivered or taken from private sidings, shall be *one* dollar ($*1.00*) per eight-wheeled loaded car, which rate shall continue in force until changed by an agreement between the proper officers of the respective interests.

All questions as to the management of the joint line that may arise hereafter shall be referred to the General Managers of the joint interests, or to such officers as they may delegate for that purpose.

The foregoing has been approved and accepted on behalf of the Receivers of the *Philadelphia and Reading Railroad Company*.

By *J. E. Wootten*,
General Manager.

The foregoing has been approved and accepted on behalf of the *River Front Railroad Company*.

By *O. E. McClellan*."

IX. That at present the *River Front Railroad Company* is leased and operated by the *Pennsylvania Railroad Company*, a corporation existing under the laws of this *commonwealth*, and that the president of the said *River Front Railroad Company* is one of the vice-presidents of the *Pennsylvania Railroad Company*, and the board of directors of the former company is composed entirely of persons who are also directors of the latter.

X. That the railroad of the *River Front Railroad Company* extends both north and south of the joint railroad before mentioned, and connects the railroad of the *Pennsylvania Railroad Company* at *Dock* street, in the *fifth* ward of the city of *Philadelphia*, with the *Philadelphia and Trenton Railroad Company*, which is leased and operated by the *Pennsylvania Railroad*, at a point in the *twenty-fifth* ward of said city.

XI. That the said railroad between *Callowhill* street and *Cumberland* street is also connected with the main line of the *Philadelphia and Reading Railroad* at a point just north of *Cumberland* street, and the traffic of said railroad between *Callowhill* street and *Cumberland* street is exclusively transported in cars to the separate railroads of the *Pennsylvania Railroad* and the *Philadelphia and Reading Railroad Company*.

XII. That numerous warehouses, wharves and other places of business are situated along the line of the common railroad, and since its construction, turnouts and sidings have been constructed connecting the same with said warehouses, wharves and places of business.

XIII. That in pursuance of the agreement referred to of *May 1*, 1882, Exhibit *D*, the plaintiff and defendant alternated in taking charge of the maintenance of said line of railroad on *Delaware* avenue up to the *first* day of *May*, 1887, when it became the right of the *Philadelphia and Reading Railroad* to take charge of the maintenance of said line under said agreement.

XIV. That said company was then in the hands of receivers, and at the instance of the *River Front Railroad Company*, permitted the company to take charge of the maintenance of said line on *Delaware* avenue from the *first* day of *May*, 1887, to the *first* day of *May*, 1888.

XV. That this arrangement was entirely provisional and only had application to the year beginning *May 1*, 1887, and ending *May 1*, 1888. That the *River Front Railroad* continued in charge of said railroad during the year extending from *May*, 1888, to *May*, 1889.

XVI. That prior to the *first* day of *May*, 1889, the plaintiff desired to take charge of the maintenance of the line for the year extending from the *first* day of *May*, 1889, in accordance with said agreement, and notified the *River Front Railroad Company* of its purpose so to do, and to this end entered into possession of the railroad on *Delaware* avenue.

XVII. That the *River Front Railroad Company* then, unlawfully and in violation of the terms of said agreement, procured a large number of men and placed them along the line of the railroad, and forcibly prevented the plaintiff from making the repairs necessary to maintain the line on said *Delaware* avenue, and further obstructed and inter-

fered with the plaintiff in the exercise of the rights vested in it by the terms of the agreement in regard to the maintenance of said road.

XVIII. That in order to preserve the public peace the mayor of the city of *Philadelphia* directed the maintenance of said line on *Delaware* avenue to be taken in charge of the *department of public safety* of the city of *Philadelphia*, and that the road since *May 1*, 1889, has been maintained by the mayor of the city of *Philadelphia*, acting through the *department of public safety*. That the *River Front Railroad Company* denies the right of the *Philadelphia and Reading Railroad Company* to take charge of the said road at any time, under said agreement, and the plaintiff is thereby deprived of the rights vested in it under the agreement, including the right to take charge and maintain said road.

Wherefore it prays:

1st. That the defendant shall keep, preserve and perform all the terms, covenants and conditions of the agreement of *May 1*, 1882, and especially the covenant authorizing the *Philadelphia and Reading Railroad Company*, in each alternate year, to take charge of the maintenance of the line on *Delaware* avenue, as set forth in the agreement.

2d. That an injunction be issued restraining the *River Front Railroad Company*, its officers and agents, from obstructing or interfering with the plaintiff, its officers and agents, in taking charge of and maintaining the said line during said period.

3d. (*General relief.*)

George P. Smith, Plaintiff's Solicitor.

(2) Answer.

Form No. 6398.[1]

Supreme Court. *New York* County.

The Bradford, Eldred and Cuba Railroad Company, and Thomas C. Platt, as receiver, plaintiffs,
against
The New York, Lake Erie and Western Railroad Company, defendant.

The amended answer of the defendant to the complaint of the plaintiff in the above entitled action:

The said defendant, answering the said complaint —

First. Denies that he has any knowledge or information sufficient

1. **This answer is copied from the record** in the case of Bradford, etc., R. Co. *v.* New York, etc., R. Co., 123 N. Y. 316. The complaint in that case sought to enforce a certain consolidation and traffic agreement between the plaintiff and the defendant, and for an accounting. It was held that, where two railroad companies had entered into an agreement by which one was to have virtual control of the other and it was to guarantee payment of interest on bonds of that other, in case of inability of the latter to do so, equity would not decree specific performance of such contract.

For the formal parts of answers, generally, consult the titles Answers in Code Pleading and Answers in Equity; of pleas, generally, consult the title Pleas.

to form a belief of the allegations contained in the second paragraph thereof; that by order of this court, duly made and entered on the *fourth* day of *February*, 1885, or otherwise in a certain action then depending, wherein the *Metropolitan Trust Company*, of the city of *New York*, was and is plaintiff, and the plaintiff company herein was defendant, the plaintiff *Thomas C. Platt* was appointed receiver of the property and franchises of this plaintiff company, with the right to sue on behalf of the said company, or that said *Thomas C. Platt*, duly or otherwise, qualified and entered upon the performance of his duties as such receiver.

Second. Admits the allegation of the fourth paragraph of said complaint, that at the several times thereafter set forth in said complaint, the railroads of the plaintiff company and of the defendant connected with each other at two places, namely, at *Wellsville* and *Cuba*, but denies the allegation of said fourth paragraph that said plaintiff's road, by reason of said connection or otherwise, was tributary to the defendant's road, or in a situation to exchange traffic and business with it to mutual advantage, or that by reason of the alleged relation of the said roads to each other, or because a large or any amount of traffic and business could be delivered to the defendant, or be diverted from it to rival lines (as to all of which defendant denies that it has any knowledge or information sufficient to form a belief), or otherwise, the defendant desired and sought to establish close and permanent or any business or other relations with the plaintiff company.

And defendant denies that it has any knowledge or information sufficient to form a belief that prior to the *12th* day of *March*, 1883, negotiations, as alleged in the complaint or otherwise, were opened and carried on between the plaintiff company and this defendant, or that all the alleged facts in the premises were fully or at all considered, or that the amount of business and traffic, present and prospective, of the plaintiff company, if any, its current earnings, the amount of its outstanding mortgage indebtedness, the loss, if any, to the defendant, if the plaintiff company should fall under the control of a rival line or lines, or the alleged fact that such rival lines desired to obtain control of the plaintiff company's road, or that all and singular or any of the several matters aforesaid were fully or at all discussed or considered in the course of said alleged negotiation, or that in view of the alleged character and permanency of the relation alleged to be contemplated between the two roads or otherwise, it was recognized by both or either of said companies that it would be desirable or proper that the defendant should directly or indirectly elect the directors of the plaintiff company from time to time, or generally control the management of the plaintiff company, or that this defendant considered how such general control or management could be lawfully or otherwise secured to the defendant.

And this defendant, on its information and belief, alleges that all the matters set forth in said fourth paragraph, beginning with the words "by reason of the relation," at folio sixth thereof down to and including the words "lawfully secured to the defendant company" at folio ninth thereof, are immaterial and irrelevant to the statement

of plaintiff's alleged cause of action, are inadmissible as evidence, and are not properly pleaded in said complaint.

And defendant denies that as the result of the said alleged negotiations and inquiries, or with a view, or for the purpose of establishing permanent or any business or other relations between the plaintiff company and this defendant or otherwise, the said alleged agreement was entered into by the plaintiff company and this defendant, as alleged in said complaint, or otherwise.

And this defendant, upon its information and belief, alleges that, at or about the same time, in that behalf in said complaint alleged, *Hugh J. Jewett* then being the president of the defendant, signed a pretended agreement in the words and figures set forth in the complaint,[1] with the name of this defendant, and *A. R. Macdonough*, then being the secretary of the defendant, by the direction of said *Jewett*, assumed to affix to said pretended agreement the corporate seal of

1. The agreement referred to in the text was as follows: "This agreement, made this *twelfth* day of *March*, A. D. 18*83*, by and between the *New York, Lake Erie and Western Railroad Company*, party of the first part, and the *Bradford, Eldred and Cuba Railroad Company*, herein called the *Eldred Company*, party of the second part, witnesseth: Whereas, the railroad of the *Eldred Company* extending from a connection with the railroad of the *Erie Company* at *Wellsville* to a connection with the railroad of the *Bradford, Bordell and Kinzua Railroad Company* at *Eldred*, with a branch extending from its *Little Genesee* station to a further connection with the railroad of the *Erie Company* at *Cuba*, has been constructed by parties in sympathy with the *Erie Company*, with a view of contributing to the business of said company, and of protecting it against hostile lines, now in process of construction; And, whereas, said *Eldred Company* may require assistance from the *Erie Company* in the completion of its said railroad, and in its successful establishment, operation and maintenance. Now, in consideration of the premises, it is agreed as follows:

The *Eldred Company* agrees: First.— That it will at all times deliver to said *Erie Company*, for transportation, all the freight and passengers that it can lawfully control or influence, destined to points that can be reached by way of the railroad of the *Erie Company* or its connections, and will use its influence to promote the interests and the business of the *Erie Company* so far as it can, with proper regard for its own interests. Second. — That for the protection of the *Erie Company* in rendering assistance to the *Eldred Company* under this contract, it will cause to be deposited with the *Erie Company* a majority of the capital stock of the *Eldred Company*, in such manner as shall be required, upon which, so long as the management of the *Eldred Company* shall be satisfactory to it, the *Erie Company* will give, or cause to be given, to such representative of the *Eldred Company* as shall be designated by it, the right to vote upon the stock so deposited.

The *Erie Company* agrees: First. — That so far as it can, with a proper regard for its own interests, it will use its influence and exercise its control to promote the interests and the business of the *Eldred Company*. Second. — That, upon condition that the corporate control of the *Eldred Company* shall become and remain vested in the *Erie Company*, as above provided, the *Erie Company* will make good any deficiencies in the net earnings of the *Eldred Company* to meet the interest upon its present bonded indebtedness, from time to time, as the same becomes due and payable, and for any and all advances so made by it, with interest thereon, as well as for any and all advances made to said *Eldred Company* by the *Erie Company* for other purposes, with interest thereon, the *Erie Company* shall have, and is hereby granted, a first lien upon the railroad franchises and property of the *Eldred Company* next after its bonded indebtedness aforesaid, and a first charge upon its surplus earnings next after the payment of the accruing interest upon its said bonded indebtedness. This con-

this defendant, and to attest the same as secretary of this defendant; but defendant denies that said *Jewett* signed the same as president of the defendant or by its authority, or that said *Macdonough* affixed said seal and attested the same as secretary of the defendant or by its authority. And defendant alleges that neither this defendant nor its board of directors assumed, or did in fact authorize the execution of said pretended agreement, and the same, if made as above set forth, was not made by this defendant, and is not binding upon it.

And defendant, upon its information and belief, alleges that neither the plaintiff company nor this defendant had any power, corporate or otherwise, to enter into said pretended agreement, and the same, if made by them or either of them, as alleged in the complaint or otherwise, was and is illegal and void.

Third. Denies that it has any knowledge or information sufficient to form a belief of the allegation of the fifth paragraph of said complaint; that the said plaintiff company has duly or otherwise performed all and singular, or any of the acts and things specified in the said alleged agreement to be performed by said plaintiff company.

And this defendant denies that it has had or enjoyed all or any of the benefits and advantages, if any there were, which this defendant denies, contemplated and provided for in and by said alleged agreement, or that from the date thereof until the alleged appointment of a receiver, as therein mentioned, this defendant has had the general or other direction and control of the plaintiff company's business and affairs or of the income and earnings of its road, or that the corporate control of the plaintiff company did become and remain vested in the defendant, as alleged to be contemplated and provided for in said pretended agreement, or continued so to remain until, by the alleged wrongful acts and breaches of said alleged agreement by the defendant, as therein set forth, the appointment of a receiver of the plaintiff company's franchises and property became necessary, if indeed it ever did.

And defendant denies that it was by the wrongful acts and breaches of said alleged agreement by this defendant, as in said complaint alleged, or in any manner, that the appointment of a receiver of the said plaintiff company's franchises and property became necessary; and this defendant denies that it has any knowledge or information sufficient to form a belief that such appointment did in fact ever become necessary.

And this defendant, upon its information and belief, alleges that if any of the acts of the description set forth in said sixth paragraph were attempted to be performed by any person or persons then being the officer or officers of the plaintiff company or of this defendant, they were not performed by such person or persons as such officer or officers, or with the authority of either said plaintiff company or the defendant, and were and are not the acts of said

tract shall continue during the corporate existence of the companies parties hereto. Witness the corporate seals of the parties hereto set and duly attested the day and year first above written." (*Signatures of companies signed by the presidents, attested by the secretaries, and corporate seals attached.*)

companies, or either of them, or binding upon them, or either of them.

Fourth. Denies that it has any knowledge or information sufficient to form a belief of the allegation contained in the sixth paragraph of said complaint, that the bonded indebtedness of the plaintiff company therein referred to was, as alleged in the said sixth paragraph, or that the amount and character thereof were well or at all known to the defendant, as in said seventh paragraph alleged.

Fifth. Defendant denies that it has any knowledge or information sufficient to form a belief that prior to the *first* day of *July*, 1884, there was a deficiency in the net earnings of the plaintiff company to meet the interest upon its said alleged bonded debt, or that such alleged deficiency amounted to the sum of *thirty-seven thousand* dollars and over, or any sum whatever, and defendant denies that it provided for and paid said deficiency according to the terms of said alleged agreement or otherwise.

And defendant, on its information and belief, alleges that heretofore it did from time to time advance various sums to the plaintiff company, amounting in all to *sixty-one thousand* dollars; but defendant denies that the same, or any part thereof, were advanced under or in pursuance of the terms of said alleged agreement.

And defendant denies that it has any knowledge or information sufficient to form a belief whether, at the times when the semi-annual instalments upon the bonds mentioned in said seventh paragraph became due and payable, as therein alleged, there were deficiencies in the net earnings of the plaintiff company's road to pay such respective instalments of interest amounting to the respective sums therein mentioned, or whether the defendant company was requested to pay the same, or whether the alleged respective amounts necessary to make good such respective alleged deficiencies, or for the payment of such respective instalments of interest were demanded of the defendant; and defendant denies that it ever became, or was, or is now, the duty of this defendant to make good said alleged deficiencies, or to provide, or to pay over to the plaintiff company the sums mentioned in said seventh paragraph, or any sums whatever.

Sixth. The defendant denies that it has any knowledge or information sufficient to form a belief whether in consequence of its alleged breach of said pretended agreement, the plaintiff company was unable to pay the amount alleged to be due for interest upon its said mortgage bonds, or whether in consequence of such nonpayment the trustee of said mortgage did, as in the complaint alleged, commence an action in this court against the plaintiff company for the foreclosure of said mortgage, or whether in said action the plaintiff, *Thomas C. Platt*, was appointed receiver, as therein alleged.

And defendant denies that it has any knowledge or information sufficient to form a belief as to whether said trustee is ready and willing to discontinue the said alleged action for foreclosure upon payment of interest so alleged to be due as aforesaid and since accrued, and thereupon to cause the said railroad to be restored to the possession of plaintiff company, or whether, upon such payment

and restoration, the plaintiff company will be ready and willing to give and restore to defendant company all the pretended rights, benefits and advantages contemplated by and provided for in said agreement.

And defendant denies that it has any knowledge or information sufficient to form a belief that said alleged agreement was intended to be, or is, continuing and permanent, or that the due performance and execution thereof would not have been interrupted but for the alleged wrongful conduct of this defendant.

Second.

The defendant, further answering the said complaint, for a second, separate and distinct answer and defense to the alleged cause of action therein set forth, repeats the allegations, admissions and denials in the preceding first defense contained, and alleges that the said pretended agreement, if made, was made without consideration to this defendant, and was, and is, void in law.

Third.

For a third, separate and distinct answer and defense to the alleged cause of action set forth in said complaint, this defendant repeats the allegations, admissions and denials in the preceding first and second defenses contained, and on its information and belief alleges that said alleged agreement, if made, was made by this defendant under a mistake as to the facts in connection therewith; defendant being induced thereto, by representations made by said plaintiff company, or its officers and agents, as to the business and traffic of said plaintiff company, which representations were not true in fact, and that the pretended consideration to this defendant, if any there was, for making said alleged agreement has failed and become of no value.

Fourth.

For a fourth, separate and distinct answer and defense to the alleged cause of action set forth in the complaint, the defendant repeats the allegations, admissions and denials in the preceding defenses contained, and alleges on its information and belief, that if it is true, as alleged in the complaint, that on or about the *fourth* day of *February*, 1885, or at any time, an action in this court, wherein the *Metropolitan Trust Company*, of the city of *New York*, was and is plaintiff, and the plaintiff company herein was defendant, the plaintiff, *Thomas C. Platt*, was duly appointed receiver of the property and franchises of the plaintiff company, that thereupon by reason of such appointment the said property and franchises and the corporate control of said plaintiff company become and are now vested in said receiver, and not in this defendant, as contemplated by said alleged agreement.

Wherefore defendant demands judgment that the complaint be dismissed, with costs.

J. A. Buchanan & Charles Steele,
Defendants' Attorneys,
21 Cortlandt St., N. Y.

(*Verification.*)[1]

1. Consult the title VERIFICATIONS.

b. To Foreclose Mortgage.[1]

ANSWER OF MINORITY STOCKHOLDERS[2] SETTING UP ILLEGAL CONSOLIDATION.

Form No. 6399.

New York Supreme Court, County of *Westchester*.

The Farmers' Loan and Trust Company, *as trustee*, plaintiff,
against
The New York and Northern Railway Company, *The New York Loan and Improvement Company*, *and The Lincoln National Bank of the City of New York*, *Artemas H. Holmes and Alfred R. Pick*, defendants.

The defendant, *Alfred R. Pick*, on behalf of himself and other persons similarly situated, who own and hold preferred and common stock of the *New York and Northern Railway Company*, appearing by *Simon Sterne*, his attorney, and the defendant, *Artemas H. Holmes*, owner and holder of stock of said *New York and Northern Railway Company*, appearing by *Holmes and Adams*, his attorneys, unite in the following answer, and jointly allege and show to the court as follows, to wit:

Defense No. I.

(*Here was set out defense number one.*)[3]

1. **For forms relating to foreclosure**, generally, consult the title FORECLOSURE OF MORTGAGES.

2. **This answer is copied from the record** in the case of the Farmers' L. & T. Co. *v.* New York, etc., R. Co., 150 N. Y. 410. The defenses mentioned in the answer were to an action brought to foreclose a second mortgage on the property of the Northern Company given to plaintiff as trustee. This mortgage was made in pursuance of an application for reorganization by the purchaser of the Northern Company. It was held that where a majority of the stock of a corporation owned by another corporation and the latter assumes control of the business affairs of the former through its officers and directors, it assumes the same trust relation toward a minority of stockholders of the controlled corporation that a corporation itself usually bears to its stockholders, and that the right of one corporation to purchase bonds and stocks of another, even if given by statute, confers upon the purchaser no right to employ such stock and bonds for purposes condemned by equity.

For formal parts of answers, generally, consult the titles ANSWERS IN CODE PLEADING AND ANSWERS IN EQUITY; of pleas, generally, consult the title PLEAS.

3. **Defense Number One**, referred to in the answer, was as follows: "I. That the said defendant, *Alfred R. Pick*, is the owner and holder of record of *one hundred* shares of preferred capital stock of the said *New York and Northern Railway Company*, and appears herein for and on behalf and at the request of, and is the representative of the owners and holders of upwards of *fifteen thousand* shares of the preferred stock and *twenty-five hundred* shares of the common stock of the said *New York and Northern Railway Company*, and that the said defendant *Artemas H. Holmes* is the owner and holder of record of *twelve hundred* shares of the common capital stock of the said *New York and Northern Railway Company*.

II. That these defendants admit the allegations contained in the *first*, *second*, *third* and *fourth* subdivisions of the complaint herein.

III. That these defendants answer

Defense No. II.

V. And these defendants, for a further and separate defense to the complaint in this action, repeating the allegations hereinbefore contained, show that the defendant, the *New York and Northern Railway Company*, organized and existing under the laws of the state of *New York*, to wit, an act of the legislature of the state of *New*

the allegations contained in the *fifth* subdivision of the complaint herein as follows:

These defendants have no knowledge or information sufficient to form a belief whether the allegations contained in said *fifth* subdivision, from the commencement thereof to the words "aggregating $1,200,000," correctly state the contents and description contained in the mortgage therein referred to, and leave the plaintiff to make proof thereof at the trial of this cause.

As to the remaining allegations in the said *fifth* subdivision contained, relating to property acquired subsequently to the making of the said mortgage, these defendants have no knowledge or information sufficient to form a belief whether the said allegations are true, or whether the property so acquired became subject to the lien of the said mortgage, and therefore deny the same.

And these defendants further show on information and belief, that the property so described as having been subsequently acquired forms a part of the terminal property of the said company and is of great value. That a portion of the consideration paid for the said property was money derived from the operation of the said railroad. And these defendants allege and charge that the application of such moneys to the payments made for the said property, instead of applying the same under the terms of the said mortgage to the payment of the coupon maturing *June 1*, 1892, was in violation of the provisions contained in the said mortgage, and in fraud of the rights of these defendants and of the stockholders of the said company.

And as to the allegations contained in the subdivision "V*a*" of the complaint, these defendants have no knowledge or information sufficient to form a belief whether the said allegations are true or not, and therefore deny the same.

IV That these defendants admit the allegations contained in the *sixth* and *seventh* subdivisions of the complaint, and with respect to all the matters contained in the *eighth* and *ninth* subdivisions thereof, these defendants refer the court to the said mortgage, and allege that the articles of incorporation of the said *New York and Northern Railway Company* provide that the said second mortgage shall contain provisions authorizing and empowering the trustee only upon written request of the holders of $2,000,000 in amount of said bonds, to take proceedings for a foreclosure of the mortgage upon any failure to pay the principal debt when due, and making the principal debt due upon a continuous failure for twelve months to pay the interest which shall accrue after four years following the date of the bonds, upon any instalment of interest on the said bonds after presentation of the coupons for such interest at the place where the same are made payable by their terms. And these defendants further allege that the said second mortgage in this respect does not conform to the articles of incorporation of the said *New York and Northern Railway Company* by which its execution and delivery is authorized, and that, therefore, the said second mortgage is not a valid, legal and subsisting obligation of the said *New York and Northern Railway Company*.

These defendants admit the allegations contained in the *tenth* subdivision of the complaint.

And these defendants have no knowledge or information sufficient to form a belief whether the allegations contained in the *eleventh* and *twelfth* subdivisions of the complaint are true or not, and therefore deny the same.

As to the allegations contained in the *thirteenth* subdivision, these defendants deny, on information and belief, that the coupons therein referred to, or the bonds to which the same appertained, were ever presented for payment, or that any such demand for payment was made as is contemplated and provided in and by the terms of the said mortgage; or that any default has continued for more than twelve months after presentation of the said bonds

York, entitled "An Act to facilitate the reorganization of railroads sold under mortgage, and providing for the formation of new companies in such cases"; being chapter 430, Laws of 1874, passed May 11, 1874, and the acts amendatory and supplementary thereof, is a railroad corporation owning and operating a line of railroad extending (*Here was set out description of line of railroad*).[1]

That it also owns and operates a branch line extending from *Cortlandt* station, on its said main line to *Getty* square in the town of *Yonkers*, county of *Westchester*. That it owns valuable terminals and terminal property in the city of *New York*; that it owns the valua-

and coupons, and demand of payment thereof.

These defendants have no knowledge or information sufficient to form a belief whether the allegations contained in the *fourteenth* subdivision are true or not, and therefore deny the same, and further allege that if the principal of all the bonds secured by said second mortgage has been declared due, it has so been declared only for the purpose of furthering the conspiracy hereinafter charged, between the holders of the second-mortgage bonds, to wit, the said *New York Central and Hudson River Railway Company*, and the said defendant the *New York and Northern Railway Company*, and in furtherance of the unlawful purpose hereinafter alleged of having the said *New York and Northern Railway Company* absorbed by the *New York Central and Hudson River Railroad Company*, and to deprive defendant railway company of the power to pay the interest by the sale of such property as it may reasonably sell, without any detriment to the security of the bondholders or other lienors of said *New York and Northern Railway Company*, and without detriment or impairment of its duty to operate and maintain said railway.

With respect to the allegations of the *fifteenth* and *sixteenth* subdivisions of the said complaint, these defendants allege that the property of the said *New York and Northern Railway Company* is worth much more than the sum of all the obligations of the said defendant railway company, and deny that the property covered by said second mortgage is essentially an entirety, and that it is to the best interest of all concerned, that all of the said property should be sold in one parcel, and defendants deny that said corporation is insolvent, but allege that there is no necessity for the sale of the said property of the *New York and Northern Railway Company* in one parcel for the purpose of getting sufficient money to pay the interest accrued upon the bonds secured by the said second mortgage, so to be foreclosed herein, and further that there is abundant property not immediately necessary for railway purposes, belonging to the said *New York and Northern Railway Company*, which can be sold for the purpose of meeting the interest charge past due, together with the interest thereon and all costs and expenses of this litigation. These defendants deny that a sale of the said property in any other way than in one parcel would be greatly to the detriment and injuriously affect parties interested in said railway company and its affairs, and allege that such a sale will not impair or otherwise affect the work of the said railway company in the performance of its duty to the public, nor injuriously affect the earning capacity of said railroad, nor impair the security of the said second mortgage.

And as to all other allegations contained in the said complaint, which are not herein admitted or denied either directly or on information and belief, these defendants say that they have no knowledge or information sufficient to form a belief whether they are true or not, and therefore deny the same."

1. **The line of railroad** referred to in the text was described as follows: "Extending from *One Hundred and Fifty-fifth* street in the city and county of *New York*, at a point of connection, or junction, with the road of the *Manhattan Railway Company*, running thence northerly and westerly across the *Harlem* river and through the counties of *New York*, *Westchester* and *Putnam*, at or near *Brewsters*, in the town of *South East* in the county of *Putnam* in the state of *New York*, at a junction with the railroads of the *New York and New England* and the *New York and Harlem Railroad Companies*."

ble bridge built over and extending across the *Harlem* river, and other valuable bridges, trestles and viaducts; that its said line of railway is of great value, and is of great public utility, convenience and necessity; that it lies midway between and parallel to the lines of railroad of the *New York and Hudson River Railroad Company* and the *New York and Harlem Railroad Company*, which latter railroad is leased to the *New York Central and Hudson River Railroad Company*, and both are under the same management and control. That the main line of the defendant railway company is (*giving length of line of road*).[1] That in addition to said lines of railway the said defendant railway company owns valuable stations and depots along its line of railway and also *thirty-two* (*32*) acres of terminal property of very great value in the city and county of *New York*, situated upon, at and under the *Harlem* river, and that it also owns a large amount of expensive railway equipment and supplies necessary for the maintenance and operation of its railway, and that with a single exception, to wit, the railroad system owned and controlled by the said *New York Central and Hudson River Railroad Company* and its allied corporations, it is the only railway company having an entrance by rail into the city of *New York*, and that the said entrance by rail into the city of *New York* is of very great, peculiar and increasing value to itself and as an inducement to other railway corporations to enter into contracts with it for the use of its road.

These defendants further show, and refer the court to the recitals of the said second mortgage mentioned in the complaint herein, that prior to the year 1887 the said railroad and property, the subject of this action, was owned and operated by a railroad corporation oganized and existing under the laws of the state of *New York*, called the *New York City and Northern Railroad Company*. That by reason of improvident financial operations and management upon the part of said last named corporation, the said *New York City and Northern Railroad Company*, about the year 1882, became involved and unable to pay the interest charges upon certain mortgages upon its said railroad and property. That thereafter certain proceedings were commenced and had in the *Supreme* Court of the state of *New York* for the foreclosure of the said mortgages, and actions were brought against said last named corporation by various creditors, more particularly the *New York Loan and Improvement Company*, one of the defendants herein. That pending said proceedings, a certain plan for the reorganization of the said *New York City and Northern Railroad Company* was entered into and adopted under and pursuant to the laws of the state of *New York* hereinbefore mentioned, by the owners and holders of the bonds issued under the said mortgages of the *New York City and Northern Railroad Company*, which plan

1. **Length of road** referred to in the text was as follows: "*Fifty-four and six one-hundredths* (54.06) miles, that the *Yonkers* branch is *three and ten one-hundredths* (3.10) miles; that the *Mahopac Falls* branch is *four and five one-hundredths* (4.05) miles, being in all *sixty-one and twenty-one one-hundredths* (61.21) miles, with second track and sidings of *twenty-three and ninety-seven one-hundredths* (23.97) miles, making a total mileage of *eighty-five and eighteen one-hundredths* (85.18) miles."

was accepted by the stockholders of the said *New York City and Northern Railroad Company*, or some of them, and which plan, and the details of which, are set forth in the articles of incorporation of the defendant railway company and in the mortgage to the *Farmers' Loan and Trust Company*, dated *October 1*, 1887, and referred to in the complaint herein. That the said plan, among other things, provided for the formation of a new corporation, to be called the *New York and Northern Railway Company*, which said new company was to obtain and operate the said railroad and property; that the said new company was to create and issue, and did create and issue, under the said reorganization securities as follows: (*Here were enumerated securities.*)[1]

That the said first-mortgage bonds were to be sold and were sold for cash at par, the proceeds being intended to be applied and were applied as in said plan set forth.

That the said second-mortgage bonds were issued to the former bondholders of the said *New York City and Northern Railroad Company* at and after the rate of *seventy-five* per cent. of the par value of the said former bonds, to the amount of $2,772,750; that the remainder thereof were issued as in said plan set forth.

That the preferred stock was issued to the said former bondholders for the balance of their holdings and as in said plan set forth.

That the common stock was issued to the holders of the former stock of the *New York City and Northern Railroad Company*, share for share, upon the payment of the sum of *ten* dollars per share.

That by the terms of said second mortgage it was provided that the first eight coupons attached to the bonds issued thereunder should be payable only from net earnings of the company as defined in the said mortgage; and that the first coupon, the payment of which was obligatory on the new company, was the coupon maturing on the *first* day of *June*, 1892.

And these defendants further show that it was also provided in the said mortgage that the income, tolls, profits, benefits and advantages pertaining to, or to arise or accrue from, the said railway and railways and property, and the maintenance and operation thereof, should become part of the security for the payment of the said bonds and of the coupons thereto appertaining. That for the purpose of determining the proper application of the earnings of the said company, the said mortgage contains a specification of the proper charges to be made against the gross earnings of the company, and that such specification declares that such charges shall include the general expenses actually incurred in operating the railroads and works of the defendant railway company, and keeping the same and its rolling stock, equipments and appurtenances in good condition

1. **Enumeration of reorganization securities** mentioned in the text were as follows: "First-mortgage gold bonds, to the amount of $1,200,000, payable *forty* years from their date, with interest at the rate of *five* per cent. per annum, said mortgage being dated *October 1*, 1887. Second-mortgage gold bonds, payable *forty* years from date, to the amount of $3,200,000, with interest, at the rate of *four* per cent. per annum, said mortgage being dated *October 1*, 1887. Preferred capital stock to the amount of $6,000,000, common capital stock to the amount of $3,000,000."

and repair, the annual taxes, assessments and expenses of keeping up the organization of the defendant railway company, the sum of *sixty thousand* dollars ($60,000) for the annual interest charges upon the first-mortgage bonds.

And these defendants further show that in the said second mortgage it was provided that the trustee thereof, upon default of the payment of the principal or the interest of said bonds thereby secured, or any part of said principal or interest, when by the terms thereof the said principal or the said interest may become due and payable, shall not proceed against the defendant railway company by reason of such default as in said mortgage provided, except upon the written request of the holders of $2,000,000 in amount of said bonds then outstanding and unpaid or unredeemed, it being intended by said provision and provisions that the defendant railway company shall not be harassed by litigation or the said mortgage foreclosed, except in good faith and by all or nearly all the owners of said second-mortgage bonds, who may have purchased the same for purposes of investment and income.

And these defendants further allege that it was a strong inducing element and part of the consideration by which the acquiescence of the then bond and stock holders to the plan and reorganization was obtained, and it was the understanding and expectation upon which the said plan and reorganization was finally adopted, that the peculiar value of the property of the *New York City and Northern Railway Company*, together with its commanding position for terminal purposes for the city of *New York*, was such that it was reasonable to expect that, taking into consideration the growing commerce and constantly increasing population of the city, its property and such commanding position would, within the near future, make it of great value to roads seeking entrance to the city of *New York* in competition with the lines now operated by the *New York Central and Hudson River Railroad Company*, and that such constantly increasing traffic and population would ultimately make valuable all the securities and stock provided for in the plan of reorganization, and that, therefore, said plan and reorganization was adopted so as to save to the then existing stockholders the equities and values represented by their stock. And defendants allege that about the time when the conspiracy and practices were devised to absorb the said defendant railway by the *New York Central and Hudson River Railroad Company*, such expectations were rapidly being realized in the increasing values of such property of the defendant.

VI. These defendants further show that heretofore, and through and immediately upon and after the reorganization of the defendant railway company about the year 1887, the *New York Loan and Improvement Company*, one of the defendants in this action, acquired and became the owners of a large amount of the said second-mortgage bonds, and of the preferred and common stock of the present corporation. That ever since the formation and organization of the present corporation, and continuously thereafter, and until after the last annual meeting of the said *New York and Northern Railway Company* in *October*, 1892, and thereafter, the said *Loan and Improve-*

ment Company owned or controlled a majority of the second-mortgage bonds and of the preferred and common stock of the said defendant railroad company. That at the annual meeting of the stockholders of said defendant railway company held in *October*, 1888, and at every subsequent annual meeting of the said stockholders, the said *Loan and Improvement Company*, by its ownership of a majority of the common and preferred stock of the said defendant railway company, controlled absolutely the said railway corporation, and by means of said control elected directors and officers of said defendant railway company who represented the interests of it, the said *Loan and Improvement Company*.

That at the annual meeting of the stockholders of the defendant railway company held in *October*, 1892, the following persons were elected directors: (*Here were listed names of directors.*)

That of the said directors Messrs. *Barney*, *Belden*, *Billings*, *Dimock* and *Whitney* were directors of the said *Loan and Improvement Company*; and of the other directors all except Messrs. *Coppell*, *Hayes* and *Mertens* were stockholders of and interested in the said *Loan and Improvement Company*, and this defendant further shows that the said board of directors (acting under the control and direction of the said *Loan and Improvement Company*, and well knowing that in the event of a failure to pay the coupons of the said second-mortgage bonds, which would mature after the *first* day of *December*, 1891, the said *Loan and Improvement Company* would control the foreclosure of the mortgage securing the same, and that under a sale by reason of such foreclosure they could acquire title to all of the said mortgaged premises for the benefit of themselves, and to the exclusion of the minority holders of the preferred and common stock) failed and neglected to apply the net earnings of the said railway in accordance with the provisions and agreements contained in the said mortgage.

And these defendants further allege that instead of using the moneys earned during the years 1891 and 1892 for the purposes of paying the coupons which accrued, and default on the payment of which is sought to justify the proceedings herein, the board of directors of the said railway company, for the purpose of furthering the sale of said property in their own interest as herein set forth, and to enable the said property to be absorbed and acquired by some other railroad corporation, failed to apply the said money for such purposes, but applied the same for unnecessary betterments and improvements on the road, so as to increase its value for such purposes and to the detriment of these defendants, and others similarly situated with them.

And these defendants further show that the gross earnings of the said defendant railway company amounted to the following sums for the following fiscal years, ending on the *thirtieth* day of *June* of each year specified, excepting for the years 1889 and 1890, when the said fiscal years ended on the *thirtieth* day of *September*, that is to say: (*Here were enumerated the earnings.*)[1]

1. **Enumeration of earnings** referred to in the text was as follows:
"*September 30*, 1889.$567,212 62
September 30, 1890.. 536,769 33
June 30, 1891..... 483,326 00 (9 mos.)
June 30, 1892..... 521,216 80
Total... .....$2,108,674 75"

That the fixed charges by way of interest on the first mortgage during the said four years amounted to $240,000. That a large part of the said remaining earnings have, by the acts of the board of directors of the said defendant railway company, been applied to purposes other than the operating expenses, taxes and necessary betterments; and that the application of such earnings to such other purposes was made by direction of the said board for the purpose of increasing the value of the security held for the second-mortgage bonds and in disregard of the rights and interests of the said minority stockholders, and in violation of the terms and provisions contained in the said second mortgage.

And these defendants allege that if the said directors had complied with the terms and provisions of the said mortgage the said earnings would have been amply sufficient to pay the said coupon maturing on the *first* day of *June*, 1892, amounting to $64,000, and there would at present be no defaulted coupon under which a foreclosure of the said property could be had.

And this defendant further alleges and charges that the said misapplication of the earnings of the company was made with the object and intent of bringing about such default in order that the said holders of the majority of the second-mortgage bonds and of the preferred stock and of the common stock, would, by means of foreclosure, destroy the interests of the minority stockholders and thus reorganize the said corporation and its property in such manner as to secure for themselves the entire advantage and benefit thereof.

VII. And for another and further defense to the complaint herein, these defendants show to the court as follows:

Defense No. III.

They repeat all the allegations contained in the defense marked *I* and *II*, and further show that on or about the *twenty-eighth* day of *January*, 1893, the said *New York Loan and Improvement Company*, which company was not then actively engaged in the prosecution of its business and the alleged objects of its incorporation, held and had in its corporate name the majority of the said second-mortgage bonds and of the preferred and common stock of the defendant railway company, and that said *Loan and Improvement Company* had no other function except as holder or custodian of said securities; that said *Loan and Improvement Company*, as is hereinbefore alleged, was managed by essentially the same persons who were the directors of and managed the defendant railway company; that these said persons, acting in their own behalf, and for the *Loan and Improvement Company*, entered into negotiations for the sale of, and sold to the firm of *Drexel, Morgan & Co.*, bankers, doing business in the city of *New York*, or to *J. Pierpont Morgan*, a member of said firm, the said securities, and promised and agreed to transfer to said *Morgan*, or to such railway corporation as he might designate, the control and management of said defendant railway company and of its railway and property.

That said *Morgan*, being then owner and holder of said securities, and being also a director of the *New York Central and Hudson River*

Railroad, entered into negotiations with the *New York Central and Hudson River Railroad Company*, as is herein shown, a rival, parallel and competing railroad to the defendant railroad company, and did, on or about the *eighteenth* day of *March*, 1893, sell to said *New York Central and Hudson River Railroad Company*, or its agents or representatives, the said securities (being a majority of the said second-mortgage bonds and of the preferred and common stock) and said control and management of the defendant railway company, and of its railway and property, with the understanding that said *Morgan* should procure the resignation of the old board of directors and its officers or some of them, so as to enable the said *New York Central and Hudson River Railroad Company* to control the board of directors of said defendant railway company, and to manage and operate in its own interest the said railway and property, with a view to its subsequent lease or amalgamation in some form.

That the *New York Central and Hudson River Railroad Company* is a corporation organized and existing under the laws of the state of *New York*, and subject to all of the laws thereof, and is a parallel and competing road with the said defendant railway, the *New York and Northern Railway Company*. That the road commonly known as the *Harlem Railroad*, extending from the city of *New York*, through *Brewsters* to *Chatham Four Corners*, and the railroad known as the *Hudson River Railroad*, extending from the city of *New York* through *Yonkers* to the city of *Albany*, are parts and parcel of the said *New York Central and Hudson River Railroad* system. That the said *New York Central and Hudson River Railroad Company* and the *New York and New Haven Railroad Company* (which is operated over the lines of the *New York Central and Hudson River Railroad* system in the city of *New York*), and the *New York and Northern Railway Company*, are the only steam railroads which have entrances into, by rail and terminal properties within, the limits of the city of *New York*.

That the *New York and Northern Railway Company* intersects the *Harlem Railroad* at *Brewsters*, and there connects with the *New York and New England Railroad*, and that it also intersects, by means of its said branch, the *Hudson River Railroad* at *Yonkers*; and that the said railroads, in respect of both passengers and freight, are parallel and competing roads.

And these defendants further show that thereupon, having acquired said securities, the said *New York Central and Hudson River Railroad Company*, and the officers and directors thereof, began openly agitating and promoting a lease of the property, franchises and privileges of the said *New York and Northern Railway Company* to the *New York Central and Hudson River Railroad Company*, and, by the exercise of its power and control over the board of directors of the defendant railway company, undertook and attempted to transfer, by means of a lease, the entire property of the *New York and Northern Railway Company* to the said *New York Central and Hudson River Railroad Company*. That by the terms of the proposed lease it was agreed that the said *New York Central and Hudson River Railroad Company* should forever control and operate, possess and enjoy, the entire property of the said *New York and Northern Railway Company*; and that in

consideration thereof, the said *New York Central and Hudson River Railroad Company* should only either directly pay or guarantee the payment of the interest of a certain limited amount of bonds of the said *New York and Northern Railway Company*; but that no provision was made in the said lease, or intended to be made, respecting either the said preferred or common stock, so that the making of the said lease would have effectually and completely destroyed the value thereof.

And these defendants further show that on the *nineteenth* day of *April*, 1893, a meeting of the stockholders of the *New York Central and Hudson River Railroad Company* was held at the city of *Albany*, and that the avowed object of the said meeting was to approve and authorize the acquirement by purchase of a controlling interest in the stock and bonds of the *New York and Northern Railway Company*, and authorize the making of a lease with that company, or a company which was to be organized in its stead, of its railroad and property, and to approve and authorize the guarantee under such lease of the principal and interest of *five million* ($5,000,000) dollars in 4% *100*-year gold bonds of the lessor company.

And these defendants further show that they, and other stockholders of the *New York and Northern Railway Company*, openly opposed the proposed lease to the *New York Central and Hudson River Railroad Company*, for the reason that such lease would be destructive of their interest, and because it was a direct violation of the law of this state, which prohibits the consolidation or leasing, one to another, of parallel and competing railroads.

These defendants further show that thereupon the said *New York Central and Hudson River Railroad Company* did not carry into effect the proposed lease of the *New York and Northern Railway* property, but instead thereof, and before the commencement of this action, with the purpose and intent of obtaining the exclusive and permanent control of the railway property of the said defendant railway company, the said *New York Central and Hudson River Railroad Company*, in order still further to acquire and hold a controlling interest of the second-mortgage bonds so as to accomplish its unlawful and improper purpose through a foreclosure, entered into a certain agreement with the then holders of the said second-mortgage bonds of the said defendant railway company, which bonds it had not theretofore acquired (whose names are unknown to these defendants), whereby the said *New York Central and Hudson River Railroad Company* agreed to buy, and the other parties to said agreement agreed to sell, the said second-mortgage bonds of the *New York and Northern Railway Company* to an amount in the aggregate exceeding *one million one hundred thousand* dollars ($1,100,000), for the nominal sum of *eight hundred* dollars ($800) per *one thousand* dollars ($1,000) of the principal of the bonds so sold, being the same rate paid by it or for its account for such of said bonds as it had theretofore acquired.

The *New York Central and Hudson River Railroad Company* agreed upon its part that it would make payment for the bonds so purchased in the bonds of a company which, at the time of their issue, should be the owner of the railroad and property of the said *New York and*

Northern Railway Company, and that the total amount of bonds so to be issued on the said property should be *six million two hundred thousand* dollars (*$6,200,000*), bearing interest at the rate of *four* per cent. per annum, payable *one hundred* years from the date thereof, secured by the property now covered by the said second mortgage of *October 1, 1887*, and that the principal and interest of the said new bonds should be guaranteed by the said *New York Central and Hudson River Railroad Company*, and should be in form approved by the said firm of *Drexel, Morgan & Co.*

And this defendant charges that immediately after the said agreement was made, the said *Drexel, Morgan & Co.* and the said *J. Pierpont Morgan* agreed that they would use the bonds so sold in such manner as might be directed by the said *New York Central and Hudson River Railroad Company.*

That the said *New York Central and Hudson River Railroad Company* thereupon, in pursuance of their design and object to obtain the control and ownership of the property of the *New York and Northern Railway Company*, and in violation of the statute of this state which forbids the consolidation, merging or leasing, one to the other, of parallel and competing lines, and in the exercise of a power and an expenditure *ultra vires* of said *New York Central and Hudson River Railroad Company*, exercised the ownership and control which it had acquired under the said agreement of *July 14, 1893*, and itself directed or instructed the said firm of *Drexel, Morgan & Co.* to direct the *Farmers' Loan and Trust Company*, as the trustee of the said second mortgage, to institute proceedings for the foreclosure of the said mortgage; that no consent of the railroad commissioners of this state has been given to the consolidation of the said two companies, or to the leasing of one to the other.

VIII. And these defendants further show that since the *New York Central and Hudson River Railroad Company* acquired the said securities and the control and management of the said property by connivance, collusion and conspiracy with the former directors of the defendant railway company, it placed in the management of the defendant railway company its own officers and agents, to wit, one *E. V. W. Rossiter*, the treasurer of the *New York Central and Hudson River Railroad Company*, as treasurer of the defendant railway company, and one *John Carstensen*, the comptroller of said *New York Central and Hudson River Railroad Company*, as auditor of the defendant railway company, and in place and stead of some of the former directors of the defendant railway company, who had resigned, other directors in the interest of and under the dominion of the said *New York Central and Hudson River Railroad Company* were elected, so that efforts, in good faith, on the part of the management of the defendant railway company to meet its obligations, could not be made, and the defaults theretofore nominally made could not be repaired.

And these defendants further show that they, and the said other minority stockholders whom they represent, and in whose behalf they act, purchase and hold their preferred stock, relying upon the great and appreciating value of the said *New York and Northern Railway Company's* property, by reason of its independent entrance

into the city of *New York* and of the important and valuable territory which it owns and serves. That he and they also relied, and had the right to rely, on the provision of law which protected him and them, as such stockholders, from the unlawful attempt of parallel and competing railroads to acquire or control the said property.

IX. And for another and further defense to the complaint herein, these defendants show to the court as follows:

Defense No. IV.

They repeat all the allegations contained in the previous defenses herein, and further show, that the said *New York Central and Hudson River Railroad Company* in so acquiring the majority of the said second-mortgage bonds of the defendant railway company, for the said purpose of owning and controlling the railway and property of the said defendant railway company, acted *ultra vires* of it, the said *New York Central and Hudson River Railroad Company*; that in acquiring said bonds for said purpose at a great discount from the real value thereof, after it had acquired the majority of the said preferred and common stock, it acted in breach of trust to the minority members of said defendant railway company, who became and were associates and partners with it, the said *New York Central and Hudson River Railroad Company*, in the said business of owning and operating the said railway, and in fraud of their rights; and that the said *New York Central and Hudson River Railroad Company* may not, in equity, so use and employ its possession and ownership of said bonds for the said avowed purpose of foreclosing the said second mortgage, and depriving the said defendants and the other minority stockholders of their interest in the said railroad and property of the said defendant railway company; but these defendants show that in so acquiring said second-mortgage bonds under their real value and for said illegal and void purposes, the said *New York Central and Hudson River Railroad Company* acquired and holds the said bonds in trust for the said defendant railway company and all of the stockholders thereof, and is not entitled to a foreclosure, but is entitled only to receive, upon a dissolution of said defendant railway company, and upon an accounting, the sums actually paid by it, the said *New York Central and Hudson River Railroad Company* for said bonds, and no more.

And these defendants further show that the *Farmers' Loan and Trust Company*, as trustee, the plaintiff herein, has no interest in the said action except as trustee under the said second mortgage, and as representing the holders of the said second-mortgage bonds, which these defendants have shown and allege are all, or nearly all, owned and held by the said *New York Central and Hudson River Railroad Company*, and that the *Farmers' Loan and Trust Company* has commenced and is prosecuting this action only at the request of, in behalf of and as representing said *New York Central and Hudson River Railroad Company*.

And these defendants further allege that the said act and agreements between the *New York Central and Hudson River Railroad Company* and said former owners of the said second-mortgage bonds,

and the said firm of *Drexel, Morgan & Co.* and said *J. Pierpont Morgan*, are forbidden by law and are void; that no title or right was acquired by the *New York Central and Hudson River Railroad Company* in and to the said bonds, or any of them; that the direction given to the *Farmers' Loan and Trust Company* to foreclose the said mortgage, if any such was given, was a direction intended to accomplish an illegal purpose, and is therefore void and of no effect, and that all proceedings instituted in pursuance of the said notice and on behalf of the said second-mortgage bonds are contrary to law and cannot confer upon the trustee of the mortgage the right to relief which it prays for in this action.

Defense No. V.

X. And for another and further affirmative defense to said complaint these defendants repeat and reaffirm the allegations hereinbefore contained, and further allege and show to the court that the affairs and business of the said *New York and Northern Railroad Company* have been managed for a long time, and since before any default in the payment of interest on the bonds in question, in the interest and for the benefit and at the dictation of the defendant the *New York Loan and Improvement Company*, and since about *April*, 1893, by and in the interest of the *New York Central and Hudson River Railroad Company*. And that for a long time the said *New York and Northern Railway Company* has been managed without any regard for the interests of its stockholders, but by corporations and persons whose interests, by reason of their large ownership of the mortgage liens, have been antagonistic to the minority stockholders of said defendant railway company. That since some time prior to *April*, 1893, the managers of said *New York and Northern Railway Company* have not only been indifferent to the rights of its stockholders, but have had a direct interest opposed to said stockholders and have zealously and persistently sought to destroy the value of the stock of said company. That its officers have not only failed to take any measures to save its property and defend said company against annihilation, but have been the willing and earnest promoters of the plans of the *New York Central and Hudson River Railroad Company* to absorb its property without compensation to its stockholders, and have, moreover, resented and denounced the efforts of these defendants to preserve and protect the property and existence of said *New York and Northern Railway Company*. That since the said *New York Central and Hudson River Railroad Company* obtained, as aforesaid, the control and domination over said *New York and Northern Railway Company*, there has been no officer, manager or director of said *New York and Northern Railway Company* who has taken any interest in its protection or any step for its defense; but its affairs have been administered with the sole object and purpose of facilitating, as much as possible, the plans of said *New York Central and Hudson River Railroad Company*, for the absorption of its property and termination, as quickly as possible, of its existence as an active and rival railroad corporation. That the two several plans for such absorption of its property by the *New York Central and Hudson River Railroad Com-*

pany have been hereinbefore set forth. That neither of said plans provides for any compensation to the stockholders of the *New York and Northern Railway Company*, but both of said plans were devised and intended for the acquirement of said property without payment or recognition of any kind whatever to any of said stockholders. That by reason of the acts and control of said *New York Central and Hudson River Railroad Company* the said *New York and Northern Railway Company* became and is, as to its own protection, inert and powerless. And these defendants show that irrespective of the foreclosure sought herein the said corporation and its stockholders will be without any adequate protection, provided the said company shall continue to be managed and dominated by the *New York Central and Hudson River Railroad Company*. That the latter company is a rival and competing line of railway, and parallel to said *New York and Northern Railway Company*, both on the east and west, with its two contiguous lines of railroad, to wit, the *Hudson River* and *Harlem* divisions. That by reason of its adverse interests the said *New York Central and Hudson River Railroad Company*, even if defeated in this action in securing the property of said *New York and Northern Railway Company*, would inevitably, as manager and in control of the same, discriminate against the said *New York and Northern Railway Company*, and manage it in such a way as to destroy it as an independent line, and prevent it from successfully carrying on its business and from performing its duty to the public. That such management and control by a rival corporation owning a majority of the stock and bonds in its own interests, and in hostility to the interest of the said *New York and Northern Railway Company*, is unjust and inequitable, and is against public policy. That the property and franchises of said *New York and Northern Railway Company* are of great and constantly increasing value, and that the said railway, if properly and prudently managed, is able to meet all its just obligations and to earn a profit for its stockholders; but that such prudent and profitable management is impossible unless the control of said company and its property is taken out of the hands of the *New York Central and Hudson River Railroad Company*. And these defendants further say, that they and their associates, minority stockholders, would be remediless, and their property would be destroyed, unless the foreclosure sought herein is enjoined and restrained, and the affairs and property of said defendant corporation placed in the hands of a receiver wholly independent from such control or influence, who shall manage and administer the same equitably and justly, under the direction of this court, for the benefit and protection of the stockholders, as well as the security holders of the said *New York and Northern Railway Company*.

Wherefore, these defendants demand that the complaint herein be dismissed, with costs, and that they may have such other affirmative and additional relief, or both, as the court may deem proper in the premises and as may be just.

Simon Sterne,
Attorney for Defendant *Alfred R. Pick*.
Office and Post-office address,
56 *Beaver* Street, *New York City*, *N. Y.*

Holmes & Adams,
Attorneys for *Artemas H. Holmes,*
one of the Defendants aforesaid,
15 *Broad* Street, *New York.*

(*Verification.*)[1]

c. To Recover Subscription to Constituent Corporation.

PETITION OF AUTHORIZED AGENT OF CONSOLIDATED COMPANY.

Form No. 6400.

(Precedent in Armstrong *v.* Karshner, 47 Ohio St. 276.)[2]

[The State of *Ohio*, *Ross* County, ss. } In the Court *of Common Pleas.*

John Karshner, plaintiff,
against
Milton Armstrong, defendant.][3] } Petition.

The plaintiff, *John Karshner*, says: That on the *26th* day of *April*, A. D. 1877, *The Cincinnati and Fayetteville Railroad Company* was duly incorporated as a corporation under the laws of *Ohio*, for the purpose of building and operating a railroad from the city of *Cincinnati*, in the county of *Hamilton*, through the counties of *Hamilton*, *Clermont* and *Brown*, to the village of *Fayetteville*, in said last named county—all in this state.

That the capital stock of said company was $*120,000*, divided into *two thousand four hundred* shares of $*50* each; and that, shortly after the incorporation of said company, the amount of such capital stock required by statute for the purpose, having been duly subscribed and paid, said company duly organized by electing according to law a board of directors, who duly qualified as such.

That on or about the *31st* day of *May*, A. D. 1878, said company, a large amount of its capital stock, to wit, more than *twenty* per centum of its authorized capital stock in bona fide subscriptions having been subscribed, and a large amount of money, to wit, more than *ten* per centum of its authorized capital having been expended by it in the construction of its said railroad, duly and legally changed the eastern terminus of said railroad, and extended the line of the same from said village of *Fayetteville* eastward through the counties of *Brown*, *Clinton*, *Highland*, *Ross*, *Hocking* and *Athens*, to the town of *Nelsonville* in said last named county—all in this state.

That, afterwards, on the *9th* day of *March*, A. D. 1880, the name of said company was, by proceedings had for the purpose in the court

1. See the title VERIFICATIONS.

2. **Subsequent Pleadings in this Case.** — A general demurrer to this petition was overruled and defendant filed an answer thereto, which is set out in full in the reported case. To the answer plaintiff demurred, which demurrer was sustained in the court of common pleas and this ruling affirmed both in the circuit court and the supreme court.

3. The words in [ ] are not in the report of the case, but have been added to render the form complete.

For the formal parts of complaints and petitions, generally, consult the title COMPLAINTS, vol. 4, p. 1019; of bills in equity, generally, consult the title BILLS IN EQUITY, vol. 3, p. 417.

of Common Pleas within and for said county of *Brown*, duly and legally changed to *The Cincinnati, Fayetteville, Hillsboro and Huntington Railway Company*, and that, afterwards, on the *7th* day of *March*, A. D. 1*881*, the name of said company was, by like proceedings in said court *of Common Pleas* within and for said county of *Brown*, again duly and legally changed from *The Cincinnati, Fayetteville, Hillsboro and Huntington Railway Company* to the *Cincinnati, Hocking Valley and Huntington Railway Company*, which said last name it still retains.

That, on or about the *14th* day of *October*, A. D. 1*880*, the *Cincinnati, Fayetteville, Hillsboro and Huntington Railway Company* made and entered into a contract in writing with one *Henry T. Niles* under the firm name and style of *Henry T. Niles and Company*, for the building and completing of said company's line of railroad, and the said *Henry T. Niles and Company*, under said contract, and certain contracts supplemental thereto, made and entered into between said firm and said railway company after its name had been changed, as aforesaid, to the *Cincinnati, Hocking Valley and Huntington Railway Company*, to wit: on the *5th* day of *September*, A. D. 1*881*, and the *19th* day of *December*, A. D. 1*881*, respectively, agreed to build and complete the line of said company's railroad from its junction with the *Cincinnati and Eastern Railroad*, in said county of *Clermont*, to said town of *Nelsonville*, in said county of *Athens*, in consideration of which among other things said railway company authorized and empowered said *Henry T. Niles and Company* to procure stock subscriptions and donations to and for said company to the amount of $*5,000* per mile for all that part of its said line of railroad between the *Scioto* river in said county of *Ross* and said town of *Nelsonville*, in said county of *Athens*, and to collect, hold, have and use the same as their own, in and about the construction of said railroad.

That on the ——— day of *October*, A. D. 1*881*, the defendant, *Milton Armstrong*, for the purpose of aiding in the construction of said railroad, and in consideration of the advantages and benefits to accrue to him therefrom, and especially from the building of that part of said railroad from the *Scioto Valley Railroad* in said county of *Ross* to a point at or near the village of *Adelphi*, in said county, as well as in consideration of like subscriptions and agreements by others for said purpose, became a subscriber to the capital stock of the *Cincinnati, Hocking Valley and Huntington Railway Company* by executing and delivering to said company an agreement in writing in the words and figures following, which was duly accepted by it, to wit: (*Here was set out verbatim copy of agreement.*)[1]

1. **The agreement referred to** in the text was substantially as follows: "We, the undersigned, agree to pay the number of shares annexed to our respective names, of *fifty* dollars each, to the capital stock of the *Cincinnati, Hocking Valley and Huntington Railway Company*, and we hereby bind ourselves, our heirs, executors or administrators to pay the same to the authorized agent of said company; but it is expressly provided as follows: that no part of said subscription shall be due until a railroad track shall be laid ready for the running of cars from some point on the *Scioto Valley Railroad* to a point at or near *Adelphi*, in *Ross* county, and when said railroad track is so laid, we, the undersigned, mutually agree that we will each, on demand, pay the

That said defendant thereby agreed to take *ten* shares of the capital stock of the *Cincinnati, Hocking Valley and Huntington Railway Company*, each share being of the par value of $*50*, and agreed to pay therefor the sum of $*500* to the authorized agent of said company on demand, so soon as a railroad track should be laid ready for the running of cars from some point on said *Scioto Valley Railroad* to a point at or near the village of *Adelphi*, in said county of *Ross*, provided said railroad should be built north of said village of *Adelphi*.

That, afterwards, on or about the *20th* day of *October*, 1*882*, the said *Henry T. Niles and Company*, who had in compliance with the terms of their said contracts with said railway company, and in consideration of said subscription of said defendant, and induced thereby, partly built a portion of the railroad of said company, including a part thereof between the village of *Kingston*, in said county of *Ross*, situate on the said *Scioto Valley Railroad*, and said village of *Adelphi*, and were still engaged in the construction of the same, made and entered into a contract in writing with the plaintiff, which was duly approved by the *Cincinnati, Hocking Valley and Huntington Railway Company*, under and by virtue of which he, the said plaintiff, agreed to build and complete that portion of the railroad of said company from said village of *Kingston*, at and on said *Scioto Valley Railroad* to said village of *Adelphi*, on the west side of the *Circleville and Adelphi* turnpike, and, also, agreed conditionally, to build that portion of said railroad of said company between said last named point and *Daniel Davis's*, at or near the mouth of *Big Pine* creek, in said county of *Hocking*, upon certain terms and conditions in said contract set forth, in consideration of which among other things, the said *Henry T. Niles and Company*, with the approval and assent of said railroad company duly given, agreed to assign and transfer, and did duly assign and transfer to him, the said plaintiff, all stock subscriptions and subscriptions for donations held and acquired by them under their said contracts with said railway company, including said subscription of said defendant, from the city of *Chillicothe*, in said county of *Ross* to said *Daniel Davis's*.

That he, the said plaintiff, under his said contract, which he was induced to make by said subscription of said defendant, and like subscriptions of other persons, built that part of said railroad between said village of *Kingston*, at and on said *Scioto Valley Railroad*, and said village of *Adelphi*; and that the last rail on that part of said railroad and of the track thereof between said points was laid on the *28th* day of *September*, 1*885*, and said part of said railroad was then ready for the running of cars thereon; and that since the *21st* day of *December*, 1*885*, he, the said plaintiff, has been operating said part of said railroad by running trains for carrying both freight and passengers over the same between said village of *Kingston*, at said *Scioto Valley Railroad*, and said village of *Adelphi*.

amount set opposite our respective names, to such authorized agent of said company, in full payment for such shares of capital stock. * * * It is distinctly agreed and understood that all the within stock subscriptions are binding providing the road is built on the north of *Adelphi*, otherwise they are void. * * *."

That said railroad was built north of said village of *Adelphi*, as mentioned in, and required by the subscription agreement of said defendant, and all conditions in said subscription agreement have been fully performed by said railway company, and by him, the said plaintiff.

That the full amount of said subscription of said defendant became and was due and payable to the plaintiff, from him, when said railroad track was laid ready for the running of cars thereon, from said village of *Kingston*, at and upon said *Scioto Valley Railroad*, to said village of *Adelphi*, to wit, on said *28th* day of *September*, 1885, but no part of said sum has been paid by said defendant, although the plaintiff at or about that time demanded payment of the same; and he, the said defendant, has since been requested by the plaintiff to pay the same.

That said railway company and the plaintiff were, at said time, and have been at all times since, ready and willing, and still are ready and willing, to issue and deliver to said defendant, upon the payment of said subscription, certificates of stock in said company, for the number of shares so subscribed for by said defendant, and have repeatedly offered to deliver such certificates to him.

Wherefore the plaintiff asks judgment against the defendant for the sum of $*500*, with interest thereon from the *28th* day of *September*, 1885.

John Karshner.

(*Verification.*)[1]

2. Proceedings against.[2]

1. Consult the title VERIFICATIONS.

2. **Proceedings by and against corporations**, generally, see *supra*, note 1, p. 527.

Sufficiency of Averment of Consolidation. — In Zealy *v.* Birmingham R., etc., Co., 99 Ala. 579, the allegations as to consolidation of the defendant corporation were held to be sufficient. The allegations were as follows: "The plaintiff claims of the defendant, a corporation organized under the laws of *Alabama*, by the consolidation on, to wit, the *fifth* day of *May*, 1890, with the *Birmingham Union Railway Company*, the *Birmingham and Bessemer Railroad Company*, the *Easley Railway* and the *Birmingham and Electric Company*, private corporations existing under the laws of the state of *Alabama*, for (*Here followed the statement of personal injuries inflicted, upon which the action was based, the count concluding as follows:*) And the plaintiff avers that by reason of said consolidation the defendant is liable to her in damages for the injuries caused by the wrongful acts of the said *Birmingham Union Railway Company* hereinabove complained of."

An allegation that certain railroad companies were by law authorized to consolidate and did consolidate and become one corporation is sufficient, without alleging the various steps of such consolidation. Collins *v.* Chicago, etc., R. Co., 14 Wis. 492.

A complaint alleging that defendant "purchased and had assigned to itself the railroad, franchises, immunities, stock, bonds, and all property and appurtenances" of another company, shows merely a succession, and not a consolidation such as would render defendant responsible for a tort previously committed by its vendor. Pennison *v.* Chicago, etc., R. Co., 93 Wis. 344.

For agreed statement of facts in an action against a consolidated corporation see John Hancock Mut. L. Ins. Co. *v.* Worcester, etc., R. Co., 149 Mass. 214; Compton *v.* Wabash, etc., R. Co., 45 Ohio St. 593. For agreed statements of facts, generally, consult the title SUBMITTED AND AGREED CASES.

a. For Injunction.[1]

(1) To Enjoin Operation of Proposed Lease.

DEMURRER TO BILL.

Form No. 6401.

(Precedent in Gyger *v.* Philadelphia, etc., R. Co., 136 Pa. St. 99.)[2]

[*Jesse Gyger* against *The Philadelphia City Passenger Railway Company.*] In the Court *of Common Pleas*, No. *2*, of the *City and* County of *Philadelphia. December* Term, *1883*. No. *332*.

The demurrer of the *Philadelphia City Passenger Railway Company* to the bill of complaint of *Jesse Gyger*, complainant:

This defendant by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true in such manner and form as the same are therein set forth and alleged, doth demur to the whole bill, and for cause of demurrer showeth,][3]

1. That it is not a railroad corporation within § 4, article XVII, of the constitution of this state, as appears from the facts stated in said bill.

2. That if it were a railroad corporation within said section of said article, it does not appear from said bill that the same has ever been accepted by this defendant.

3. That if it is a railroad corporation within said section of said article, the lines of the railway companies, defendants herein, as appear by the charters thereof cited in said bill, do not constitute parallel or competing lines, inasmuch as the same are laid and operated on different streets within the limits of a city and have different termini; street mathematical parallelism, nor merely eastern and western endings, not constituting prohibited lines, within the meaning of the said section of said article, as in said bill is erroneously averred.

4. That the said bill contains no matter of equity whereon this court can ground a decree, or give complainant any relief as against the defendant.

[Wherefore these defendants demand judgment of this honorable court whether they shall be compelled to make any further answer

1. **Injunction** at the suit of a single stockholder may issue to restrain the carrying out of a consolidation agreement which has been carried through without due authority, the object of which was to prevent lawful competition. Elkins *v.* Camden, etc., R. Co., 36 N. J. Eq. 5.

For forms connected with injunction proceedings, generally, consult the title Injunctions.

2. **The bill in equity** in this case was against two railway companies seeking to declare illegal a proposed lease by one company to another, for a period f nine hundred and ninety-nine years, of the franchise, tracks, cars, and all property of the lessor, and for an injunction. Upon the demurrer filed, assigning the reasons given in the text, the court sustained the same and dismissed the plaintiff's bill, which ruling was affirmed on appeal.

For formal parts of demurrers, generally, consult the title Demurrers.

3. The words in [ ] do not appear in the reported case, but have been added to complete the form.

to the said bill or any of the matters or things therein contained, and pray to be hence dismissed with their reasonable costs in their behalf sustained.

Homer Merritt, Solicitor for Defendant.][1]

[(*Verification.*)][2]

(2) To Restrain Operation of Agreement Creating Monopoly.

(*a*) *Attorney-General's Information.*

Form No. 6402.[3]

In *Chancery of New Jersey.*

Between *John P. Stockton, Attorney-General*, informant,
and
The Central Railroad Company of New Jersey, the Port Reading Railroad Company, and the Philadelphia and Reading Railroad Company, defendants.
} *Supplemental* Information.

To his Honor *Alexander T. McGill, Chancellor* of the State of *New Jersey*:

Informing showeth unto your honor your informant, *John P. Stockton*, Attorney-General of the state of *New Jersey*, on behalf of the said state.* That on or about the *thirty-first* day of *May*, 1892, your informant exhibited his information in this honorable court against the *Central Railroad Company of New Jersey*, the *Port Reading Railroad Company*, and the *Philadelphia and Reading Railroad Company*, hereinafter named as defendants, thereby stating: (*Here was set out, omitting the formal parts, the original information.*)[4]

And your informant further shows that the said the *Central Railroad Company of New Jersey*, the *Philadelphia and Reading Railroad Company* and the *Port Reading Railroad Company* appeared and put in separate answers to said information admitting many of the allegations of said information, but denying that the lease made by the *Central Railroad Company of New Jersey* to the *Port Reading Railroad Company* was in reality made to the *Philadelphia and Reading Railroad Company*, or for the objects and purposes in said information alleged;

1. The words in [ ] do not appear in the reported case, but have been added to complete the form.

2. Consult the title Verifications.

3. **This supplemental information is copied from the record** in Stockton *v.* Central R. Co., 50 N. J. Eq. 59, 489. The object of the information was to have a certain indenture of lease, made between the Central Company of New Jersey and the Port Reading Company, and also certain other agreements, decreed to be *ultra vires* and void as against public policy, and as tending to create a monopoly in the anthracite coal trade within the state by stifling competition between the contracting corporations. An injunction was granted directing the defendants to refrain from further performing or carrying into effect the lease and tripartite agreement.

For other informations see *infra*, this title, *Complaint, Petition, Suggestion or Information.*

4. **The original information** referred to in the text is set out *infra*, Form No. 6403.

and the said defendant corporations further insisted that even if the said lease was to be deemed a lease made to the *Philadelphia and Reading Railroad Company*, that such lease was authorized, and that the act of the legislature of this state, approved May 2, 1885, entitled "An Act respecting the leasing of railroads," was unconstitutional and void; and the said defendants also denied having entered into any combination whatever to monopolize the business of mining and selling anthracite coal, and they further denied that they were the owners of any coal lands, or that they had any power to increase the selling price of coal or that they had entered into any combinations or agreement to prevent competition in the trade in coal.

And your informant further informs your honor that said answers have been replied to, and that witnesses have been examined on the part of your informant, but the proofs have not yet been closed, as by the said information and proceedings now remaining as of record in this court will more fully appear.

And your informant further informs your honor, by way of supplement, that on the *thirty-first* day of *May last*, being the day on which said information was filed, your honor made an order in said cause as follows: (*Here was set out order to show cause why injunction should not issue.*)[1]

And your informant further informs your honor, that on the hearing directed by said order, the *Central Railroad Company of New Jersey*, the *Port Reading Railroad Company*, and the *Philadelphia and Reading Railroad Company*, appeared by their respective counsel, having answered the information in manner aforesaid, and that argument was had concerning the matters referred to in said order, and that on the *twenty-ninth* day of *August*, 1892, your honor, after having considered the pleading, proofs and arguments, made a further order or decree, as follows: (*Here was set out the order granting injunction.*)[2]

And your informant further informs your honor, that upon the making of the said last mentioned order and injunction, issued and duly served upon the proper officers of the said answering defendants, which injunction was in the words following: (*Here was set out the injunction verbatim.*)[3]

And your informant further informs your honor, that between the said *thirty-first* day of *May* and the said *twenty-ninth* day of *August last*, the preliminary order made by this court was disobeyed by the *Philadelphia and Reading Railroad Company* and the *Central Railroad Company*, acting in combination and conjointly with each other, which railroad corporations operated their railroads in the state of *New Jersey* in such manner as to diminish competition among them in the trade in anthracite coal and arbitrarily increased the price thereof to the people of this state, as well the coal owned or controlled by the *Central Railroad Company* as that owned or controlled

1. **The order to show cause** why injunction should not issue referred to in the text is set out in full *infra*, Form No. 6404.

2. **The order for injunction** referred to in the text is set out in full *infra*, Form No. 6405.

3. **The injunction referred to** in the text is set out in full *infra*, Form No. 6406.

by the *Philadelphia and Reading Railroad Company*, by raising the price of egg coal, on or about the *first* day of *July*, 1892, at least *ten* cents per ton, and by raising the price of stove coal, at the same time, at least *fifteen* cents per ton; and said corporations did in other respects combine with each other to prevent competition in the production, transportation and sale of such coal and to create a monopoly thereof.

And your informant further informs your honor, that on or about the *first* day of *September*, 1892, the said the *Philadelphia and Reading Railroad Company* and the *Central Railroad Company*, acting in combination and conjointly with each other, and in disobedience of said order made on the *thirty-first* day of *May*, 1892, and of said order made on the *twenty-ninth* day of *August*, 1892, and of the injunction issuing thereon, operated their respective railroads in the state of *New Jersey* in such manner as to diminish competition in the trade in anthracite coal, and again arbitrarily raised the price of the anthracite coal owned or controlled by the *Philadelphia and Reading Railroad Company* and the *Central Railroad Company*, of the sizes known as *egg* and *stove*, not less than *twenty-five* cents per ton, and have arbitrarily maintained such increased prices ever since to the people of this state, and about the same time the said railroad companies, acting in concert as aforesaid, arbitrarily raised the price of anthracite coal to the people of this state by raising the rate of freight charged by them, and each of them, for the transportation thereof from the mines to points on tide-water in this state adjacent to *New York*, not less than *ten* cents, and have maintained such increased rate of transportation ever since.

And your informant further informs your honor, that the disobedience of the *Central Railroad Company of New Jersey* and of the *Philadelphia and Reading Railroad Company* to the said orders has been deliberate and wilful, and that the said corporations cannot safely be trusted with the execution thereof, and that it is necessary that a receiver should be appointed with such powers in relation to the transportation of coal over said road as may be necessary to give full effect to the orders heretofore made, and to such further order and decree as may be deemed proper, and that the *Philadelphia and Reading Railroad Company* and the *Central Railroad Company* should be enjoined and restrained from continuing to maintain the aforesaid advances made in the price of coal and for the transportation thereof, and should be restrained from operating the road of the *Central Railroad Company of New Jersey*, so far as such operation relates to the transportation of coal thereover at said advanced prices and rates.

To the end, therefore, that the said defendants may, if they can, show why your informant should not have the relief hereby craved, and may under their respective common and corporate seals, on the oaths or affirmations of their respective presidents and secretaries, answer the premises as fully as if the same were here again repeated, and they particularly interrogated thereto, and that a receiver may be appointed to take charge of the road of the *Central Railroad Company of New Jersey* generally, with such powers in relation to the trans-

portation of coal thereover as may be necessary to enforce obedience to the commands of said orders and injunction, and of such further decree as the court may make in the premises, and that your informant may in addition to the relief specifically prayed by him in the original information, have such other or further relief in the premises as the circumstances of his case may require, and to your honor shall seem meet.

May it please your honor, the premises considered, to grant unto your informant, not only the state's writ of injunction issuing out of and under the seal of this honorable court, to be directed to the said the *Central Railroad Company of New Jersey* and the *Philadelphia and Reading Railroad Company*, enjoining and restraining them from further continuing the aforesaid advances made in the price of coal and for the transportation thereof, and enjoining and restraining the *Philadelphia and Reading Railroad Company*, and the *Central Railroad Company of New Jersey*, and each of them, from operating the road of the *Central Railroad Company of New Jersey* and its various branches for the transportation of coal thereon at said advanced prices and rates, and for so long a time as said corporations, or either of them, continue to maintain such prices and rates or any other arbitrary increase in the price of coal, or doing any act or thing tending to prevent future or existing competition in the production, transportation or sale of such coal, and enjoining and restraining them further from doing the acts or things mentioned in the prayer of the original information, but also the state's writ of subpœna to be directed to the said the *Central Railroad Company of New Jersey*, the *Philadelphia and Reading Railroad Company* and the *Port Reading Railroad Company*, commanding them, and each of them, at a certain day and under a certain penalty therein to be expressed, to be and appear before your honor in this honorable court, then and there to answer the premises, and to stand to, abide by and perform such decree therein as to your honor shall seem meet.

John P. Stockton, Attorney-General.

(*Verification.*)[1]

Form No. 6403.[2]

(*Commencing as in Form No. 6402, and continuing down to* *.)

1. That by an act of the legislature of the state of *New Jersey* and a grant of the said state, approved February 26, 1847, *Garret D. Wall* and others, his associates named in the same act and grant, were ordained, constituted and declared to be a body corporate in fact and in name by the name of the *Somerville and Easton Railroad Company*, with a capital stock of *twelve hundred thousand* dollars, with liberty to increase the same to *two millions of* dollars, to be divided into shares at *fifty* dollars each, which shares were declared to be personal property, and to be transferable as the corporation by their by-laws might direct. That the persons named in the act were appointed commissioners to receive subscriptions to the capital stock

1. Consult the title VERIFICATIONS.

2. **This information is based upon the facts** in Stockton *v.* Central R. Co., 50 N. J. Eq. 59, 489; and is partly a copy of the record in that case. See also *supra*, note 3, p. 568.

as directed therein, who executed the duty imposed upon them, and the said capital stock was subscribed; and that the stockholders of said corporation were convened, according to the provisions of the charter and grant aforesaid, and elected the directors of said corporation, which were duly organized according to law, and accepted the franchises bestowed upon it by said act and charter, and entered upon the performance of its duties. That the capital stock of the said corporation was all paid in, and that the said corporation entered upon the performance of its duties, constructed the railroad authorized and prescribed by the said act and charter, and proceeded to discharge its corporate functions.

That the powers conferred upon the said corporation by its said charter were, among others, to lay out and construct a railroad, or lateral roads (*describing lines of road*), not exceeding *one hundred* feet in width, with as many sets of tracks as they might deem necessary; and the power of eminent domain so conferred upon the said corporation for the purpose of taking such lands and waters as might be necessary for the construction of said railroad, which the said corporation was unable to purchase from the owners thereof.

That the said corporation, among other things, was required by its said charter to deposit in the office of the secretary of state a survey of its route or routes, and thereafter it was enacted that it should be lawful for the said corporation to enter upon, take possession of, have, hold, use, occupy and acquire any such lands, and to erect embankments, bridges, ferries, and all other works necessary to lay rails, and to do all other things which should be suitable and necessary for the completion or repair of said road or roads subject to making such compensation to the owners of lands as were directed in said charter; and in and by the said charter proper prescriptions were made and enacted prescribing the method in which the said corporation should exercise the power of eminent domain, delegated to it by the said charter, and the particular proceedings which should be taken by the said corporation for giving notice to the owners of the lands, so to be taken, and procuring a proper and lawful valuation of the lands so to be taken by the said corporation. That the president and directors of the said corporation were empowered by the *tenth* section of the said charter to (*statement of powers granted*).[1] That the president and directors were required to make dividends within *one* year after the said railroad should have been completed, and semiannually thereafter as they might deem prudent and proper. By the *thirteenth* section of the said charter the said corporation were authorized to (*statement of powers given*).[2]

1. **The powers granted under the tenth section** of the charter referred to in the text were "to construct or purchase with the funds of the company and to place on the said railroad all machines, * * * for the transportation * * * to charge for the transportation" (*enumerating rates*).

2. **The powers given under the thirteenth section** of said charter referred to in the text authorized the company "to have and to hold real estate * * * to erect and build thereon such houses * * * as they might deem expedient, * * * to erect, build and maintain * * * wharves, piers, bridges, * * * which lands might be taken by the exercise of the power of eminent domain."

By the *fifteenth* section of the said act or charter the said corporation was empowered to (*statement of powers given*).[1] And your informant shows that no other power of alienating the said corporate franchises granted to the said corporation was given to or conferred upon the said corporation, and that the said corporation had in fact no other power of alienating its corporate franchises or property. And for greater certainty your informant prays leave to refer to the act entitled "An Act to incorporate the Somerville and Easton Railroad Company," approved February 26, 1847, which act is the legislative act, grant or charter of the said corporation hereinbefore substantially set forth.

2. And your informant further informs your honor, that by an act of the legislature of the state of *New Jersey*, or grant or charter, passed February 9, 1831, *Isaac H. Williamson* and his associates named in the said act, grant or charter, were ordained, constituted and declared to be a body corporate and politic, in fact and in name, by the name of the *Elizabethtown and Somerville Railroad Company*, with a capital stock of *two hundred thousand* dollars, with liberty to increase the same to *four hundred thousand* dollars, to be divided into shares of *fifty* dollars each, which should be deemed personal property, to be transferred in such manner as the corporation by its by-laws should direct, and that the said *Williamson* and his associates were constituted commissioners to receive subscriptions for the capital stock of said corporation, and to give notice for a meeting of the stockholders thereof, when the subscription should be completed, for the election of *nine* directors of said corporation. That the books of subscription were opened in conformity to such authority by the said commissioners, and the capital stock of said corporation was subscribed, and the stockholders were duly called together in a legal meeting and organized the said corporation by electing directors, who thereafter elected the said corporate officers, and the corporation thereby accepted the said charter and entered upon the discharge of its corporate functions and duties, and became legally vested with the corporate privileges, franchises and powers conferred upon it in and by the said act, grant or charter. That the president and directors of the said company were authorized and vested with all the rights and powers necessary and expedient to survey, lay out and construct a railroad or lateral roads, from one or more suitable place or places in the village of *Somerville* to one or more place or places in *Elizabethtown*, passing as near as practicable *Bound Brook*, *Plainfield*, *Scotch Plains* and *Westfield*, not exceeding *sixty-six* feet wide, with as many sets of tracks and grades as they might deem necessary; and the said corporation was authorized at all times to enter upon all the lands or water by its agents for the purpose of surveying and laying out the road or roads of such railroad or lateral roads, and locating the same, and to do and direct all necessary work and appendages

1. **The powers given by the fifteenth section** of said act or charter referred to in the text authorized the corporation "to borrow such sum or sums of money from time to time as might be necessary to build, * * * and to secure the repayment thereof by bond and mortgage, or otherwise, of the said road, * * * at a rate of interest not exceeding *seven* per cent. per annum."

thereon, and that the route or routes of such road or roads or lateral roads so determined upon they were required to deposit a survey thereof in the office of the secretary of state; and thereafter were authorized to enter upon, take possession of, hold and use such lands for the purposes of the said act, charter or grant, subject to such compensation as was provided in said charter to be made to the owners of said lands, and for the payment of damages by reason of the erection and construction of said road. That in and by the said charter the corporation were vested with the power of taking such lands as they might reasonably require for the purposes of the corporation by the exercise of the power of eminent domain, and in and by said charter particular directions were prescribed for the mode in which the said corporation should exercise such power of eminent domain; to give notice to the owners of lands to be taken by it, and ascertain, and make due and lawful compensation therefor. That the president and directors of the said corporation were empowered to have constructed, or to purchase with the funds of the company, and to place on the said railroad constructed by them, all machines, engines, wagons, carriages or vehicles for the transportation of persons or any species of property as they might deem reasonable or expedient, provided that they should not charge more than (*enumerating charges*). And that the railroad or railroads with all their appendages and the land over which the same should pass, and all its works, improvements, carriages and other property whatsoever were vested in the said company, their successors and assigns, during the continuance of said act. That the president and directors of said corporation were required, within *one* year after the railroad should have been completed, to declare and make such dividends as they might deem prudent and proper of the net profits thereof, and should in like manner semiannually thereafter declare such dividends, and pay the same to stockholders, as they might deem prudent and proper.

By the *thirteenth* section of said act or charter the said corporation was authorized to (*statement of powers given*).[1]

3. And your informant further informs your honor, that by an act of the legislature of the state of *New Jersey* (*title and date of act*) the *Somerville and Easton Railroad Company* was authorized and empowered to purchase the railroad from *Somerville*, in the county of *Somerset*, to the sound in the township of *Elizabeth*, then in the county of *Essex*, constructed under and by virtue of the act entitled "An Act to incorporate the Elizabeth and Somerville Railroad Company," passed February 9, 1831; and was also authorized to pay for said road, in part or in whole, in the stock of the *Somerville and Easton Railroad Company*, and for that purpose the *Somerville and Easton Railroad Company* was authorized to issue so much of its capital stock authorized by the act of incorporation as should be required for that purpose. That by the *third* section of said act it was enacted that

1. **The powers conferred by the thirteenth section** of the act of the charter referred to in the text were "to have and to hold real estate, * * * to erect and build thereon houses, * * * to maintain and to erect, build and maintain such wharves, piers, bridges and other facilities," etc.

(*statement of enactment*);[1] and various provisions in detail were contained in the said act last cited, for conserving the rights of all creditors of both companies and effectually enforcing the same. And that by the *fifth* section of said last mentioned act the *Central Railroad Company of New Jersey* was empowered to (*statement of powers granted*).[2]

To which said acts or charters of February 9, 1831, and February 22, 1849, your informant for greater certainty prays leave to refer.

4. And your informant further informs your honor, that by an act of the legislature of *New Jersey*, approved March 17, 1854, the *Central Railroad Company of New Jersey* was authorized and empowered to erect, build or extend such wharves, docks or piers opposite to and adjoining the lands owned by it in the township of *Elizabeth*, as far into the sound or bay as might be necessary for the purpose of facilitating transshipment of coal and its general transporting business, and also to have and hold whatever wharves, piers, lands, steamboats, sailing vessels and other facilities in the state of *New York* or *Elizabeth* as might be necessary for the managing of its business. And was also authorized and empowered to increase its capital stock with the assent of a majority of its stockholders to any sum not exceeding *five millions of* dollars, and to change the par value of the shares of the stock of said corporation by issuing *one* share of *one hundred* dollars at par in place of every *two* shares of the value of *fifty* dollars. And by the *third* section of said last mentioned act the said corporation, the *Central Railroad Company of New Jersey*, was authorized and empowered to (*statement of powers granted*).[3] And by section *four* of the said charter it was also provided (*statement of provisions*).[4] And by section *seven* of the said last men-

1. **The enactments of the third section** of the act referred to in the text were to the effect that "when the said purchase should have been made, the railroad so purchased should become part of the railroad authorized to be constructed by the *Somerville and Easton Railroad Company*; and in its further construction and completion, maintenance, use and enjoyment the said roads should be regulated and governed by the provisions of the charter of the last named company; and for that purpose all and every provision of the act entitled," etc.

2. **The powers granted under the fifth section** of the act referred to in the text authorized the corporation "to purchase and hold lands at the termination of said railroad," etc.

3. **The powers granted by the third section** of the act mentioned in the text authorized the corporation "to purchase, or lease, or operate any railroad which might connect with or intersect their roads, or to guarantee the bonds of said company, or to consolidate the stock of such company with their own, on terms to be mutually agreed upon, with the assent of *three-quarters* in interest of the stockholders of the said *Central Railroad Company of New Jersey*, with provisions by which any dissenting stockholder might have the value of his shares of stock appraised, and thereupon the said corporation was required to take said shares of stock at said appraised value."

4. **The provisions of section four** of the charter referred to in the text were to the effect "that if such purchase or consolidation should be made, the railroads so purchased or consolidated, if in this state, should be and become a part of the railroad authorized to be constructed by the act incorporating said *Central Railroad Company of New Jersey*, and for that purpose every provision of such act of incorporation, with supplements thereto, to extend and be applicable to the railroad so purchased or consolidated in every respect as if the same had been author-

tioned act or supplement it was provided that (*statement of provisions*).[1] And in and by said act it was further enacted that if the company, within six months from the passage thereof, should file in writing its assent to an acceptance of the provisions thereof, the act should take effect immediately thereafter; but that if the company refused or neglected so to do, then the act should be null and void, and your informant informs your honor that the said company duly accepted and filed its acceptance of said act within the said period of six months, to which said act your informant refers.

5. And your informant further informs your honor, that by an act of the legislature of *New Jersey* (*title and date of act*), the said the *Central Railroad of New Jersey* was authorized to extend its railroad from some point in the city of *Elizabeth* to some point or points on *New York* bay, in the county of *Hudson*, at or south of *Jersey City*, and for that purpose was authorized to use all powers and franchises conferred upon it by the act entitled "An Act to incorporate the Somerville and Easton Railroad Company," hereinbefore in substance set forth, and was required to construct certain bridges and drawbridges within certain prescribed conditions, and was required to run certain trains for the accommodation of commuters and local travelers on said road, and in said act certain conditions were contained prohibiting the construction of the said extension of said railroad nearer than *one thousand* feet to the *Jersey City* and *Bergen Point* plank road, and conserving the claims of all riparian shore owners, to which act your informant refers.

6. And your informant further informs your honor, that by an act of the legislature of *New Jersey* (*title and date of act*), the said extension from *Elizabeth* to *Jersey City* was authorized to be constructed, not nearer than (*description of extension*), to which act your informant refers.

7. And your informant further informs your honor, that by an act of the legislature of the state of *New Jersey*, approved March 11, 1863, the *Central Railroad Company of New Jersey* was empowered to increase its capital stock to any sum not exceeding *two millions of* dollars in addition to the then authorized amount of capital stock, and that by like act approved April 5, 1865, the *Central Railroad*

ized to be made under the act or charter of the said *Central Railroad Company of New Jersey*."

1. **The provisions of section seven** of the act, or supplement, referred to in the text were to the effect that "the said the *Central Railroad Company of New Jersey* might alter the location of their railroad, or locate new lines when additional tracks should be required, at any point or points, between *Phillipsburg* and *Elizabethport*, not varying in any case over *one* mile from the line located and filed, after filing in the office of the secretary of state a survey of such location as varied from the original location, and that the said corporation should be subject to all the conditions and restrictions in taking possession of and using the lands required by their act of incorporation, and to which they were subject respecting land required for said road; with the further provision that if the company located any new line or lines of tracks within the township of *Bridgewater*, and should not own the land lying between the old or lands of the new line or lines they might locate, the old lines should be vacated and the land upon which the same had been constructed should revert to the original owner."

Company was authorized to increase its capital stock in any sum not exceeding *three millions of* dollars in addition to its then authorized amount of capital. And by an act of the legislature of *New Jersey*, approved April 6, 1865, the *Central Railroad Company of New Jersey* was authorized and empowered to construct a bridge across the *Delaware* river jointly with such corporation of the state of *Pennsylvania*, as has been thereto properly empowered by the said state of *Pennsylvania*, which bridge when constructed should not destroy or materially injure any of the works of the *Morris Canal and Banking Company*, or the ferry of said company across the *Delaware* river, except by agreement between the said corporations authorized to build the said bridge and the *Morris Canal and Banking Company*, and to protect the rights of navigation as far as practicable in the interests of the public. The location of piers and abutments of the said bridge was required, before the same should be constructed, to be approved by three suitable and disinterested commissioners to be appointed by the chancellor and the chief justice of this state, and the said bridge when constructed was to be open to the free use of any other railroad or canal corporation of the state of *New Jersey* for the transportation of passengers or freight upon or over the same, and to make such connection with the said bridge as might be requisite to give them the free use of the same for the convenience of such passengers and freight; and the said corporation so using said bridge was required to pay to the *Central Railroad of New Jersey* tolls not exceeding *three* cents per ton for each ton of merchandise or freight, and *five* cents per passenger for each passenger transported over said bridge; and that by an act of the legislature, approved March 5, 1866, the said the *Central Railroad of New Jersey* was authorized and empowered to increase its capital stock to any sum not exceeding *four millions of* dollars in addition to the then authorized amount of its capital stock, to which acts your informant refers.

8. And your informant further informs your honor, that by an act of the legislature of the state of *New Jersey*, approved March 17, 1870, the *Central Railroad Company of New Jersey* was authorized and empowered to survey, lay out and construct a branch railroad from (*description of branch road*), and was authorized and empowered to use all powers and franchises granted and conferred by the act entitled "An Act to incorporate the Somerville and Easton Railroad Company," passed February 26, 1847, and the supplements thereto; and by an act approved March 24, 1872, the said the *Central Railroad Company of New Jersey* was authorized and empowered to increase its capital stock *five millions of* dollars in addition to the then authorized amount, and to use the same to take up scrip for like amount theretofore issued with the assent of the majority in interest of said stockholders, and by the same last mentioned act the *Central Railroad Company of New Jersey* was authorized and empowered to construct a branch railroad from (*description of branch road*); and for the location, construction and enjoyment of such branch all the provisions of the charter of the said company and supplements were made applicable.

9. And your informant informs your honor, that in and by the said several acts of the legislature of *New Jersey*, hereinbefore set forth and stated in substance, and for greater certainty your informant begs leave particularly to refer to the said acts and provisions thereof, the purpose and intent for which the said corporation was created was (*Here was stated purpose of creation of corporation*); and the said the *Central Railroad Company of New Jersey* was not authorized and empowered and could not lawfully use its corporate franchises, powers and privileges for any other purposes or business whatever, and that the said the *Central Railroad of New Jersey* was prohibited, by necessary implication, from carrying on and from using its capital stock or corporate funds for carrying on any other business whatever than the transportation of passengers and freight in manner aforesaid, and that the said the *Central Railroad Company of New Jersey* had no power whatever of alienating by device, conveyance or otherwise howsoever, any of its corporate property, railroad, franchises, powers or privileges, except by way of mortgaging for the purpose of raising funds, for the purpose of the construction of the railroad and branches authorized to be constructed by the charters and acts hereinbefore set forth; and your informant further informs your honor that the *Central Railroad of New Jersey* proceeded to construct and operate the railroads and branches which it was authorized by its charter and supplements thereto to construct and operate, and entered upon and discharged the functions which it was bound by said acts to undertake and execute, and did execute and perform the same in conformity to the said charter until about the year eighteen hundred and *seventy-one*, when the said the *Central Railroad Company of New Jersey*, without authority of law, and in violation of its charter, entered into an indenture of lease with the *Lehigh Coal and Navigation Company*, a corporation created by the state of *Pennsylvania*, by which instrument the said the *Central Railroad Company of New Jersey* pretended to acquire in perpetuity the railroad, branches and works of the *Lehigh Coal and Navigation Company* in the state of *Pennsylvania*; but your informant informs your honor that the *Central Railroad Company of New Jersey*, at the execution of said lease, had no authority by any grant or charter from the state of *New Jersey* to execute said lease in perpetuity or to take the said railroad and works of the said *Lehigh Coal and Navigation Company*, nor to operate and manage said road by the exercise either of the corporate franchises and powers and privileges of the said *Lehigh Coal and Navigation Company*, or by the exercise of the corporate franchises and privileges which had been granted to the *Central Railroad Company of New Jersey* by the state of *New Jersey*, but that said lease was wholly *ultra vires* of *the Central Railroad Company of New Jersey*, and was illegal and void, and an unwarrantable use of the corporate powers and privileges granted by the state of *New Jersey* to the said *Central Railroad Company of New Jersey*.

10. And your informant further informs your honor, that at or about the year eighteen hundred and *seventy-one*, and at or after the acceptance by the *Central Railroad Company of New Jersey* of the lease hereinbefore stated, made to it by the *Lehigh Coal and Naviga-*

tion Company, the said the *Central Railroad Company of New Jersey*, without authority of law and in violation of its charter, purchased from the *Lehigh Coal and Navigation Company* a large part, or all of the rolling stock, equipment, locomotive engines, passenger and freight cars of the said *Lehigh Coal and Navigation Company*, used by it upon its said railroad so demised as aforesaid by it to the *Central Railroad Company*, and which said rolling stock, etc., was purchased by the *Central Railroad Company* for the purpose of operating the said illegally demised railroad, and said last named company used and applied several millions of dollars of its capital funds, subscribed and contributed to said capital fund under the aforesaid charter granted by the state of *New Jersey* to the said the *Central Railroad Company*, to the purchase of the said rolling stock, engines, cars, etc., aforesaid, by assuming the payment of the purchase money thereof then owing by the said *Lehigh Coal and Navigation Company*. And your informant shows that such use of the capital funds so subscribed, and constituting a part of the capital authorized by the charter of the said the *Central Railroad Company of New Jersey*, was wholly diverted from the uses and intents for which the same was authorized by the said charter, and applied to a wholly different and unauthorized use and purpose.

11. And your informant further shows unto your honor, that by a supplement to the charter of the *Somerville and Easton Railroad Company*, which supplement was approved March 21, 1874, the *Central Railroad Company of New Jersey* was authorized and empowered, in order to secure a paying business for its said railroad and works, to guarantee the payment of the bonds of any coal company or companies owning or working coal lands along the aforesaid line of, or adjacent to any of the aforesaid railroad's branches or works in the state of *Pennsylvania*, which were pretended to be leased as aforesaid to the said the *Central Railroad Company of New Jersey*, in which lands the said company may or may not have an interest. That at and before the time of the passage of this act, and subsequently thereto, the *Central Railroad Company of New Jersey*, without any authority of law, had purchased large quantities of anthracite coal lands in the state of *Pennsylvania*, and had expended many millions of dollars of its capital funds in the purchase of such lands, which use of its said capital fund was wholly unauthorized by its charter, and had, after said purchase, pretended to organize a coal company under the laws of the state of *Pennsylvania*, under the corporate title of the *Lehigh and Wilkesbarre Coal Company*, and pretended to subscribe to, or did actually purchase with the capital funds of the *Central Railroad Company of New Jersey*, a large majority of the capital stock of the said *Lehigh and Wilkesbarre Coal Company*, and being in control of the said *Lehigh and Wilkesbarre Coal Company*, and in fact the owners thereof, by means of the use of its capital funds in violation of said charter in the purchase thereof, proceeded to issue large quantities of bonds in the name of the said *Lehigh and Wilkesbarre Coal Company*, and indorsed thereon the guaranty of the *Central Railroad Company of New Jersey* of the payment of the principal and interest of the said bonds, and that by means of these acts of purchase of coal lands, and

the formation of the said *Lehigh and Wilkesbarre Coal Company*, which was owned and is still owned and controlled by the *Central Railroad Company of New Jersey*, and acquired by the use of the capital funds of said last mentioned company authorized to be raised by its charter and supplement hereinbefore stated, the said the *Central Railroad Company of New Jersey* became in fact the owner of a large part of the anthracite coal-bearing territory of the United States, situated in the said state of *Pennsylvania*, and entered into the regular business of mining and selling coal, which said business was *ultra vires* and unauthorized by the charter of the said the *Central Railroad Company of New Jersey*; and the said the *Central Railroad Company of New Jersey* entered into the said business of mining and selling coal so extensively that the annual product of its mines and the annual sales of coal by said company amounted to many millions of tons; and the said the *Central Railroad Company of New Jersey* became and has continued from thence until this time to be one of the largest producers and sellers of anthracite coal in the United States, and still continues, in violation of law and its charter, to be such producer and dealer in anthracite coal. And your informant shows your honor that all these acts aforesaid of the *Central Railroad Company of New Jersey* were intended to be, and are in fact, acts tending to a monopoly of the business of making and selling anthracite coal, and are wholly violative of its charter aforesaid.

12. And your informant further informs your honor, that on or about the *twenty-ninth* day of *May*, eighteen hundred and *eighty-three*, the said the *Central Railroad Company of New Jersey*, without any authority of law enabling it thereto, executed and delivered to the *Philadelphia and Reading Railroad Company*, a corporation of the state of *Pennsylvania*, an indenture of lease by which it purported and affected to demise to (*Here was set out purport of lease*),[1] and delivered the possession of all its property at the date of said lease to said lessee; and that one *Alfred Mills* and *John H. Lidgerwood*, executors of the will of *Stephen Vail*, deceased, filed their bill of complaint in this court, praying to have the said lease decreed to be null and void, and to be set aside and for nothing holden, and to have the said the *Central Railroad Company of New Jersey* reinstated in the rights and repossessed of the property which was so demised and conveyed by the said alleged instrument of lease, and that in said suit such proceedings were had and taken that the cause came on to a hearing before this court upon the pleadings and proofs in the cause, and the chancellor having duly considered the same, and heard the arguments of counsel thereon, adjudged and determined that the said the *Central Railroad Company of New Jersey* had no

1. **The purport of the indenture of lease** referred to in the text was to demise "to the said the *Philadelphia and Reading Railroad Company*, for the period of *nine hundred and ninety-nine* years, its railroad and works and all appendages, and convey to it all its property, real and personal, rights, powers, franchises and privileges for the maintenance, renewal, extension, alteration or improvement of the said demised railroad and works, and their appurtenances, reserving in said instrument an annual rent, equal to *six* per cent. upon the par value of the then outstanding capital stock of the *Central Railroad Company of New Jersey*."

power and authority, by virtue of its charter, or any of the supplements thereto, or by any other act of the legislature of the state of *New Jersey*, to enter into such indenture of lease, or to demise its property, powers, privileges and franchises, or any of them, to any other corporation or corporations, and by the decree of this court the said indenture of lease was wholly set aside, and decreed to be for nothing holden, and the said the *Philadelphia and Reading Railroad Company* was ordered and decreed to (*Here was set out effect of decree*),[1] and for greater certainty your informant refers to the record of the proceedings in this cause as the same appear of record in the Court *of Chancery of New Jersey*, which record your informant is ready and offers to produce and prove.

13. And your informant further shows unto your honor, that on or about the *third* day of *November*, eighteen hundred and *ninety*, *A. A. McLeod*, *I. A. Sweigard*, *William R. Taylor*, *D. Jones*, *Robert S. Davis*, *John Walker*, *Jr.*, all of the city of *Philadelphia* in the state of *Pennsylvania*, and all of whom are officers and persons in the employ of the *Philadelphia and Reading Railroad Company*, together with *Nathan Francis* and others of the state of *New Jersey*, whose names are set forth in the certificate of articles of association hereinafter mentioned, formed themselves into a railroad corporation by the name of the *Port Reading Railroad Company*, under an act of the legislature of the state of *New Jersey* entitled (*title and date of act*), and the acts supplementary and amendatory thereof, for the alleged purpose of constructing, maintaining and operating a railroad for the public use, in the conveyance of persons and property, to begin at (*description of line of road*). The amount of the capital stock of the said company was declared to be *two millions of* dollars in *twenty thousand* shares of the par value of *one hundred* dollars; and (*names of directors*) were constituted and appointed and became the directors of the said company to manage its affairs for the first year, all of whom are officers or agents of the *Philadelphia and Reading Railroad Company*, and that the present directors of the said *Port Reading Railroad Company* are (*names of directors*), all of whom your informant avers to be officers or agents of the *Philadelphia and Reading Railroad Company*, and that all the moneys which have been paid and expended heretofore, and are being paid and expended in the construction of the railroad of the said *Port Reading Railroad Company*, have been paid and are being paid by the *Philadelphia and Reading Railroad Company*, and that the said *Port Reading Railroad Company* is, in fact, owned and controlled by the *Philadelphia and Reading Railroad Company*, through the nominal officers and directors of the *Port Reading Railroad Company* and solely in the interest of and for the benefit of the

1. **The decree referred to** in the text ordered the Philadelphia and Reading Railroad Company "to restore to the *Central Railroad Company of New Jersey* all its railroads, property, assets, works and appurtenances purported to have been demised as aforesaid, and the said the *Central Railroad Company of New Jersey* was decreed and ordered to re-enter into the possession of the same and to discharge all its corporate powers and privileges, and to perform all its functions as a transporter of persons and passengers, and in the management of its said roads, works, property, franchises and privileges as if the said lease had never been executed."

Philadelphia and Reading Railroad Company, and that the principal office of the *Port Reading Railroad Company* is at No. *227 South Fourth* street, *Philadelphia*, which is the office of the *Philadelphia and Reading Railroad Company.*

14. And your informant further shows unto your honor, that on or about the *twelfth* day of *February*, eighteen hundred and *ninety-two*, the *Central Railroad Company of New Jersey* executed and delivered to the said the *Port Reading Railroad Company* an indenture of lease wherein the lessor is denoted the "*Central Company*," and the lessee is denoted the "*Port Reading Company*," and by the said indenture of lease the *Central Company* pretended to (*Here was set out the purport of the indenture of lease*).[1]

1. The purport of the lease referred to in the text pretended "to let and demise the *Port Reading Company*, its successors and assigns, for the term of *nine hundred and ninety-nine* years, the entire railroad of the *Central Company*, as the same was then located and constructed, or as the same might be thereafter located and constructed, in pursuance of any and every lawful authority now existing, or which might hereafter exist, together with all its right to construct, maintain and operate the following described railroads: *The Central Railroad of New Jersey*, including its following branches (*naming the branches*), together with all the branches, laterals, extensions, sidings, turnouts, tracks, bridges, viaducts, culverts, rights of way, water rights and privileges, all lands, shops, machinery, fixtures, depots, stations, water stations, houses, buildings, structures, improvements, tenements, hereditaments of whatever kind and description, wherever situate, pertaining to the operation and maintenance and renewal of the said railroads, which were then held, leased or owned by the *Central Company*, or which may at any time hereafter during the term of said demise be acquired by the *Central Company* for railroad purposes at the request of the *Port Reading Company*, pursuant to the betterment clause of the said lease, together with all the ferries and rights of ferriage then belonging to or which might thereafter be required for the purposes aforesaid by the *Central Company*, and all engines, stationary and locomotive, cars, tenders, trucks and other rolling stock, tools, implements, machinery and personal property of every kind and description, in use or intended or adapted for use, upon or about the railroad premises demised, or the business thereof, including ferry-boats, steamboats, tugs, floats, barges and other vessels, belonging to the *Central Company*." And it was therein declared to be the intention and agreement of said corporate railroad parties "that all cars and other rolling stock then used by or in the possession of the *Central Company* under the terms of any car trust, should, when and so soon as they should become the property of the *Central Company*, and to the extent of the interest of the *Central Company* therein, be included in the terms of the said lease, and all rights, benefits and privileges of any nature whatsoever then enjoyed, or which might thereafter be enjoyed by the *Central Company*, relating and pertaining to the demised property, together with all rights, powers, franchises, other than the franchise of being a corporation, and privileges which might then, or at any time thereafter, during the aforesaid term, be lawfully exercised or enjoyed in or about the use, management, maintenance, renewal, extension, alteration or improvement of the railroad's premises, or appurtenances, be demised, excepting and reserving nevertheless out of the demised premises a certain building in the city of *New York*, at the corner of *Liberty* and *West* streets, known as '*The Central Building*,' and all other real estate owned or held by the said *Central Company* not adjacent to said railroads, or if adjacent, not used or required for the purposes of the business of the demised railroads and their appurtenances; providing, however, that all real estate included in the lease, but not then personally used for railroad purposes although forming part of the demised premises and remaining in the possession of the *Central Company*, and the income of any parcels which

And your informant further shows unto your honor, that the said indenture of lease contains a large number of covenants relating to matters of detail between the said corporations which cannot be conveniently set forth at large in this information, and for the particulars of the said indenture of lease, and the covenants and demises therein contained, your informant prays leave to refer to a copy of the said lease, which your informant has appended to this information, and which copy was furnished to your informant for his official use by the counsel of the said lessor and lessee corporations to this informant.

15. And your informant further shows unto your honor, that in the pretended performance of said lease the said the *Central Railroad Company of New Jersey* has delivered into the possession of the *Port Reading Railroad Company* the actual possession of all the railroads enumerated in the said indenture of lease both within and

might by lease or otherwise produce income, remaining after payment of taxes on such parcels, should belong to the *Central Company* until required for railroad purposes, and when so required, the possession thereof should be delivered over to the *Port Reading Company*, who should thereafter use and enjoy the same under the said lease. And in consideration of said demise, the *Port Reading Company* covenanted to pay as rent for said demised premises: A. All interest, dividends, rentals, guarantees, and all other charges which the *Central Railroad Company* was then, or might at any time thereafter be obliged in any manner to pay, which sums should be paid in equal monthly instalments during the said term, on the *first* day of each month, and it was provided that the first payment for the year 1892 should be made on the *first* day of *February*, 1892, and a further sum in each and every year which should be equal to *seven* per centum per annum upon the then present outstanding capital stock of the *Central Company*, including as such outstanding stock any stock thereafter issued under the obligations of its convertible debenture bonds, which sums should be paid in equal monthly instalments on the *first* day of each month in each year during the said term, commencing on the *first* day of *February*, 1892, and a further sum equal to *fifty* per cent. of the surplus earnings over the *seven* per centum therein above stipulated which should have accrued to the *Port Reading Company* during each calendar year of the term of said lease from all the trade, traffic, business and income of the demised premises; provided, that no amount should be paid to the *Central Company* as its share of such surplus earnings in excess of a sum equal to *three* per cent. additional upon the said outstanding capital stock of the *Central Company*, including as such outstanding stock any stock thereafter issued under the obligations of its convertible debenture bonds thereinbefore mentioned, and payment of this last mentioned amount should be made in one annual payment at the end of each year during said term, the first payment to be made on the *first* day of *January*, 1893, and annually thereafter on each *first* day of *January*. And the *Port Reading Company*, in and by the said indenture of lease, and during the continuance of the term thereby demised, assumed the payment of and covenanted punctually and faithfully to pay all taxes and assessments upon the capital stock of the *Central Company*, upon the yearly payments therein agreed to be made by the *Port Reading Company* to the *Central Company*, and upon the dividends declared and paid by the *Central Company* to its stockholders out of the said yearly rent, for the payment or collection of which taxes or assessments the *Central Company* would otherwise be liable or accountable under any lawful authority whatever; provided, that the *Port Reading Company* should not be liable or responsible for taxes or assessments on any dividends or part of a dividend paid by the *Central Company* out of any other funds than the aforesaid yearly rent."

without this state, and all its rolling stock, locomotives, freight and passenger cars and all the property indispensable in the operation of the said railroads, and has actually surrendered to the said *Port Reading Railroad Company* the enjoyment and use of all its corporate franchises granted to it in and by the aforesaid charter of the *Central Railroad Company of New Jersey* and the supplements thereto hereinbefore set forth and referred to, and that the *Central Railroad Company of New Jersey* has absolutely stripped itself, so far as it has been able to do so, of all the franchises, powers, privileges and property indispensable in the performance of its duties to the state of *New Jersey* and to the inhabitants thereof, under its aforesaid charter and the supplements thereto, and is absolutely unable to discharge or perform in any wise any of the public duties which by virtue of the said charter and supplements, it owes to the state of *New Jersey* and the inhabitants thereof, and to the public, and that the said the *Central Railroad Company of New Jersey*, by force of the premises, is now absolutely unable to perform any of its corporate duties.

16. And your informant further shows unto your honor, that the said pretended indenture of lease is not a bona fide indenture of lease, but was intended by both the said railroad corporations to be a mere cover or means by which to carry out and effect the transfer of the actual exercise and enjoyment of the corporate franchises of the *Central Railroad Company of New Jersey* to the *Philadelphia and Reading Railroad Company*, a foreign corporation created by the state of *Pennsylvania*, and to transfer the railroads, franchises and rolling stock, engines, cars and other property set forth in the said pretended lease, into the possession and enjoyment of the said the *Philadelphia and Reading Railroad Company*, and to turn over to the said last mentioned company the actual operation of the said railroads, and the carrying on of all the business of the said the *Central Railroad Company of New Jersey*, and the enjoyment of all the corporate franchises, privileges and powers of the *Central Railroad Company of New Jersey*, and the performance of all the public duties which it owed and owes to the state of *New Jersey* and inhabitants thereof and to the public.

17. And your informant, in fact, informs your honor, that it never was intended by the *Central Railroad Company of New Jersey* to demise and let its corporate franchise, powers, privileges and property to the *Port Reading Railroad Company*, but in fact to demise and let the same to the *Philadelphia and Reading Railroad Company*; and that this same intent was likewise held by the said *Port Reading Railroad Company* and the *Philadelphia and Reading Railroad Company*, and that the real intent of the said parties was before the pretended making of the said pretended lease, by other and further instruments, to immediately transfer the term, granted by said lease, and all the demised corporate powers and property, to the *Philadelphia and Reading Railroad Company*; and that in fact the *Central Railroad Company of New Jersey* absolutely refused to execute the said pretended lease, hereinbefore set forth, to the *Port Reading Railroad Company*, until, by other and further instruments duly executed for that purpose between the said three corporations, the said term granted in said lease, and the payments of rent reserved thereby,

should be in fact passed to, and be assumed, together with the possession of all the demised corporate powers, privileges and property, to the *Philadelphia and Reading Railroad Company*; and that at and before the execution of the said pretended lease to the *Port Reading Railroad Company*, the instruments necessary to effect said intent and purpose of all the parties were prepared and actually executed to effect such result, and to substitute the *Philadelphia and Reading Railroad Company* in the place of the *Port Reading Railroad Company*, one of which instruments is hereinafter set forth and a copy of which is appended to this information, and to which your informant begs leave particularly to refer, which copy was furnished to your informant for official use by counsel of said companies.

18 And your informant further shows unto your honor, that the *Philadelphia and Reading Railroad Company* is a railroad corporation of the state of *Pennsylvania*, and that neither its property nor franchises, nor the persons of its president and directors are within the jurisdiction of this state, and that the state of *New Jersey* would have no practical means of enforcing, through its courts, the due performance of the public duties owing by the *Central Railroad Company of New Jersey* to the state, its inhabitants and the public, either as against the *Central Railroad Company* itself or against its actual lessee, the *Philadelphia and Reading Railroad Company*, in case the said lease and other instruments should be construed to be valid and effectual in law, but that the state of *New Jersey* would be wholly without redress in the premises.

19. And your informant further shows unto your honor, that the *Philadelphia and Reading Railroad Company* is very largely engaged in the business of mining and selling coal. That it is the owner of the capital stock of the *Philadelphia and Reading Coal and Iron Company*, in whose name it holds and owns very large tracts of territory, containing very large deposits of anthracite coal, in the state of *Pennsylvania*; and also is the owner of the capital stock of other coal companies in like position, and that by means of its ownership of said stock and coal lands, the said the *Philadelphia and Reading Railroad Company* is the largest miner, producer and seller of anthracite coal in the United States; and that before the execution of the said pretended lease and the instruments before mentioned, the said the *Philadelphia and Reading Railroad Company* was a competing coal miner, owner and seller and dealer, in anthracite coal, producing and selling the greatest number of tons of anthracite coal which were produced and sold by any concern in the anthracite coal business in the United States; and that the *Easton and Amboy Railroad Company*, which is owned by the *Lehigh Valley Railroad Company*, a corporation of *Pennsylvania*, and through its connection with the said last mentioned company, which was also a very large owner of the anthracite coal territory of the state of *Pennsylvania*, was, as the agent of, or in connection with, the *Lehigh Valley Railroad Company*, very largely engaged in the business of mining, transporting and selling coal, and that its revenues and success, and the revenues and prosperity of the *Lehigh Valley Railroad Company* were almost entirely dependent upon the successful transaction of their said coal business, and they were

active competitors with the *Philadelphia and Reading Railroad Company*, in the production, transporting and selling of coal. And that the said the *Central Railroad Company*, through its ownership of the coal lands of the *Lehigh and Wilkesbarre Coal Company*, and of various other coal lands, was the owner of a very large tract of anthracite coal territory, in the state of *Pennsylvania*, and dependent mainly for its revenues and success upon its competing business with the *Easton and Amboy Company* and the *Philadelphia and Reading Railroad Company* in the said coal business.

And your informant in fact shows that the said three corporations, the *Philadelphia and Reading Railroad Company*, the *Easton and Amboy Railroad Company* and the *Central Railroad Company of New Jersey*, were and have for many years past been in active and continual competition with each other in the coal business, and that the intent of all the parties to the pretended instrument of lease, and other instruments hereinbefore set forth, was by said instruments and by further lease or other instruments to combine the said three corporations in the conduct of the said coal business, and to put an end to all competition between them. And your informant in fact shows that by reason of the ownership and control by the said three corporations of the said anthracite coal lands in the state of *Pennsylvania*, they are in fact the owners and controllers of at least *sixty* per cent. of the entire anthracite coal field of the United States advantageously accessible by the inhabitants of the state of *New Jersey*; and that a supply of anthracite coal at fair prices is an absolute necessity on the part of every householder in the state of *New Jersey*, it being the most convenient and most economical fuel for all the households of the said state, and that the intent of the said three corporations in conceiving and in executing the said pretended lease, and the instruments before referred to, was and is to control the market in the state of *New Jersey* for the supply and sale to the inhabitants of the state of *New Jersey* of anthracite coal, and to fix the price thereof at such rates as will be most profitable to the said corporations. And your informant shows that all these proceedings and acts on the part of the *Philadelphia and Reading Railroad Company*, the *Port Reading Railroad Company* and the *Central Railroad Company of New Jersey* tend directly to a monopoly of the trade in anthracite coal in the state of *New Jersey* and to the manifest oppression of the inhabitants thereof.

20. And your informant shows, that in the execution of the scheme aforesaid, and for the accomplishment of the result aforesaid, and in order to assure to the *Central Railroad Company of New Jersey* its due share in the proportion of the profits arising and to arise therefrom, and it being well known both to the *Central Railroad Company of New Jersey* and the *Philadelphia and Reading Railroad Company* that the *Port Reading Railroad Company* was wholly incompetent to perform the covenants for the payment of money which were contained in the said pretended lease, and was wholly incompetent and unable to exercise the corporate franchises, powers and privileges of the said the *Central Railroad Company of New Jersey*, or to perform the public duties which said last mentioned company owed to the state of

New Jersey, its inhabitants and the public, the said corporations agreed to substitute for said *Port Reading Railroad Company* a corporation more able to perform such covenants and duties aforesaid, and at and before the pretended execution of the pretended lease from the *Central Railroad Company of New Jersey* to the *Port Reading Railroad Company*, the *Central Railroad Company of New Jersey*, the *Philadelphia and Reading Railroad Company*, and the *Port Reading Railroad Company* entered into and mutually executed and delivered a certain contract and agreement made on the *twelfth* day of *February*, A. D. eighteen hundred and *ninety-two*, in and by which said agreement it was recited that (*Here were set out recitals of agreement*).[1]

1. The recitals in the agreement referred to in the text were as follows: "Whereas the lines of railroads owned, leased and operated by the parties thereto were connected at several points in the states of *Pennsylvania* and *New Jersey*, and formed continuous lines of railroad between numerous cities of commercial importance, capable of producing large contributions of freight and passenger traffic to the lines of said companies, if worked as continuous lines; and whereas, the *Central Company* and the *Port Reading Railroad Company* had negotiated for a lease of all the lines of railroad of the *Central Company*, whether owned by it or acquired by virtue of any lease to the *Port Reading Company* for the term and period of *nine hundred and ninety-nine* years, upon the payment of the annual rentals, and the performance of the certain covenants, agreements and stipulations contained in the said proposed lease, a copy whereof was thereto attached and made a part thereof, which said lease the *Central Company* was willing to execute and deliver if the *Reading Company* should guarantee the prompt and punctual payment to the *Central Company* by the *Port Reading Company* of the rentals reserved in the said lease as and when the same should become due and payable, and should also guarantee the full and faithful performance by the *Port Reading Company* of all the covenants, stipulations and agreements contained in the said lease by it, the said *Port Reading Company*, to be kept and performed on its part, and the *Central Company* was willing to execute and deliver the said lease upon the execution of this contract by the *Reading Company*, whereby there would be assured to the said lines of the *Central Company*, in addition to the traffic now tributary thereto, such an increase of the traffic thereon as would secure to the *Port Reading Company* sufficient revenue to meet and pay the said rentals, and perform the covenants and stipulations contained in the said lease; and whereas, in consideration of the benefits and advantages to be derived thereunder from the use of the terminal properties and facilities of the *Central Company* so to be leased to the *Port Reading Company*, and from the interchange of traffic therein provided for the *Reading Company* was willing to guarantee to the *Central Company* the payment by the *Port Reading Company* of the rentals reserved in the said proposed lease, and the performance by the said *Port Reading Company* of all the covenants, stipulations and agreements of the said lease by it to be kept and performed, and also all of the covenants, stipulations and agreements therein contained and written to be kept and performed by the said *Port Reading Company*; therefore, in consideration of the premises and of the mutual covenants and agreements in said contract or agreement contained, and as well for and in consideration of the sum of *one* dollar by each of the parties thereto paid to each of the other parties thereto, the said corporate parties agreed and covenanted among other things — First that the *Central Company* and the *Port Reading Company* should immediately execute and deliver the said alleged lease of the railroads and other property of the *Central Company*, a copy of which is attached to the said contract or agreement, and that the possession and control of the railroads and other property of the *Central Company* so leased should forthwith be taken by the *Port Reading Company*. Second, that the *Reading Company* should and would guarantee, and thereby did guarantee, unto the *Central Company* the prompt payment by the *Port Reading Company* to the

And the said contract or agreement contained various other covenants and agreements in detail, which are too voluminous to set forth in this information, but your informant has appended to this information a copy of the said articles of contract and agreement, fully setting forth all the mutual covenants, contracts and agreements of the said parties thereto, to which your informant begs leave particularly to refer.

And your informant shows that the *Reading* company had no power, either by the laws of this state or by its charter or otherwise, to make said agreement, or to give said guarantee to said *Central* company, nor did said *Central* company have any power to accept or receive the same, and that such agreement and guarantee and each of them were and are *ultra vires* of the *Reading* company and void, and were and are likewise *ultra vires* of the *Central* company, and for that reason also void.

21. And your informant further shows unto your honor, that in and by an act of the legislature of the state of *New Jersey*, approved April 4, 1871 (*Rev., p. 1096*), it is enacted that (*Here was set out substance of enactment*),[1] and that the said act still remains in effect and unrepealed; and that by the laws of this state the aforesaid alleged lease so made and executed by the *Central Railroad Company of New Jersey* is invalid and of no effect until the execution of the same shall have been acknowledged or proved as conveyances of land in this state are required to be acknowledged and proved; and that the said alleged lease is also invalid and of no effect unless the parties thereto shall have lodged the same with the secretary of state for record within *thirty* days from the date of the execution thereof. And your informant in fact shows unto your honor that the said alleged lease has never been acknowledged or proved as conveyances of land in this state are required by law to be acknowledged or proved, and that the said indenture of lease has never been lodged with the sec-

Central Company of the various sums fixed and appointed in said lease to be paid, and the said *Reading Company* did thereby guarantee unto the *Central Company* that the *Port Reading Company* should at all times during the continuance of the said lease fully and faithfully keep and perform each and every of the covenants, agreements and stipulations contained therein to be kept and performed by the said *Port Reading Company*, and should, during the continuance of said lease and of the said contract, fully and faithfully keep and perform on its part each contract, covenant and stipulation in said agreement to be kept and performed by it, the said *Port Reading Company*."

1. **The enactment referred to** in the text is to the effect that "all contracts or agreements for the sale, letting, leasing, consolidating, merging or in any manner disposing of or transferring the franchise privileges or any part thereof of any company or organization, incorporated by or under the laws of this state, shall be acknowledged or approved as conveyances of lands in this state are authorized to be acknowledged or approved, and shall be recorded in the office of the secretary of state within *two* months after the execution thereof, at the proper cost of the parties thereto; and unless such contract or agreement is lodged with the secretary of state for record within *thirty* days from the date of the execution thereof, the same shall become invalid and of no effect, and copies of the said record, duly certified by the secretary of state, shall be received in evidence in any court of this state, and be as good, effectual and available in law as if the original contract or agreement was then and there produced."

retary of state for record within *thirty* days from the date of the execution thereof; and has never, in fact, been recorded by the said secretary of state, although more than *thirty* days have now elapsed from the date of the execution thereof, and that the said indenture of lease is therefore, by the prescriptions of the statute aforesaid, absolutely invalid and of no effect.

22. And your informant further shows unto your honor, that under the pretended authority of the said alleged indenture of lease, and of the tripartite agreement hereinbefore set forth, the said the *Philadelphia and Reading Railroad Company*, which is a foreign corporation created by the state of *Pennsylvania*, has actually entered into the possession of, and is in fact now in possession of all the railroads, branches, etc., of the *Central Railroad Company of New Jersey* specifically set forth in the said pretended indenture of lease, and has entered upon, and is now actually in the enjoyment and exercise of, and now actually possesses all the property, railroads and corporate powers, privileges and franchises of the said the *Central Railroad Company of New Jersey* and is operating the same; and that the said the *Central Railroad Company of New Jersey* has no actual possession of any of its corporate property, franchises, powers and privileges, excepting that of the franchise to be a corporation, and that the *Central Railroad Company* has fully ceased to exercise its corporate powers, privileges and franchises, and to manage and operate any of the said railroads and branches, etc., specifically set forth in the said alleged indenture of lease, or to perform or discharge any of the public duties which, under and by force of the said charter and the supplements hereto, it owes to the state of *New Jersey*, and to the inhabitants thereof, and to the public, but has wholly surrendered the same to the *Philadelphia and Reading Railroad Company* in the execution of the intent and agreement hereinbefore stated, which was entered into and contrived between the three corporations aforesaid as hereinbefore stated, and to effectuate which the said pretended lease and the said tripartite agreement and other instruments to your informant unknown, were conceived and executed; and the said the *Philadelphia and Reading Railroad Company* is now engaged in the practical execution of the said scheme and contrivance agreed upon between the three corporations for the purpose of carrying into effect a monopoly of the anthracite coal business in the state of *New Jersey*, and with the intent to artificially increase the price of coal as hereinbefore stated to your honor.

23. And your informant in fact shows unto your honor, that the said the *Philadelphia and Reading Railroad Company*, with the intent and for the purpose of carrying into effect the said agreement for a monopoly of the said anthracite coal trade, and of artificially and arbitrarily increasing the profits to be derived from the said business in the said state, to the oppression of the inhabitants thereof, has actually increased the prices of anthracite coal, and is now selling anthracite coal of various classes at greatly increased rates per ton beyond the prices which were exacted for the same class and quality of anthracite coal at and before the entering into the said scheme for a monopoly, and the execution and delivery of the said alleged lease,

and the said tripartite articles of agreement, to wit: (*Here were set out facts showing the increased selling price of coal.*)

And your informant further shows unto your honor, that the period of the year between the *twenty-third* day of *March*, 1892, and the *second* day of *May*, 1892, is a period in which in the natural course of production and consumption the wholesale price of coal ordinarily is materially reduced, but during the period aforesaid it has been arbitrarily increased by means of the combination aforesaid, and the instruments aforesaid, an average of *fourteen* cents per ton.

And your informant shows unto your honor, that the object and purpose in making the lease of the *Central Railroad* to the *Port Reading Railroad* was to restore the price of coal to the high figures which existed before the competition between the various coal roads had affected the market. The manifest purpose was to prevent natural and healthy competition between the various coal roads and coal companies, which benefits the public and regulates the market. On page eight of the report of the president and managers to the stockholders of the *Philadelphia and Reading Railroad Company* (a copy of which report is attached to this information) the president and managers say: (*quotation concerning company's coal traffic.*)

And your informant shows unto your honor, that since the *Reading Railroad* system has been operating the *Central Railroad of New Jersey* and its branches, with the other coal roads and coal companies which belong to said combination, the price of coal has increased from *five* to *twenty-five* cents per ton to the wholesale dealers, varying with the different grades, and it is universally believed and stated in the public journals that the price is to be again advanced in a short time, and the retail dealers will then be obliged to make a large advance to the consumers, so that the prices will not only reach the maximum before the large production and competing transportation reduced the price in 1890 and 1891, but, the control being in the power of the combination, effected by the lease of the *Central* to the *Port Reading*, it will have no limit but the necessities of the various coal and transporting companies who are directly or indirectly interested in the combination.

And your informant avers that the use to which the said combination has been put, by the aforesaid corporate parties thereto, has been to arbitrarily impose upon the inhabitants of the state of *New Jersey* an arbitrary increase of price in the article of anthracite coal, which is a necessary of life, an exaction of a very great amount, and amounting in the aggregate to at least *two hundred and eighty thousand* dollars per annum; and your informant in fact avers that that sum of money will be exacted from the people of the state of *New Jersey* at the mere will of the said corporate defendants, acting through the *Philadelphia and Reading Railroad Company.*

And your informant further informs your honor, that if the said corporate defendants be permitted still further to prosecute their design, the price of anthracite coal may be and will be increased by them to a much greater extent, and that there will be no limit to the further exaction of the said corporate defendants, in respect to the

price of anthracite coal, except that which may be fixed by the mere forbearance of the said corporate defendants.

And your informant further informs your honor, that he is informed and believes that various other instruments have been executed and delivered between the said corporate parties thereto, or between the said corporate parties thereto and other persons to your informant unknown, in effectuating and carrying out their aforesaid combination, and investing the possession of the corporate powers, franchises, privileges and property, and the use and exercise thereof of the *Central Railroad Company of New Jersey*, in the *Philadelphia and Reading Railroad Company*, which are not of record or within the state of *New Jersey*, and not accessible to your informant, but are concealed from him and from the knowledge of the state of *New Jersey*, and he prays that the parties defendant hereto may answer this averment particularly, and may set forth and append to their answer a copy of all and every instrument or contract, lease or otherwise, which has been executed and delivered between the said corporate defendants or between them or other persons whereby or whereunder the said the *Philadelphia and Reading Railroad Company* claims to have authority to possess and manage, directly or indirectly, the corporate franchises, powers and privileges, railroad and property of the *Central Railroad Company of New Jersey*.

24. And your informant further shows unto your honor, that by an act of the legislature of the state of *New Jersey*, approved May 2, 1885, and entitled "An Act respecting the lease of railroads," it was enacted that (*statement of enactments*).[1]

25. And your informant informs your honor, that the aforesaid indenture of lease, purporting to have been made and executed by the *Central Railroad Company of New Jersey* to the *Port Reading Railroad Company*, was contrived and agreed upon between the *Central*

1. **The enactment referred to** in the text was to the effect "that no company * * * should have power to lease its road, or franchise, or any part thereof, to any foreign corporation, or to any resident of any other state, or to unite, consolidate or merge its stock, property, franchise or road, or any part thereof, with those of any foreign corporation or resident of any other state until the consent of the legislature of this state should have been first obtained thereto; and that if any corporation aforesaid should desire to execute such lease or effect such union, consolidation or merger, it should submit a draft of the proposed lease, or of the detailed scheme of union, consolidation or merger, as the case might be, to the legislature of this state for its consideration, and no such lease, union, consolidation or merger should be of any effect whatever until the same should have been approved by an act of the legislature, passed for that purpose, nor until the corporation or corporations, person or persons, parties to such proposed lease, union, consolidation or merger, should first, and as a condition precedent to the same, file in the office of the secretary of state an agreement, to be approved by the governor and attorney-general, surrendering to the state all rights of exemption from taxation, and all privileges and advantages arising from any alleged contract establishing any special mode of taxation in respect to said parties, and agreeing further that such lease, union, consolidation or merger should not in any wise affect or impair the right of the state to take the property of such parties thereto under any existing law of the state, and that any law affecting such parties should be subject to alteration or repeal by the legislature."

Railroad Company of New Jersey, the *Port Reading Railroad Company* and the *Philadelphia and Reading Railroad Company*, as a mere cover and nominal compliance with the laws of the state of *New Jersey*, but with the intent and purpose of evading and committing a fraud upon the aforesaid act of May 2, 1885, and to transmit to the *Philadelphia and Reading Railroad Company* the corporate privileges and franchises of the *Central Railroad of New Jersey*, and of entrusting the custody and enjoyment thereof and the management and operation of its property and franchises to the same, without first obtaining the assent of the legislature of *New Jersey* to such transfer, as required by the aforesaid act of May 2, 1885; that the *Port Reading* was then in fact owned and controlled by the stockholders, or some of them, of the *Philadelphia and Reading Railroad Company*; that the original stock of the *Port Reading Railroad Company*, subscribed under its articles of incorporation, was subscribed wholly by officers, directors, agents or stockholders of the *Philadelphia and Reading Railroad Company*, and that such subscribers took their said shares of capital stock and hold the same as trustees for the *Philadelphia ana Reading Railroad Company*, and that the beneficial use of said capital stock is equitably vested in the said the *Philadelphia and Reading Railroad Company*.

26. And your informant further informs your honor, that the said the *Port Reading Railroad Company*, so far as the same has been constructed, has been in fact constructed with moneys furnished by the *Philadelphia and Reading Railroad Company*, directly or indirectly; that *Albert Foster*, *James M. Landis*, *W. H. Blood*, *F. W. Stone* and *Charles H. Quarles*, each and every one of whom was and is an officer or agent of the *Philadelphia and Reading Railroad Company*, organized themselves into a company under the provisions of the "Act concerning corporations of the State of New Jersey," approved April 7, 1875, and the supplement and amendments thereto, under the name of the *Port Reading Construction Company*, with an authorized capital stock of $*100,000*, on or about the *third* day of *November*, 1890, and that the actual capital stock subscribed for and paid in of the said authorized capital stock was subscribed and paid as follows: (*Statement of subscriptions*); that by the return of the said *Port Reading Construction Company*, made to the department of the state board of assessors of *New Jersey*, for the year 1892, made pursuant to the provisions of an act entitled "An Act to provide for the imposition of state taxes on certain corporations, and for the collection thereof," approved April 18, 1884, under the hand of *Albert Foster*, president of the said the *Port Reading Railroad Company*, it was therein and thereby certified that (*statement of facts certified*),[1] a copy of which

1. **The return referred to** in the text certified that "The amount of the authorized capital stock of the said *Port Reading Construction Company* was *one hundred thousand* dollars, divided into *two thousand* shares, of which *forty* shares were fully paid, and that none of said shares were partially paid, and that the whole amount of capital stock issued was *two thousand* dollars, and that the business address of said company was *227 South Fourth* street, *Philadelphia*, *Pa.*, which is the address, and which is the office, of the *Philadelphia and Reading Railroad Company*; and it is further certified that the address of *Albert Foster*, the said president, is also at *227 South Fourth* street, *Philadelphia*,

return is hereto annexed, to which your informant refers; and it further appears by the statement of the said *Port Reading Railroad Company*, filed in the department of state of said state of *New Jersey*, as required by an act of the legislature approved March 8, 1877, and which statement was filed on the *fifth* day of *May*, 1892, a copy of which statement is hereto annexed, to which your informant refers, which certifies and states that (*statement of facts certified*).[1]

27. And your informant further informs your honor, that he is informed and believes that certain capital stock, and all of the capital stock of the said *Port Reading Railroad Company* was issued to and nominally became the property of the said *Port Reading Construction Company*, except the shares subscribed to and paid for by the original incorporators, and that all of the said shares so issued to the *Port Reading Construction Company* are held by the said corporation as trustee for the *Philadelphia and Reading Railroad Company*, its officers and agents, or some of them, and that all moneys that have been paid to the *Port Reading Construction Company*, on account of the work of constructing the said *Port Reading* railroad, have been paid and disbursed directly or indirectly out of the funds of the *Philadelphia and Reading Railroad Company*, and that at the time the said pretended lease was executed and delivered by the *Central Railroad Company of New Jersey* to the *Port Reading Railroad Company*, the said *Central Railroad Company* and its officers and directors had full notice and knowledge of the fact that the *Port Reading Railroad Company* was in reality the property of the *Philadelphia and Reading Railroad Company*, and that the pretended organization and existence of the said *Port Reading Railroad Company* was a mere contrivance by which, under cover of the name of the *Port Reading Railroad Company*, the *Philadelphia and Reading Railroad Company* was to build, own and control the said corporation and the railroad being constructed thereunder; and was the equitable owner and was furnishing all the funds necessary for the organization, construction, and management of the affairs of the said *Port Reading Railroad Company*, and that it was because of such knowledge, and because of the knowledge that the said *Port Reading Railroad Company* was without means and without pecuniary responsibility, that the *Central Railroad Company of New Jersey* absolutely refused to execute the said indenture of lease, or to deliver the same, until the *Philadelphia and Reading Railroad Company*, which it well knew to be the party interested in and under the said lease as lessee, had first executed the contract or guarantee hereinbefore set forth, and that it was

which is the office of the *Philadelphia and Reading Railroad Company*."

1. **The statement referred to** in the text certified that "the officers of the said the *Port Reading Construction Company* are, president, *Albert Foster*; secretary, *James M. Landis*; treasurer, *William A. Church*, each and all of whom are officers and agents of the *Philadelphia and Reading Railroad Company*, and that the principal office of the company is at *Kaighn's Point Ferry House* in *Camden*, which said ferry house is occupied and controlled by the *Philadelphia and Reading Railroad Company*, and that the principal office of said *Port Reading Construction Company* is at No. *227 South Fourth* street, *Philadelphia*, which is also the office of, and the building is owned and controlled by, the *Philadelphia and Reading Railroad Company*, as aforesaid."

never intended by either the *Central Railroad of New Jersey*, or the *Port Reading Railroad Company*, or the *Philadelphia and Reading Railroad Company*, that the actual custody, enjoyment and management of the corporate franchises, powers, privileges and property of the *Central Railroad Company of New Jersey*, purporting to be demised under the terms of the said lease, should be enjoyed, conducted and managed by the said the *Port Reading Railroad Company*, but that by force of the said contract or guarantee and tripartite agreement executed by the said three corporations, as hereinbefore set forth, the actual control, enjoyment and management of the corporate franchises, privileges, powers and property of the *Central Railroad Company* demised in and by the said lease should be enjoyed by and conducted and managed by the *Philadelphia and Reading Railroad Company*; and it was intended by all the three corporate bodies aforesaid to effect this transfer and the enjoyment and management of the corporate franchise, powers, privileges and property of the *Central Railroad Company* into the hands of the *Philadelphia and Reading Railroad Company*, for the purpose of evading and committing a fraud upon the aforesaid act respecting the leasing of railroads, approved May 2, 1885, and to avoid the necessity of securing the sanction of the legislature of the state of *New Jersey* to the leasing of the said corporate powers, privileges, franchises and property of the *Central Railroad Company of New Jersey* to the *Philadelphia and Reading Railroad Company*, which is a foreign corporation.

28. And your informant shows, that he is informed and believes that the said the *Philadelphia and Reading Railroad Company* immediately took the possession of the said demised premises and now holds the same, and is now conducting and operating the same as a part of what it styles the *Reading* system, and it is now receiving unto its own treasury, directly or indirectly, all the tolls for freight and passengers which are paid under the provisions of the aforesaid charter and the supplements thereto of the *Central Railroad of New Jersey*, and that the said the *Philadelphia and Reading Railroad Company* has undertaken to and does disburse out of its own treasury, directly or indirectly, all the rents reserved and moneys coming to be paid to the *Central Railroad of New Jersey* in and by the terms of the aforesaid lease, and that the said the *Port Reading Railroad Company* in fact takes no part in the performance of the covenants on its part in said lease contained, except that its corporate name and title are used therein, and that all the covenants in said lease contained are being performed wholly by the *Philadelphia and Reading Railroad Company*, if performed at all.

29. And your informant further informs your honor, that the *Central Railroad of New Jersey* and the *Port Reading Railroad Company* give out and pretend that the first named company was authorized to execute and deliver the aforesaid indenture of lease demising its corporate franchises, powers, privileges and property to the latter corporation by force of the provisions of an act entitled "An Act to amend an act entitled 'An Act to authorize the formation of railroad corporations and to regulate the same,' approved April 2, 1873,"

which act was approved March 11, 1880. And your informant informs your honor, that the said original act of April 2, 1873, was and is an act commonly called the general railroad law, and exclusively relates to and concerns the organization and operation of railroad corporations authorized thereby to be organized, and concerning the acquisition of property by eminent domain and otherwise, and the management and method of management of the affairs of corporations organized pursuant to the provisions of said general act, and has no reference whatever to, nor was it intended by the legislature of *New Jersey* to operate upon, or to be effectual by way of amendments, or otherwise, to alter, increase or change the powers of railway corporations theretofore created by special charters granted by the legislature of this state; and that the seventeenth section of said original act did confer certain powers of leasing, merger and consolidation upon railroad corporations incorporated under the provisions of said act as between each other, but that said section did not in anywise confer any additional powers upon or impose any restrictions whatever upon or in anywise concern railroad corporations incorporated under the authority of special acts or charters granted by the legislature of *New Jersey*; and your informant in fact shows unto your honor, that under the title as aforesaid of a supplement to the original general railroad law, section seventeen was enacted and substituted in and by said supplement, which purports on the face thereof to confer upon any corporations incorporated under any of the laws of this state at any time during the continuance of its charter the power to lease its road or any part thereof to any corporation or corporations of this or any other state, or to do both, and such other company or companies were thereby authorized to take such lease or to unite, consolidate as well as merge its stock, property, franchises and roads with said company, or to do both, and after such lease or consolidation the company or companies so acquiring said stock, property, franchises and road might use and operate such road and their own road, or all or any of them, and transport freight and passengers over the same, and take compensation therefor according to the provisions and restrictions contained in said general railroad law, notwithstanding any special privilege theretofore granted, or thereafter to be granted, to any other corporation for the transportation of freight and passengers between any point on the lines of said road or any other point within or without this state, provided that nothing in said supplement contained should authorize any railroad company, incorporated under a special act of the legislature, to charge for transportation of freight or passengers over the roads constructed under said special act, more than they might be authorized to charge by provisions of their special acts of incorporation.

And your informant in fact shows unto your honor, that the said act entitled "An Act to amend an act entitled 'An Act to authorize the formation of railroad corporations and to regulate the same,'" approved March 11, 1880, is unconstitutional and void, in that it is in direct violation of article IV, section 7, subdivision 4, of the Constitution of the State of New Jersey, which constitution ordains and

enacts in and by said subdivision as follows (*setting out enactment*).[1]

And your informant informs your honor, that the said supplement to or amendment of the general railroad law, which supplement was approved March 11, 1880, purports by its title to embrace but one single object, to wit, the amendment of the provisions of the act of April 2, 1873, for the formation of railroad corporations formed under and regulated by the said act of April 2, 1873; and that the said supplement or amendment can have no legal or valid operation to alter or amend the charter of any railroad corporation, or to increase or restrict its corporate powers, except only railroad corporations formed under and pursuant to and regulated by the provisions of said general railroad law, whereas in and by the body of said act an object is declared and embraced which is not expressed in the title thereof, and has no proper relation whatever to the said general railroad law and the corporations authorized to be formed and regulated thereby, but has relation only to corporations formed and organized under and pursuant to the special charters granted by the legislature of *New Jersey* to such corporations respectively, in that it purports to authorize and empower corporations formed, organized and regulated under and by virtue of the provisions of said special charters, and to grant to such corporations vastly increased powers in the alienation, disposition and regulation of their corporate property and franchises, powers and privileges, without disclosing or expressing in anywise in the title of said last mentioned act of March 11, 1880, any intent or purpose so to do, and without embracing such object in the title of said act.

And your informant further informs your honor, that the purpose and effect of said amendatory act of March 11, 1880, was and is, after such leasing or consolidation should have been effected. under and pursuant to the powers thereto granted under and by said amendatory act of March 11, 1880, to (*enumeration of powers granted*),[2] and that by any such lease, merger or consolidation the special charters of any corporation so leased, merged or consolidated would be *pro tanto* absolutely repealed, and that such object so expressed and indicated in the said amendatory act had no proper relation to the said general railroad act, but is an object wholly different and having no relation to the objects of the said general railroad law, and that such object is not any object directly or indirectly expressed in the title of said amendatory act of March 11, 1880.

1. **The constitutional enactment referred to** in the text is as follows: "To avoid improper influences which may result from intermixing in one and the same act such things that have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title."

2. **The powers granted under the amendatory act** referred to in the text were "to compel the lessee corporation, or the merged and consolidated corporation, after such lease, merger or consolidation, to exercise only the powers and privileges and franchises conferred by the said general railroad law, and to operate their respective roads in conformity thereto, and to conduct the transportation of freight and passengers and take compensation therefor, according to the provisions and restrictions contained in said general law, and to repeal and vacate every special privilege, power and franchise contained in the charter of such leased or consolidated road or corporation, and to vest in such leased or consolidated or merged road or corporation from thenceforth only the corporate powers, privileges and franchises granted and contained in the said general railroad law."

And your informant shows unto your honor, that if the said act of March 11, 1880, is to be construed in conformity to the aforesaid constitution of the state of *New Jersey*, it can only be construed to be a constitutional act by construing the words (*statement of construction*),[1] and that to attempt to construe it otherwise would render the said act of March 11, 1880, violative of the aforesaid provision of the constitution of the state of *New Jersey*.

30. And your informant further informs your honor that the said the *Central Railroad Company of New Jersey* and the *Port Reading Railroad Company* also give out and pretend that by force of and pursuant to the powers granted to the said the *Central Railroad of New Jersey* in and by the third section of an act (*title, date and substance of act*),[2] to which said section of said supplement your informant prays leave to refer; but your informant informs your honor, that the said section does not purport to and cannot be construed to empower the *Central Railroad Company of New Jersey* to demise or let or otherwise alien in fee or for any term of years its corporate powers, privileges, franchises and property to any other railroad company, and that the true construction of the said act is to authorize the *Central Railroad Company* to acquire the corporate powers, privileges and franchises, and to operate other railroad corporations located in the state of *New Jersey* which connect with or intersect the road of the said *Central Railroad Company of New Jersey*, and that such power to acquire by lease, purchase of stock or consolidation is expressly limited to the leasing, purchasing or consolidation of or with the railroad so connecting with or intersecting in the state of *New Jersey* the road of the *Central Railroad Company of New Jersey*.

31. And your informant in fact informs your honor, that the rail-

1. The construction referred to in the text as necessary to make the act constitutional was by construing the words "'and it shall be lawful for any corporation, incorporated under this act or under any of the laws of this state, at any time during the continuance of its charter, to lease its road, or any part thereof, to any other corporations of this state, or to unite or consolidate,' etc., to refer exclusively to corporations, whether acting as lessor or lessee in the execution of this power to lease, which have been incorporated either under the general railroad law or some other general law of the state of *New Jersey*."

2. The act referred to in the text was entitled (*title of act*), and enacted: "That it shall be lawful for the said company to purchase or lease or operate any railroad which may be connected with or intersect their road, or to guarantee the bonds of such company, or to consolidate the stock of such company with their own, on terms to be mutually agreed upon, provided such purchase or consolidation shall not be made without the assent of three-fourths in interest of the stockholders, and provided also, if any stockholder or stockholders shall refuse his or their assent, or if by reason of absence or legal inability such assent cannot be obtained, application may be made by said stockholder or stockholders within three months from the time that the purchase or consolidation is to take effect, to one of the justices of the supreme court of this state for the appointment of three disinterested, impartial persons, well acquainted with the value of railroad property, as commissioners, to appraise the value of the shares held by said stockholder or stockholders, provided the appraisement shall, in no case, be less than the par value thereof; whereupon, such proceedings shall be had as are provided under section seven of the act of incorporation, for the appraisement and taking of lands, so far as the same is applicable."

roads of the *Port Reading Railroad Company* and the *Central Railroad Company of New Jersey*, as authorized by law, do not in anywise connect with or intersect the one with the other, but that their routes are wholly separated and unconnected, and that (*description of routes*), and that therefore the powers granted by the third section of the aforesaid act cannot operate upon or grant powers to the said two railroad corporations, and that the said indenture of lease is wholly without authority derived from the said third section of the said amendatory act.

32. And your informant informs your honor, that the said *Port Reading Railroad Company* was authorized to file a route, and did file a route, in the office of the secretary of state of the state of *New Jersey*, at its beginning point connecting with the *Delaware and Bound Brook* railroad, and that the said road was intended by the organizer thereof, and has been in fact used, until the execution of the aforesaid pretended lease, in connection with the *Delaware and Bound Brook Railroad Company* and in opposition to and in competition with the said railroad of the *Central Railroad of New Jersey*, a certified copy of which route is hereto annexed and to which your informant prays leave to refer.

33. And your informant further informs your honor, that the facts that the *Port Reading* railroad was constructed by the *Philadelphia and Reading Railroad Company*, and that the corporation thereunder was formed and the stock subscribed and paid for by the *Philadelphia and Reading Railroad Company*, and that said road was intended to form and be used as a connecting road with the *Philadelphia and Reading Railroad Company* through its leased line, the *Delaware and Bound Brook* railroad, was admitted by the *Philadelphia and Reading Railroad Company*, and the officers thereof, in the annual report of the president and directors of said road, presented by them to the annual meeting of the stockholders of said corporation, in 1890, which report is an official report presented to the stockholders at said meeting for the purpose of informing them of the actual situation of the railroads of the said *Philadelphia and Reading Railroad Company*, and of the intended extension of the same for the conduct of the business of the said corporation; in which said report the said president and directors informed the stockholders of the said corporation that (*substance of report*).[1]

And your informant shows that the road so announced by the said managers to the said stockholders, as having been surveyed, and to be rapidly pushed forward to completion, for the purpose of connecting with the *Philadelphia and Reading* system, and of transporting thereon the coal of said company for distribution in the *New York* market, so economically and advantageously, was the railroad of the *Port Reading Railroad Company*, and that the *Port Reading Railroad Company* was formed and organized by the *Philadelphia and Reading Railroad Company*, through the instrumentality of various of its officers, directors and employees, for the purpose of

1. **The report of the president** and directors referred to in the text was in relation to the promotion and extension of a new line of road to provide additional facilities for the distribution of anthracite coal at certain points.

connecting with the *Delaware and Bound Brook* railroad and running thence to the waters of the *Arthur Kill*, in competition with the railroad of the *Central Railroad of New Jersey*, and for the purpose of transportation over the same, by means of the connection aforesaid, the product of the mines of the *Philadelphia and Reading Railroad Company*, owned and controlled through the *Reading Coal and Iron Company*, and for the transportation of other coals and freight from the various parts of the system of the said the *Philadelphia and Reading Railroad Company*, from *Bound Brook* to the waters of the *Arthur Kill*.

34. And your informant further informs your honor, that *A. A. McLeod*, who at the time was the president, and still is the president of the *Philadelphia and Reading Railroad Company*, and who appears on the articles of association of the *Port Reading Railroad Company*, to which reference has been heretofore made, and a copy of which is hereto annexed, to have been one of the associates who formed the association of the *Port Reading Railroad Company*, and subscribed to *three hundred and eighty-eight* shares out of the *four hundred* shares subscribed in the formation of said corporation, and who, as appears by the certified copy of the official report of the *Port Reading Railroad Company* hereto annexed and referred to, was elected on the *fourth* day of *May*, 1891, president of the *Port Reading Railroad Company*, and was at the time of the execution and delivery of the alleged indenture of lease aforesaid the president both of the *Philadelphia and Reading Railroad Company* and of the *Port Reading Railroad Company*, and as such president of said companies purports to have executed and delivered the said alleged indenture of lease as appears by the copy thereof hereto annexed; and that at the time, and now, the same *A. A. McLeod* was also president of the *Philadelphia and Reading Coal and Iron Company*, which was then and is now entirely owned by the *Philadelphia and Reading Railroad Company*; and the said *McLeod* was then and is now president of the *Philadelphia and Kaighn's Point Ferry Company*, which is also controlled by lease, ownership of stock or otherwise by the said *Philadelphia and Reading Railroad Company*; that * (*averments as to other persons holding official positions in the several corporations*).[1]

35. And your informant further shows unto your honor, that the said alleged indenture of lease so purported to have been executed and delivered by the *Central Railroad Company of New Jersey* to the *Port Reading Railroad Company* was executed and delivered without any power or authority whatever contained in the charter of either of said corporations, or given and granted by any act of the legislature of the state of *New Jersey* to the said corporations or either of them; that the said alleged indenture of lease was not executed and

1. **The information continued after the *** in the text as follows: "*W. R. Taylor*, who at the time of the execution of said alleged indenture of lease was and still is the secretary of the *Port Reading Railroad Company*, was at the same time and is now the secretary of the *Philadelphia and Reading Railroad Company*; that *I. A. Sweigard*" (*continuing with similar averments as to other persons holding official positions at the same time in the several corporations*).

delivered by any lawful authority of the *Central Railroad of New Jersey*, and is not, in fact, the act of the said corporation, but that the said alleged indenture of lease was executed and delivered by the officers who purport to have executed the same without any authority whatever lawfully derived from the corporation, the *Central Railroad Company of New Jersey*, but that the same was executed and delivered by the said officers wholly by usurpation of powers, and that neither by the charter nor by the by-laws of the corporation was any power ever vested in the said officers to execute and deliver the said instrument, nor was power granted any officer whatever of the said corporation, and that in fact the stockholders of said corporation, who alone had power to exercise the leasing power which such corporation might possess at and before the execution of the said indenture of lease, had never in anywise authorized the execution and delivery thereof by the officer who assumed and usurped the power of execution and delivery of the same; and your informant informs your honor, that, as between the president and secretary of the said *Central Railroad of New Jersey* and the said corporation and the said *Port Reading Railroad Company*, the said indenture of lease is wholly without authority and voidable, and that as between the said corporations and officers and the state of *New Jersey* the said indenture of lease is wholly without authority and void, and that no authority was ever vested by the state of *New Jersey*, the grantor of the corporate powers, privileges and franchises of the *Central Railroad Company of New Jersey* to the said officers of the said *Central Railroad Company of New Jersey* to alienate in anywise by indenture of lease, mortgage or deed the said corporate privileges, powers and franchises, or to vest the said officers who actually executed said lease, or the board of directors of said corporation, with any powers as agents to effectuate a legal alienation of the said corporate powers, privileges, franchises and property, and that the attempted alienation thereof by means of said indenture of lease was wholly invalid and void for want of authority from the state of *New Jersey*, or otherwise, to execute and deliver the same.

36. Your informant further informs your honor, that the corporate and prerogative franchises, powers and privileges granted by the state of *New Jersey* to the *Central Railroad Company of New Jersey* in and by its charter hereinbefore set forth, and the acts supplementary and amendatory thereof, were granted expressly to the said corporation alone, and by the terms of said charter and acts supplementary and amendatory thereof, said corporate and prerogative powers, franchises and privileges were made assignable only for especial purposes set forth in the said charter, to wit, by way of mortgaging the same for the purpose of raising money for the completion of the construction of the railroad of the said *Central Railroad Company of New Jersey*, and that the same were not assignable for any other purpose whatsoever, but were special grants to the said the *Central Railroad Company of New Jersey* alone, and that the said *Central Railroad Company* alone could take and enjoy the same, and discharge the public duties arising on its part by force of said grant to the state of *New Jersey*, its inhabitants and the public; and fur-

ther, that even if by force of the provisions of the aforesaid act of March 11, 1880, the *Central Railroad Company of New Jersey* acquired additional power of alienating by lease the said corporate and prerogative powers, privileges and franchises, the only power of assigning the said franchises so granted to said corporation by said act is a special power to assign the same by one act in the exercise of such power to another corporation or corporations, and that the *Central Railroad Company of New Jersey* by such one act exhausted its powers, and was not clothed by said act or by any other act of the legislature of the state of *New Jersey* with the power of imparting to the term which it had demised in the execution of its power to the *Port Reading Railroad Company* that assignable quality, and had no power to demise or let its corporate and prerogative franchises, powers and privileges to the assigns of said corporation, or to clothe its said assignment with the power to reassign the same, but that the nonassignable quality of the original grant by the charter of the said corporation to said corporation remains unchanged, with power only to execute the one act of assigning, if any such power was granted by the act of 1880, or any other act of the legislature of the state of *New Jersey*.

But your informant informs your honor, that in and by the said alleged indenture of lease, executed by the *Central Railroad Company of New Jersey* to the *Port Reading Railroad Company*, the said *Central Railroad Company* undertook and assumed not only to assign, let and demise to the *Port Reading Railroad Company* its prerogative franchises and other franchises, powers and privileges to the *Port Reading* company, but to let and demise the same to the *Port Reading* company, its successors and assigns, and the said indenture of lease thus assumed to exercise a power of assignment with which the state of *New Jersey* had never clothed it, and that the utmost that the said indenture of lease could accomplish was to assign the franchises and privileges of the *Central Railroad Company* to the *Port Reading Railroad Company* alone, in whose hands said franchises and privileges, if well assigned, would remain and do remain absolutely unassignable, no power thereto having been granted by the state of *New Jersey*.

37. And your informant further informs your honor, that in and by the said alleged indenture of lease the said the *Central Railroad Company of New Jersey* affected to and usurped the power to let and demise to the *Port Reading Railroad Company* the corporate rights, powers and privileges of a large number of other railway corporations nominated in the said indenture of lease; and as to the said railway corporations so nominated in said indenture of lease, your informant informs your honor, that a large number of them are existing separate corporations, if not all of them, of which your informant has no accurate knowledge, nor the means of obtaining such knowledge, but your informant charges that the railways nominated in said lease, and known as (*names of railroads*), are separate and existing corporations, and that the *Central Railroad of New Jersey* has no other power in and over their respective properties or franchises than the power that it derives either as the lessee of the said several railroad corporations or as the owner of all or a majority of their respective

capital stock, and that if the said act of March 11, 1880, or any other act of the legislature of the state of *New Jersey*, does empower the said several railroad corporations, or any of them, to demise and let its corporate and prerogative powers, privileges and franchises, such power to demise and let exists in and is conferred upon the said several corporations alone, and is a special power, and if they have exercised the same by demising and letting their franchises, powers and privileges to the *Central Railroad of New Jersey*, that by so demising and letting the same their power to demise and let is exhausted, and that such power does not extend to or vest the *Central Railroad Company of New Jersey* with any power to further let and demise the same or any of their respective prerogative and corporate powers, privileges and properties, and that the said indenture of lease executed by the *Central Railroad Company of New Jersey* to the *Port Reading Railroad Company* is wholly *ultra vires* and a usurpation of corporate powers on the part of the *Central Railroad Company of New Jersey*, and that the said indenture of lease is wholly *ultra vires* and void as to the state of *New Jersey*, and should be by decree of this court set aside and for nothing holden.

To the end, therefore, that inasmuch as your informant is without adequate relief in the premises, save by the aid and interposition of this honorable court, said defendants and their confederates, when discovered, may full, true and distinct answer make under their respective common and corporate seals, on the oaths and affirmation of their respective presidents and secretaries to all and every the matters hereinbefore informed and averred as fully as if the same were now here again repeated, and they particularly interrogated thereto, paragraph by paragraph, and that the aforesaid alleged indenture of lease made, executed and delivered by the *Central Railroad Company of New Jersey* to the *Port Reading Railroad Company* may be decreed to be *ultra vires* and void and a usurpation of corporate franchises on the part of the said corporations respectively, and that the said lease may be decreed to be absolutely null and void, and be set aside and for nothing holden; and that the said tripartite agreement between the *Central Railroad Company of New Jersey*, the *Port Reading Railroad Company*, and the *Philadelphia and Reading Railroad Company* may be decreed to be *ultra vires*, fraudulent and void, and that the said indenture of lease and tripartite agreement, and all other agreements, leases or other instruments executed and delivered between the said parties under which the combination aforesaid was effected, and the possession, management and control of the said the *Central Railroad Company of New Jersey*, and its corporate powers, privileges and franchises have come into the possession, control and management of the *Philadelphia and Reading Railroad Company*, may be decreed to be *ultra vires*, fraudulent and void, and tending to create a monopoly of the anthracite coal trade and to stifle competition between the said corporations, and to arbitrarily increase the price of anthracite coal to the inhabitants of the state of *New Jersey*; and that the said the *Philadelphia and Reading Railroad Company*, and the *Port Reading Railroad Company*, may be decreed to surrender and return to the *Central Railroad*

Company of New Jersey the possession of all its railroads, corporate franchises, powers and privileges, and to cease forever hereafter from controlling or intermeddling with, in anywise, the possession, exercise, management and control of any of the said railroads and corporate property, franchises, powers and privileges of the *Central Railroad Company of New Jersey*, and that all the said instruments of leases, tripartite agreements, and other instruments whatever, under which, or by force of which, the *Philadelphia and Reading Railroad Company* assumes to exercise any such possession, management, control or enjoyment of the corporate property, power, privileges and franchises of the *Central Railroad Company of New Jersey* may be decreed to be *ultra vires*, fraudulent and void, and be set aside and for nothing holden, and that the said corporate defendants may be decreed forever hereafter to cease from all combinations arbitrarily increasing, or tending to increase, the price of coal to the inhabitants of the state of *New Jersey* under any instrument or pretenses whatever, either by arbitrarily lessening the production of coal or by arbitrarily fixing the price of anthracite coal or the transportation of the same, when produced, or in any other wise whatsoever; and that your informant may have such other and further relief in the premises as the nature of the case may require, and may be agreeable to equity and good conscience.

May it please your honor to grant unto your informant not only the state's writ of injunction issuing out of and under the seal of this honorable court, to be directed to the said the *Central Railroad Company of New Jersey*, the *Port Reading Railroad Company* and the *Philadelphia and Reading Railroad Company*, enjoining and restraining them, their officers and agents, directors and employees, and each of them, from doing or continuing any act whatever under and by virtue of the terms, covenants and conditions contained and set forth either in the said alleged indenture of lease or in the said tripartite agreement, or under and by virtue of any other instrument which may have been executed and delivered between the said companies, or between them and any other parties whereby under, or under color of which, the said the *Philadelphia and Reading Railroad Company* pretends, or the *Port Reading Railroad Company* pretends, to have acquired or be empowered to possess, manage or in anywise control the corporate franchises, powers, privileges or property of the *Central Railroad Company of New Jersey*, its officers and directors, and that the said *Central Railroad Company of New Jersey*, its directors, officers and agents, be directed to retake possession of, and exercise, manage and control all the corporate powers, privileges and franchises granted to the said corporation, and to manage and conduct the same under the sole authority of the said the *Central Railroad Company of New Jersey*; and also to enjoin and restrain the said defendant corporations, their officers and agents, from doing any and all acts, and making any arrangements or combinations, by contract or otherwise, having for their object, effect or result, either to limit or diminish the production of anthracite coal, or arbitrarily to increase the price thereof, or to prevent competition among them in the production, transportation and sale of anthracite coal, and from

doing any other act or thing, or making any arrangements or agreements to do the same in and about the business of mining, producing and transporting anthracite coal which shall tend to a monopoly in the same, or arbitrarily to increase the price of anthracite coal to the inhabitants of the state of *New Jersey*, and that the said defendants, their officers and agents, and each and every of them, in the meantime and until the further order of the court in the premises, desist and refrain from operating their railroads in the state of *New Jersey*, in such manner as to diminish competition in the trade in anthracite coal, and desist and refrain from making, continuing, or acting under any arrangements or combinations with each other, by contract or otherwise, having for their object, effect, or result, either the creation of an artificial scarcity of such coal, by limitation or diminution of the supply thereof, despite the natural laws of demand and supply, or having for their object, effect or result the arbitrary increase of the price of such coal, or the prevention of existing or future legitimate competition in the production, transportation, or sale of such coal, and from doing any other act or thing in and about the business of mining, producing and transporting anthracite coal which shall tend to a monopoly of the same, or arbitrarily to increase the price of such coal to the inhabitants of the state of *New Jersey*; but also the state's writ of subpœna, to be directed to the said the *Central Railroad Company of New Jersey*, the *Port Reading Railroad Company*, and the *Philadelphia and Reading Railroad Company*, commanding them and each of them at a certain day and under a certain penalty therein to be expressed, to be and appear before your honor in this honorable court, then and there to answer the premises, and to stand to and abide by and perform such decree therein as to your honor shall seem meet, etc.

John P. Stockton, Attorney-General.

(*Verification.*)[1]

(*b*) *Order to Show Cause why Injunction should not Issue.*

Form No. 6404.[2]

(*Title of cause as in Form No. 6402.*) } Order to Show Cause why Injunction should not Issue.

Upon reading the information of the attorney-general of the state of *New Jersey*, on the behalf of said state in this cause, and the exhibits and affidavits thereto annexed, and on motion of *John P. Stockton*, attorney-general, it is on this *thirty-first* day of *May*, 1892, ordered that the defendants, the *Central Railroad Company of New Jersey*, the *Port Reading Railroad Company*, and the *Philadelphia and Reading Railroad Company*, show cause before the chancellor, at *the state-house* in *Trenton*, on the *fifteenth* day of *June next*, at *ten* o'clock in the *fore*noon, or as soon thereafter as counsel can be heard, why an injunction should not issue according to the prayer of the information, among

1. Consult the title VERIFICATIONS.

2. **This order to show cause** why an injunction should not issue is copied from the record in the case of Stockton *v.* Central R. Co., 50 N. J. Eq. 52, 489. See *supra*, note 3, p. 568.

For forms of orders, generally, consult the title ORDERS, ETC.

other things in substance enjoining and restraining them, their officers and agents, directors and employees, and each of them, from doing or continuing any act whatever under and by virtue of the terms, covenants and conditions contained and set forth in the indenture of lease or in the said tripartite agreement of *February 12*, 1892, alleged in said information, or under and by virtue of any other instrument which may have been executed and delivered between the said companies, or between them and any other parties, whereby under, or under color of which, the said the *Philadelphia and Reading Railroad Company* pretends or the *Port Reading Railroad Company* pretends, to have acquired or be empowered to possess, manage or in anywise control the corporate franchises, powers, privileges or property of the *Central Railroad Company of New Jersey*, its officers and directors, and commanding the said *Central Railroad Company of New Jersey* to retake possession of and exercise, manage and control all the corporate powers, privileges and franchises granted to the said corporation, and to manage and conduct the same under the sole authority of the said the *Central Railroad Company of New Jersey*; and also enjoining and restraining the said defendant corporation, its officers and agents, from doing any and all acts, and making any arrangements or combinations, by contract or otherwise, having for their object, effect or result either to limit or diminish the production of anthracite coal, or arbitrarily to increase the price thereof, or to prevent competition among them in the production, transportation and sale of authracite coal, and from doing any other act or thing, or making any arrangements or agreements to do the same in and about the business of mining, producing and transporting anthracite coal, which shall tend to a monopoly of the same, or arbitrarily to increase the price of coal to the inhabitants of the state of *New Jersey*. And it is further ordered that the said defendants, their officers and agents, and each and every of them, in the meantime and until the further order of the court in the premises, desist and refrain from operating their railroads in the state of *New Jersey*, in such manner as to diminish competition in the trade in anthracite coal, and desist and refrain from making, continuing or acting under any arrangements or combinations with each other, by contract or otherwise, having for their object, effect or result either the creation of an artificial scarcity of such coal, by limitation or diminution of the supply thereof, despite the natural law of demand and supply, or having for their object, effect or result the arbitrary increase of the price of such coal, or the prevention of existing or future legitimate competition in the production, transportation or sale of such coal, and from doing any other act or thing in and about the business of mining, producing and transporting anthracite coal which shall tend to a monopoly of the same, or to arbitrarily increase the price of such coal to the inhabitants of the state of *New Jersey*.

And it is further ordered that a copy of the said information, exhibits and affidavits, together with a copy of this order, which copies need not be certified, be served on the said defendants, respectively, within *five* days from the date of this order.

Alex. T. McGill, C.

(*c*) *Order for Injunction.*

Form No. 6405.[1]

(*Title of cause as in Form No. 6402.*) } Order for Injunction.

Application having been made by *John P. Stockton*, attorney-general, on the *thirty-first* day of *May last past*, by information filed on that day, for injunction, according to the prayer of said information, and an order having been thereupon made that the said defendants, the *Central Railroad Company of New Jersey*, the *Port Reading Railroad Company*, and the *Philadelphia and Reading Railroad Company*, show cause before the chancellor on the *fifteenth* day of *June then next*, why the injunction asked for should not issue; and the hearing of the said order to show cause having been continued until the *nineteenth* day of *July last past*, at which time the matter therein involved came on to be heard upon the said information and the exhibits and affidavits annexed thereto, and the answers of the defendants and affidavits respectively annexed thereto, and upon limited proofs which had been taken under an order of this court in conformity with the provisions of rule *one hundred and twenty-one*; and said pleadings and proofs having been read and the said attorney-general and Mr. *Frederick W. Stevens*, of counsel with the informant, and *Messrs. Benjamin Williamson*, *Samuel Dickson* and *Robert W. DeForrest*, of counsel with the *Central Railroad of New Jersey*, and Messrs. *Thomas N. McCarter*, *John G. Johnson* and *John R. Emery*, of counsel with the *Philadelphia and Reading Railroad Company*, and the *Port Reading Railroad Company*, having been heard from thence from day to day, unto and including the *twenty-second* day of *July* aforesaid, and the chancellor having considered the said pleadings and the said affidavits and other proofs, and the arguments of counsel, orally and by briefs subsequently submitted, and being of opinion therefrom, that the indenture of lease and tripartite agreement set out and admitted in the pleadings bearing date *February 12*, 1892, were made without legal sanction and in contravention of law; and being of opinion also, that the effect of the said lease and tripartite agreement is to partially destroy competition in the production and sale of anthracite coal, a staple commodity of this state, and therefore is a corporate excess of power which tends to monopoly and the public injury, and for that reason that the further carrying into effect said lease and agreement and the terms thereof in other form, or in disguise of any kind, may be restrained at the suit of the informant.

It is thereupon, on this *twenty-ninth* day of *August*, in the year one thousand eight hundred and *ninety-two*, ordered that an injunction do issue against the said defendants, their officers and agents, and each of them, restraining and prohibiting them, and each of them, from further performing and carrying into effect the aforesaid lease and tripartite agreement; and further restraining and prohibiting the

1. **This order for injunction** is copied from the record in the case of Stockton *v.* Central R. Co., 50 N. J. Eq. 52, 489. See *supra*, note 3, p. 568.

For forms of orders, generally, consult the title ORDERS, ETC.

Port Reading Railroad Company and the *Philadelphia and Reading Railroad Company*, their officers and agents, from continuing to control the roads, property and franchises of the *Central Railroad Company of New Jersey*, and from in any wise further intermeddling therewith; and further restraining and prohibiting the *Central Railroad Company of New Jersey*, its officers and agents, from permitting the *Port Reading Railroad Company* or the *Philadelphia and Reading Railroad Company* to use, control or operate its road, property and franchises; and enjoining and commanding the said the *Central Railroad Company of New Jersey*, its officers and agents, to again resume control of all its property and franchises and the performance of all its corporate duties; and further restraining and prohibiting the defendants from conjointly operating their railroads in the state of *New Jersey* in such manner as to diminish competition in the trade in anthracite coal, and from making, continuing or acting under any arrangements or combinations with each other, by contract or otherwise, having for their object, effect or result, the control and operation of the *Central Railroad Company of New Jersey*, its roads, property or franchises by the other defendants, or either of them, and thereby effecting either the creation of an artificial scarcity of such coal, by limitation or diminution of the supply thereof, despite the natural law of demand and supply, or the arbitrary increase of the price of such coal, or the prevention of existing or future legitimate competition in the production, transportation or sale of such coal.

And it is further ordered that the attorney-general have leave to serve the said injunction upon the said corporations, and upon the officers and directors thereof, without this state, in case such officers and directors cannot be found within this state.

Alex. T. McGill, C.

(*d*) *Injunction.*

Form No. 6406.[1]

New Jersey, to wit: The state of *New Jersey* to *The Central Railroad Company of New Jersey*, *The Port Reading Railroad Company*, *The Philadelphia and Reading Railroad Company*, and their respective officers, directors, servants and agents, and each and every of them, Greeting:

Whereas, it hath been represented to us in our Court *of Chancery*, on the part of *John P. Stockton*, attorney-general of the state of *New Jersey*, on the behalf of said state, informant, that he has lately exhibited his information against you the said *The Central Railroad Company of New Jersey*, the said *The Port Reading Railroad Company*, and the said *The Philadelphia and Reading Railroad Company*, defendants, to be relieved touching the matters set forth in the said information.

1. **This injunction** is copied from the record in the case of Stockton *v.* Central R. Co., 50 N. J. Eq. 52, 489. See *supra*, note 3, p. 568.

For forms in injunction proceedings, generally, consult the title INJUNCTIONS.

We, therefore, in consideration of the premises, and of the particular matters set forth in the said information, do strictly enjoin and command you the said *The Central Railroad Company of New Jersey*, the said *The Port Reading Railroad Company*, the said *The Philadelphia and Reading Railroad Company*, your respective officers, servants and agents, and all and every the persons before mentioned, and each and every of you, under the penalty that may fall thereon, that you, and each and every of you, do absolutely desist and refrain from further performing and carrying into effect the lease made the *twelfth* day of *February*, A. D. 1892, by and between the *Central Railroad Company of New Jersey* and the *Port Reading Railroad Company*, and the guarantee or tripartite agreement bearing date the day and year last aforesaid, and made by and between the *Central Railroad Company of New Jersey*, the *Philadelphia and Reading Railroad Company* and the *Port Reading Railroad Company*; and that you the *Port Reading Railroad Company* and the *Philadelphia and Reading Railroad Company*, your and each of your officers and agents, do also absolutely desist and refrain from continuing to control the roads, property and franchises of the *Central Railroad Company of New Jersey*, and from in any wise further intermeddling therewith; and that you the *Central Railroad Company of New Jersey*, your officers, directors and agents, do absolutely desist and refrain from permitting the *Port Reading Railroad Company* or the *Philadelphia and Reading Railroad Company* to use, control or operate your road, property and franchises; and that you the said *The Central Railroad Company of New Jersey*, your officers, directors and agents, do again forthwith resume control of all your property and franchises, and the performance of all your corporate duties; and further that you the said *The Central Railroad Company of New Jersey*, the said *The Port Reading Railroad Company*, and the said *The Philadelphia and Reading Railroad Company*, your officers, directors, servants and agents, do absolutely desist and refrain from conjointly operating your respective railroads in the state of *New Jersey* in such manner as to diminish competition in the trade in anthracite coal, and from making, continuing or acting, under any arrangements or combinations with each other by contract or otherwise, having for its object, effect or result the control and operation of the *Central Railroad Company of New Jersey*, its roads, property or franchises by the other defendants, the *Port Reading Railroad Company*, or the *Philadelphia and Reading Railroad Company*, or either of them, and thereby affecting either the creation of an artificial scarcity of such coal or by a limitation or diminution of the supply thereof, despite the natural law of demand and supply, or the arbitrary increase of the price of such coal, or the prevention of existing or future legitimate competition in the production, transportation or sale of such coal, until our said court shall make other order to the contrary.

Witness: *Alexander T. McGill*, our chancellor, the *thirtieth* day of *August*, in the year of our Lord one thousand eight hundred and *ninety-two*.

Allan L. McDermott, Clerk.

(3) To Restrain Operation of Consolidated Competing Railroad.

Form No. 6407.[1]

In the *Supreme Judicial* Court.

Middlesex, ss.

Between

The Boston and Lowell Railroad Corporation, a corporation duly incorporated and existing under the laws of the Commonwealth of Massachusetts, plaintiff,

and

The Salem and Lowell Railroad Company, The Boston and Maine Railroad, and The Lowell and Lawrence Railroad Company, all being corporations duly incorporated and existing under the laws of the Commonwealth of Massachusetts, defendants.

Bill of Complaint.

I. By an act passed on the 5th of June, 1830 (Massachusetts Statutes, 1830, c. 4), a charter of incorporation was granted to the plaintiffs by

1. This bill of complaint is based upon facts set out in the case of Boston, etc., R. Corp. *v.* Salem, etc., R. Co., 2 Gray (Mass.) 1. To this bill each of the defendant corporations filed a general demurrer, which, upon consideration by the court, was overruled and a temporary injunction granted as prayed for, the court holding that by the consolidation of the defendant companies a competing road was established which was in violation of the contract in the plaintiff's charter that it was to be the only railroad between certain points for thirty years.

For formal parts of bills in equity, generally, consult the title Bills in Equity, vol. 3, p. 417; of complaints and petitions, consult the title Complaints, vol. 4. p. 1019.

Temporary Injunction to Restrain Operation of Consolidated Competing Road. — In Boston, etc., R. Corp. *v.* Salem, etc., R. Co., 2 Gray (Mass.) 1, upon the application therefor the court issued an injunction to continue in force while the suit was pending or until further order of the court, which injunction, omitting the formal parts, was as follows: "to enjoin and restrain the said defendant corporations, and each of them, and their several officers, agents and servants, and all persons in the employment of the said defendant corporations, or either of them, under the penalty of *thirty thousand* dollars, against carrying, transporting or conveying any persons, or property of any kind, by one continuous line of conveyance by railroad cars proceeding from *Lowell*, or from any part within *five* miles of the northern terminus of the *Boston and Lowell* railroad, and from thence to *Boston* in the county of *Suffolk*, or to *Charlestown*, *Cambridge* or *Somerville* in the county of *Middlesex*, or from said *Boston*, *Cambridge*, *Charlestown*, or *Somerville*, to said *Lowell*, or any point within *five* miles of the northern terminus of the *Boston and Lowell* railroad, by one continuous line of conveyance by railroad cars, between the said termini; and from doing any act or acts toward the effecting or accomplishing such transportation of persons or property, by connecting together, or using in connection certain sections of their respective railroads, as follows, namely: The section of the *Boston and Maine* railroad lying between *Boston* and its intersection with the *Salem and Lowell* railroad at *Wilmington*; that section of the *Salem and Lowell* railroad which lies between the last named point and the intersection of said *Salem and Lowell* railroad with

the legislature of this *commonwealth* (*which was set forth at length in the bill*), and by the *first* section of which *John F. Loring* and others named, their associates, successors and assigns, were made a body corporate, under the name of the *Boston and Lowell Railroad Corporation*, with power to sue and be sued, and have a common seal, and were vested with all the powers, privileges and immunities which were or should be necessary to carry into effect the purposes and objects of this act, as hereinafter set forth. And the said corporation were authorized and empowered to locate, construct and finally complete

the *Lowell and Lawrence* railroad in *Tewksbury*; and that section of the *Lowell and Lawrence* railroad between said last mentioned place of intersection and its termination in *Lowell*; or by any variation or alteration of said places of junction and intersection, or in any other mode using any sections of said several railroads in such manner as to form a continuous line of conveyance by railroad of persons or property between the said termini. And the said three defendant corporations, their officers, agents, servants, and all persons employed by them, are enjoined and prohibited from using or employing any of the means heretofore stated towards the formation, establishment or maintenance of any such continuous line of conveyance of persons or property, in any of the modes following, to wit:

1st. By any agreement or understanding between themselves, to the effect that either of said corporations shall have the use of the cars of either of the other of said corporations, on its own section of railroad, in such a manner as to form one continuous and uninterrupted transportation of persons or passengers over the said sections of said different railroads, or any two of them, without change of cars or loss of time, or either of them.

2d. Or by taking passengers at one of the said termini to be carried or transported to the other of said termini, without change of cars at the places where any one of the said sections of the said several railroads intersects with either of the other of the said sections; or in any other mode from engaging, procuring, employing and using any car or cars, at their common expense or otherwise, for the conveyance of persons or property, for running and passing upon or over the said sections of their respective railroads without change of cars, from either of said termini to the other.

3d. Or by receiving money at either of said termini, as fare or compensation for the passage of any person from one of the said termini to the other, or by selling a ticket for the entire passage, or by taking, at one and the same time and place, payment for said tickets on the several sections of the said respective railroads of the different corporations, or by taking payment in a car, on one section, for a passage on any other section or sections of the same line.

4th. Or by advertising any notice, in any newspaper, pamphlet, written or printed paper, card, circular letter, or by printing or posting up, or causing to be printed or posted up, any handbill, placard, or other like paper, giving notice that passengers or merchandise may be carried and transported by railroad through from one of the said termini to the other by one continuous line, or that a passage may be had from one of said termini to the other without change of cars and without stoppage or detention at the said several points of intersection.

5th. Or by painting, or in any way placing upon their cars or any or either of them, the words '*Boston and Lowell*' or '*Lowell and Boston*,' or by continuing the same or similar words on their said cars or any one of them, or in any other way giving information that a direct and uninterrupted passage by railroad may be had between said termini; or from entering into any other arrangement, or doing any other act, the intent and purpose of which may be to effect a continuous line of travel by railroad for passengers and merchandise in a direct and uninterrupted course between said termini; or from agreeing to use, or actually using, the sections or any sections, constituting parts of the lines of their respective railroads, in such manner as to form a continuous line of travel or transportation of persons or property from the one to the other of the said termini."

a railroad at or near the city of *Boston*, and thence to *Lowell* in the county of *Middlesex*, in such manner and form as they should deem to be most expedient; and for this purpose the said corporation were authorized to lay out their road, at least four rods wide through the whole length; and for the purpose of cuttings, embankments, and stone and gravel, may take as much more land as may be necessary for the proper construction and security of said road.

II. The plaintiffs further allege that said act of incorporation was duly accepted, and plaintiffs became a corporation, possessed of all the rights, powers and privileges conferred by said charter; that subsequently certain other acts, in addition to said first named act, were passed by the legislature (*copies of which were annexed to the bill*); that the same were duly accepted by the plaintiffs, with the exception of the *second* proviso of the Massachusetts Statutes (1836), chapter 146; and that thereby a contract, conformable to the terms of said charter, and of the acts thus accepted, was created between the *commonwealth* and the plaintiffs.

III. The plaintiffs further allege, that, confiding in said acts and the privileges therein granted to them, they proceeded at great cost and expense to construct and complete the said railroad, and had ever since maintained and employed the same for the transportation of persons and property, and had derived therefrom just and reasonable gains and profits; and in all respects conformed to the provisions and requirements of said acts, which by them were to be kept and performed; and were consequently entitled to enjoy the privileges and receive the tolls in said acts granted to them, and especially to enjoy the privileges granted in the *twelfth* section of their said charter, namely that no other railroad should, within *thirty* years from and after the granting of their said charter, be authorized to be made, leading from *Boston* to *Charlestown* or *Cambridge* to *Lowell*, or from either of said places to any place within *five* miles of the northern termination of their said road; and also to enjoy the right of conveying and transporting persons and property by railroad from *Boston* and *Charlestown* to *Lowell*, and from *Lowell* to *Boston* and *Charlestown*, without hindrance, competition or interruption from any other corporation or corporations, authorized to own a railroad between other places, by making use of their railroads, or portions of their lines of railroad, to establish a nearly parallel railroad communication from *Lowell* to *Boston* or *Charlestown*, and from *Boston* or *Charlestown* to *Lowell*, and with a terminus in *Lowell*, or within *five* miles of the terminus of the plaintiffs' road in *Lowell*.

IV. And the plaintiffs further allege, that by Massachusetts Statutes (1845), chapter 159, which was duly accepted by the *Boston and Maine Railroad* and the *Boston and Maine Railroad Extension Company*, said two corporations, previously established by the laws of this *commonwealth*, were united, and became one corporation, under the name of the *Boston and Maine Railroad*, and the owners and proprietors of the railroad known as the *Boston and Maine* railroad, constructed and leading from *Boston* into the state of *Maine* and running through the town of *Wilmington*, and having its southern terminus in *Boston*. That by Massachusetts Statutes (1846), chapter 157, certain persons

were made a corporation by the name of the *Lowell and Andover Railroad Company*, with powers to construct a railroad from *Lowell* to a point in or near *Andover*, and to enter with their road upon a part of the *Boston and Lowell* railroad in *Lowell*, and use the same; that said act was duly accepted and said road built and constructed by said corporation from *Lowell* to *Andover*; and that the terminus of said road in *Lowell* was constructed within *half* a mile of the northern termination of the plaintiffs' road; and that by Massachusetts Statutes (1848), chapter 14, which was accepted by said corporations, it was provided that it should take and be known by the name of the *Lowell and Lawrence Railroad Company*; that by Massachusetts Statutes (1848), chapter 223, certain persons were made a corporation by the name of the *Salem and Lowell Railroad Company*; that said act was duly accepted, and said corporation constructed their railroad from a point at or near *Salem* to a point on said *Lowell and Lawrence* railroad, in the town of *Tewksbury*, where they effected a junction of their said road with the *Lowell and Lawrence* railroad, and used the track of the *Lowell and Lawrence Railroad Company* to their terminus in *Lowell*, and in so doing constructed their railroad through the town of *Wilmington*, and there intersected the *Boston and Maine* railroad.

V. And the plaintiffs further allege that by means of the said junction of the road of the *Lowell and Lawrence Railroad Company* with the road of the *Salem and Lowell Railroad Company* at *Tewksbury*, and by the intersection of the said last named road with the road of the *Boston and Maine Railroad* at *Wilmington*, the rail and other material of a line of railroad communication, nearly parallel with the plaintiffs' road, was created between *Lowell* and *Boston*, through *Charlestown*, only about *one* mile and *six-tenths* of a mile longer than the plaintiffs' road, and at no point more than *three* miles and *one-third* of a mile distant therefrom, having one terminus in *Lowell* within *half* a mile of the northern terminus of the plaintiffs' road, and a station-house for passengers in *Charlestown*, and the southern terminus in *Boston* a *half* a mile nearer to the center of business in *Boston* than the southern terminus of the plaintiffs' road, by which line passengers and property could be conveyed and transported from *Lowell* to *Charlestown* or *Boston*, and from *Boston* or *Charlestown* to *Lowell*. But the plaintiffs well hoped that no such use of said road, or portions thereof, would be made or suffered by the defendant corporations, and that the plaintiffs would be permitted peaceably, without interruption, molestation or interference, to have and enjoy the profit, benefit and advantage secured and intended to be secured to them by their act of incorporation, and the acts in addition thereto, of transporting passengers and property from *Boston* to *Lowell*, and from *Charlestown* to *Lowell*, and from *Lowell* to *Boston*, and from *Lowell* to *Charlestown*, and free from the competition of any other railroad, authorized to be made by the *commonwealth*, extending from *Boston*, *Charlestown* or *Cambridge*, to any place within *five* miles of the northern terminus of the plaintiffs' road; and free from the competition of any other corporation or corporations, authorized by the legislature to run railroads between other places and to inter-

sect and to unite with each other, but making use of their roads or portions thereof, for establishing a railroad between *Boston* and *Lowell*, nearly parallel with the plaintiffs' road, and for transporting passengers from *Boston* and *Charlestown* to *Lowell*, and from *Lowell* to *Boston* and *Charlestown* on the railroad thus established.

VI. And the plaintiffs further allege that the defendants, combining, colluding and confederating together to deprive the plaintiffs of the reasonable gains and profits which they were entitled to receive from the transportation of passengers and property over their road, and to hinder them in the enjoyment of the rights and privileges to which they were entitled by virtue of their said contract with the *commonwealth*, and especially under the *twelfth* section of their charter, did enter into a certain mutual agreement, understanding or arrangement to convey, and cause to be conveyed, passengers and property over portions of their said roads, by means of said junctions and intersections, from *Boston* and *Charlestown* to the terminus of the *Lowell and Lawrence* railroad in *Lowell*, and from *Lowell* to *Boston* and *Charlestown*, and by causing cars, and trains of cars, to run over said portions of each of their said roads at such times that passengers could exchange out of the cars of the *Salem and Lowell Railroad Company* into the cars of the *Boston and Maine Railroad*, and from the cars of the last mentioned railroad company into the cars of the *Salem and Lowell Railroad Company*, at said intersection at *Wilmington*; and in pursuance of said agreement and understanding, did, on or about the *twenty-eighth* day of *June*, 1851, commence transporting, and had ever since continued to transport passengers and property over their said line of road as aforesaid, from *Boston* to *Charlestown* to *Lowell* and from *Lowell* to *Boston* and *Charlestown*, using therefor the road of the *Lowell and Lawrence Railroad Company* from its terminus in *Lowell* to the place of its junction with the road of the *Salem and Lowell Railroad Company* in *Tewksbury*, and thence using therefor the road of the last mentioned company to its intersection with the road of the *Boston and Maine Railroad* in *Wilmington*, and thence using the said road of the last mentioned corporation; and for the purpose of more effectually injuring and competing with the plaintiffs in the transportation of passengers between said places, the defendants had from time to time, since entering into their said agreement and confederacy, published, and caused to be published, and still continued to publish and advertise the said route between *Boston* and *Lowell*, so made and formed as aforesaid by portions of their said roads, as a railroad route between *Boston* and *Lowell*, by publishing notices thereof in newspapers printed in said cities of *Boston* and *Lowell*, and by posting up printed notifications thereof in public places in said cities and in divers of the station-houses on the roads of the defendant corporations; and had advertised and sold, and still continued to advertise and sell tickets for the transportation of passengers between said cities over said portions of their roads, and also season tickets and package tickets for the use of families and firms, and had employed and still did employ agents to divert and dissuade passengers from traveling between said cities upon and over the plaintiffs' road, and to induce them to travel over

the said roads of the defendant corporations; and by means of the premises had succeeded in deterring and preventing many persons from using the plaintiffs' road for the purpose of being transported from *Boston* and *Charlestown* to *Lowell*, and from *Lowell* to *Boston* and *Charlestown*, and in depriving the plaintiffs of the gain and profits which would have accrued to them from the transportation of such passengers between said cities over their said road; and that the defendant corporations, not content with the injury they had thus inflicted, and were still continuing to inflict upon the plaintiffs, had recently combined and mutually agreed, and now threatened and intended to transport and convey passengers and property between *Boston* and *Lowell*, and *Charlestown* and *Lowell*, over said portions of said roads, by means of cars, and trains of cars, to run entirely through without being changed, from the said terminus in one of said cities to the said terminus in the other, and without the necessity of the passengers being removed from one train of cars into another at *Wilmington*; all of which acts and doings and threatened acts and doings were and would be a nuisance to the rights and franchise of the plaintiffs, legally acquired as aforesaid under their said charter and acts in addition thereto.

VII. And the plaintiffs further allege that they duly protested against the acts heretofore enumerated which had already been done and which were threatened to be done by the said defendants, and made a demand upon the said defendants to desist therefrom, and to account to them, the said plaintiffs, for the gains and fares received for the transportation of passengers and the property as aforesaid, but that the defendants refused to desist as requested, or to render such account as demanded, and that said defendants are still doing and assert that they will continue to do the acts complained of, claiming the right of such transportation under their acts of incorporation, and under the Massachusetts Statutes (1851), chapter 196, and Massachusetts Statutes (1852), chapter 118. Whereas plaintiffs deny that said acts did or could legally confer upon the defendants any such power.

Plaintiffs pray:

1. That (*Here insert prayer for discovery*).[1]
2. That (*Here insert prayer for an accounting*).[2]
3. That (*Here insert prayer for specific relief by way of injunction*).[3]
4. That (*Here insert prayer for general relief*).[4]
5. That (*Here insert prayer for due process*).

Oliver Ellsworth, Solicitor for plaintiffs.

1. **Discovery.** — For proper prayer for discovery in a bill in equity consult the title DISCOVERY AND INSPECTION.

2. **Accounting.** — For proper prayer for an accounting consult the title ACCOUNTS AND ACCOUNTING.

3. **Injunction.** — For proper prayer for an injunction consult the title INJUNCTIONS.

4. **Prayer for relief in Massachusetts,** consult title BILLS IN EQUITY, vol. 3, note 2, p. 444.

b. For Mandamus.[1]

(1) To Compel Reconstruction of Highway.

Form No. 6408.[2]

To the Honorable the Judges of the Court *of Common Pleas* of *Venango* county, State of *Pennsylvania*.

The petition of *W. C. Tyler*, *William Thurston* and *Peter Winsted*, road commissioners[3] of *Cornplanter* township in said *Venango* county, and state of *Pennsylvania*, respectfully represents:

That in 1807 a public highway (*Here set out description of highway*) was laid out and opened in due and legal course. That in 1837 a company was incorporated to construct a turnpike over substantially the same route, but it continued to be maintained as a public highway until about 1862, when the *Franklin and Oil Creek Turnpike Company* was incorporated, took possession of the highway under its charter, and improved and maintained it as a toll-road until in 1865, when the *Atlantic and Great Western Railroad Company*, in the construction of its road-bed, so encroached upon the turnpike as to injure it materially. Thereupon the turnpike company abandoned the road, and it became and was once more maintained by the township as a public highway. In 1871, the franchises and papers of the said *Atlantic and Great Western Railroad Company* were sold, and the purchasers organized as a railroad company under the name of the *New York, Pennsylvania and Ohio Railroad Company*,[4] the defendant hereinabove complained of. That the principal office of the defendant company was at the city of *Cleveland* in the state of *Ohio*, but that its principal place of business in *Pennsylvania* was at *Meadville*, *Crawford* county, in this *commonwealth* of *Pennsylvania*, where an office was maintained and where *Elisha Derickson*, one of its directors, resided.[5]

1. **For forms connected with mandamus** proceedings, generally, consult the title Mandamus.

2. **The petition** for a mandamus in this case is based upon the facts as set out in Com. *v.* New York, etc., R. Co., 138 Pa. St. 59. In that case a rule was issued upon the New York, Pennsylvania and Ohio Railroad Company to show cause why a mandamus should not issue requiring the reconstruction of the public highway.

For formal parts of applications for mandamus, generally, consult the title Mandamus; of petitions, generally, consult the title Petitions.

3. **Road commissioners** of the proper township acting officially may, without the consent of the attorney-general, institute proceedings by mandamus to compel a railroad company to reconstruct a public highway injuriously occupied by it. Com. *v.* New York, etc., R. Co., 138 Pa. St. 58.

4. **The consolidated company becomes subject** to the duties and liabilities of the constituent company, to whose franchises, etc., it has succeeded by purchase. So held where the constituent company had originally injuriously occupied a certain public highway. Com. *v.* New York, etc., R. Co., 138 Pa. St. 58.

5. **The rule was served upon an agent.** This was held to be sufficient service, and it was also held that mandamus was properly directed to the consolidated company instead of the original wrong-doer. The alternative writ of mandamus in the name of the Commonwealth *ex rel.* W. C. Tyler, was awarded as prayed for, and the writ served on M. C. Flower, agent of said company, Franklin, Venango county, Pennsylvania, and "by leaving a true and attested copy of the same at the office of said company in *Oil City*, in said county, and with *A. N. Simmons*, at that time in charge of said office, for Mr. *D. W. Guernsy*, the agent of said company, and afterwards upon *D. V.*

The petitioners showing the premises and that they are without other adequate and specific remedy at law, therefore pray that an alternative writ of mandamus may be directed to the said *New York, Pennsylvania and Ohio Railroad Company*, requiring said company to reconstruct said public highway, generally known as the *Franklin and Oil City* road, between *Reno* and *Oil City*, in said *Cornplanter* township, and for such other and further relief as to the honorable judges may seem fit, and your petitioners will ever pray, etc.

W. C. Taylor.
William Thurston.
Peter Winsted.

(*Verification.*)[1]

(2) To Compel Running of Passenger Trains.

Form No. 6409.[2]

To the *Supreme* Court of the State of *Illinois*:

The petitioner, *Daniel Webster*, state's attorney in and for the county of *Hamilton* in the state of *Illinois*, in his official character, complaining against the *Louisville and Nashville Railroad Company*, a corporation duly and regularly organized and existing under and by virtue of the laws of the state of *Illinois*, shows to this honorable court the following facts, to wit:

On the *third* day of *November*, 1868, a majority of the electors of *Hamilton* county voted to subscribe *two hundred thousand* dollars to the capital stock of the *Shawneetown* branch of the *Illinois Central Railroad Company*. The line of road contemplated by the charter of that company extended from *Tonti*, on the *Chicago* branch of the *Illinois Central* railroad, to *Shawneetown*, the intermediate points being *Salem*, *Mt. Vernon* and *McLeansboro*. (2 Private Laws (1865), pp. 211–220.) The proposition to subscribe the *two hundred thousand* dollars above mentioned was voted for upon the express condition that *McLeansboro* was to be a point with a station on the road. In pursuance of a provision in the charter of the *St. Louis and Southeastern Railway Company*, approved March 10, 1869, the *County* Court of *Hamilton* county, on the *eleventh* day of *June*, 1869, subscribed to the capital stock of the latter company the *two hundred thousand* dollars which had been voted to the former company. The *St. Louis and*

Derickson, a director of said company, residing at *Meadville*, *Crawford* county, *Pennsylvania*." It was held that where the principal office of the corporation is without the state, a writ of alternative mandamus may issue from the county where its works are situated, and to be served on a director residing in an adjoining county. Com. *v.* New York, etc., R. Co., 138 Pa. St. 58.

1. Consult the title Verifications.

2. **This Petition** for mandamus is based upon the facts in People *v.* Louisville, etc., R. Co., 120 Ill. 53. The proceeding was commenced in the supreme court by the state's attorney of Hamilton county in his official character against the defendant railroad company, to compel it to stop its trains at what is known as the "old depot," in McLeansboro, the county seat of Hamilton county. A peremptory mandamus was awarded in conformity with the prayer of the petitioner.

For formal parts of applications for mandamus, generally, consult the title Mandamus; of petitions of this character, generally, consult the title Petitions.

Southeastern Railway Company, by the terms of its charter, was authorized to construct, maintain and operate a railway from a point on the *Mississippi* river opposite *St. Louis* to *Shawneetown*, on the *Ohio* river, by way of *Mt. Vernon*, *McLeansboro* and *Equality*.

On the *twenty-sixth* day of *March*, 1869, the legislature passed an act incorporating the *Evansville and Southern Illinois Railroad Company*, by the terms of which that company was authorized to construct and operate a railway from *McLeansboro*, *Hamilton* county, through the towns of *Enfield* and *Carmi*, to the state line, on the *Big Wabash* river. The charter of this company authorized the counties through which the road should run to make donations to it, upon such terms as might be agreed upon between it and the said counties. (3 Private Laws, p. 10.) The corporate authorities of *Hamilton* county, on the *seventh* day of *June*, 1870, in pursuance of the provisions of said act, and in conformity with an affirmative vote of a majority of the electors of the county, cast on the *second* day of *November*, 1869, entered into a contract with the *Evansville and Southern Illinois Railroad Company*, whereby the county agreed to donate to the company, upon the completion of the road and the running of trains thereon, the sum of *seventy-four thousand* dollars in interest bearing bonds of the county. This donation, by the terms of the contract, was made upon the following express condition: "That the said railroad company should erect and forever maintain a depot for passengers and freight at *McLeansboro*, within the corporate limits thereof, and not exceeding one-half mile from the court-house in said town, and that all passenger trains running upon said road, whether express or otherwise, should stop at said depot to receive and put off passengers, and that no discrimination should ever be made against said town of *McLeansboro*, or any person or persons shipping to or from said town, in favor of any other point, in the relative charges for carrying either freight or passengers thereto or therefrom." The same conditions were imposed by the vote of the people in favor of the donation. It was also stipulated in this contract, that the company might, without forfeiture of the contract, consolidate with other companies, on condition that the rights of the county in the respects stated should be fully protected.

On the *twenty-first* day of *February*, 1871, the said company was consolidated with the *St. Louis and Southeastern Railway Company*, under the name of the latter company. On the *twelfth* day of *May* following, the *County* Court entered an order of record, approving the consolidation of the two companies, upon the express stipulation and understanding, as set forth in said order, "that nothing therein contained should, in any wise, affect or invalidate any of the duties, obligations and promises to the county, made by any of said railroad companies prior to said consolidation," or by the new company since the consolidation. The roads of the two companies thus consolidated were built as contemplated by their respective charters, and the *two hundred thousand* dollars subscription was paid to the consolidated company in instalments, of *one hundred thousand* dollars each, on the *twenty-third* day of *October* and the *twenty-eighth* day of *November*, 1871, respectively. On the *first* day of *January*, 1872, the

county delivered to the consolidated company its bonds, amounting to *thirty-seven thousand* dollars, in full payment and satisfaction of the donation of *seventy-four thousand* dollars to the *Evansville and Southern Illinois Railroad Company*, the remaining *thirty-seven thousand* dollars having been already otherwise settled and discharged by the county, to the satisfaction of the company. The entire subscription and donation to the two companies were fully paid and discharged by the county. Both lines of the consolidated road were completed in 1872, and the old depot in question was located, as heretofore stated, within a quarter of a mile of the court-house, and otherwise in strict conformity with the conditions upon which the subscription and donation were made by the county to these companies. On the *first* day of *December*, 1869, prior to any of the foregoing transactions, except the subscription of *two hundred thousand* dollars, the *St. Louis and Southeastern Railway Company* issued its bonds to the amount of *two million two hundred and fifty thousand* dollars, secured by a deed of trust to *George Opdyke* and *Philo C. Calhoun*, upon the company's road and its appurtenances, together with all its rights and franchises. After its consolidation with the *Evansville and Southern Illinois Railroad Company*, to wit, on the *first* day of *March*, 1871, the consolidated company issued another series of bonds, amounting to *one million* dollars, secured by a second trust deed to the same trustees, upon the road, its appurtenances, etc.

On the *twenty-eighth* day of *February*, 1871, the company consolidated with the *Evansville, Carmi and Paducah Railroad Company*, whose line of road extended from *Evansville*, and formed a junction with the *St. Louis and Southeastern* railway at its eastern terminus on the said *Wabash* river. Consolidations were subsequently made with other companies owning lines of road extending into the states of *Kentucky* and *Tennessee*. On each consolidation, a new series of bonds was issued, and secured, like the others, by deeds of trust upon the road. Upon a bill filed by the bondholders, the *Circuit* Court *of the United States* for the *Southern* District of *Illinois*, on the *thirtieth* day of *August*, 1880, rendered a decree foreclosing all of the above mentioned deeds of trust. By virtue of that decree, the *St. Louis and Southeastern Railway Company* consolidated, together with all the company's property rights and franchises, was, on the *sixteenth* day of *November*, 1880, sold, at public outcry, to *William F. Whitehouse* and *Charles W. Opdyke*, as representatives of the bondholders.

On the *twelfth* day of *November*, 1880, the *Southeastern and St. Louis Railway Company* was organized, under the general laws of the state of *Illinois*, for the purpose of purchasing and operating said railway, which purchase was consummated on the *twenty-seventh* day of *January*, 1881. On that day, *Whitehouse* and *Opdyke*, purchasers under the decree, conveyed the entire road, with everything pertaining to it, to the said *Southeastern and St. Louis Railway Company*, and the latter company thereupon leased the same to the *Louisville and Nashville Railroad Company*, the present defendant. The defendant is now operating the road under its lease, in violation of the contracts between the county and the original companies.

Wherefore your petitioner prays a writ of mandamus, directed to the said *Louisville and Nashville Railroad Company*, commanding it forthwith to run all its said passenger trains to and into the said town of *McLeansboro*, in said county and state, and there to stop said passenger trains at the place in said town of *McLeansboro* commonly known as the "old depot" for the purpose there of receiving and of discharging of passengers, and for such further orders in the premises as to the honorable court may seem fit and proper, and justice may require, etc.

Daniel Webster, State's Attorney.

(*Verification.*)[1]

c. For Mandatory Injunction to Enforce Decree.

APPLICATION FOR ORDER TO SHOW CAUSE WHY WRIT SHOULD NOT ISSUE.

Form No. 6410.[2]

In the *Supreme* Court of *Iowa*.

The State of Iowa, on the relation of the Attorney-General, plaintiff, against *The Iowa Central Railway Company*, defendant.	*October* Term, 1897. Application for rule to show cause.

Daniel Webster, attorney-general of the state of *Iowa*, for and on behalf of said state, states to the court that, on the *twenty-seventh* day of *October*, 1887, a decree of this court was rendered in the case of the *State of Iowa* against the *Central Iowa Railway Company*, to which the attention of the court is respectfully directed, and especially to that part of said decree following:

"And it is further ordered, adjudged and decreed that the said *Central Iowa Railway Company*, its officers, agents and servants, its successors, assigns, grantees and lessees, and each and every thereof, are directed and commanded, until otherwise ordered, to forever maintain and operate that certain piece and part of railroad lying and being between the depot buildings in *Northwood*, *Iowa*, and *Manly Junction*, *Iowa*, and will run its and their trains, engines, cars, both passenger and freight, according to regular and public schedule time, on and over said part of said railroad, giving to any and all the public desiring to travel over the same, and to ship freight over the same, the accomodations and facilities incident to and usual to such desired service, and will maintain and operate said part of said railroad in connection with its other road extending south from *Manly Junction*, *Iowa*, to *Albia*, *Iowa*, and without unusual and unnecessary delays; and to enforce this, the *third* paragraph of this decree, both a preventive and mandatory writ of injunction will issue at any time on the request of the state of *Iowa* or its attorney."

1. Consult the title VERIFICATIONS.

2. **This application** was made on behalf of the state, and is based upon the facts set out in State *v.* Iowa Cent. R. Co., 83 Iowa 721. The order was granted as asked, the court holding that the decree against the predecessor company was binding on its successors, although they were not parties to the original action.

That the said defendant herein, the *Iowa Central Railway Company*, has become the successor, assignee, and grantee of the *Central Iowa Railway Company*, to which said decree was directed, and as such successor, is operating said line of railway contrary to the provisions of said decree, and a violation thereof, and is disregarding and disobeying the mandate thereof.

Wherefore, *Daniel Webster*, attorney-general as aforesaid, asks that the defendant be required to show cause why it should not obey the mandate and order contained in said decree, and why a writ of mandatory injunction should not issue against it thereon, and that, upon the hearing thereof, an order be made requiring the defendant to obey said decree, and that a writ of mandatory injunction be ordered to issue against the defendant to enforce said decree.

Daniel Webster, Attorney-General.

(*Verification.*)[1]

d. By Judgment Creditor[2] of Constituent Corporation.[3]

(1) To Set Aside Transfer of Property.

1. See the title VERIFICATIONS.

2. For forms connected with suits by judgment creditors, generally, consult the title CREDITORS' SUITS.

3. **To Enforce Personal Liability of Stockholders.** — The bill filed by judgment creditors of constituent corporation to enforce personal liability of stockholders of consolidated corporation in Hamilton *v.* Clarion, etc., R. Co., 144 Pa. St. 34, averred in substance as follows:

"That the *Mahoning & Susquehanna Railroad Co.* was incorporated by the special act of April 19, 1854, P. L. (1855), 687, and that on or about *November 22*, 1881, the *Conewango & Clarion Railroad Co.* was duly incorporated under the provisions of the act of April 4, 1868, P. L. 62; that by articles of agreement, made on or about *December 6*, 1881, the said railroad companies, by virtue of the act of May 16, 1861, P. L. 702, and its supplement of April 10, 1869, P. L. 24, were merged and consolidated into one company, called the *Clarion, Mahoning & Pittsburgh Railroad Company.*

That the capital stock of the said *Conewango & Clarion R. Co.* was divided into *20,000* shares of the par value of *$50* each, and by the charter thereof was subscribed for by certain persons named in the bill, among whom were *S. S. Jackson*, *100* shares; *R. C. Winslow*, *150* shares; *Thomas K. Litch*, *300* shares.

That, by force of the said merger and consolidation and of the statutes, such of the defendants as were subscribers to the stock of the *Conewango & Clarion R. Co.* became subject to all liabilities, conditions and penalties, in the same manner and with like effect, as were the original subscribers to the stock of the aforesaid *Clarion, Mahoning & Pittsburgh R. Co.*, the corporation defendant, and that the amounts for which the several stockholders defendant were liable were as set forth by name and amount in the bill, including *S. S. Jackson*, *100* shares, *$5,000*; *R. C. Winslow*, *150* shares, *$7,500*; *Thomas K. Litch*, *300* shares, *$15,000.*

That the plaintiffs were creditors of the corporation defendant, for wages, work and labor done and materials furnished as follows: *George C. Hamilton*, judgment, *$4,025.90*, interest and costs; *W. A. Irwin*, judgment, *$264.42*, interest and costs; *Almon B. Hamilton*, judgment, *$546.90*, interest and costs; and that other creditors also exist, holding large claims against the corporation defendant.

That writs of fieri facias had issued out of the Court of *Common Pleas* of *Warren* county, upon the judgments of *George C. Hamilton* and *Almon B. Hamilton*, and had been returned unsatisfied; that the said corporation defendant was wholly insolvent and had no available assets other than the amounts due upon its capital stock, and had taken no steps to enforce payment from the stockholders defendant of their unpaid subscriptions, or of so much thereof as was necessary to liquidate its indebtedness.

Wherefore they pray:

Form No. 6411.[1]

New York Supreme Court — County of *Dutchess.*

Emory Cole, plaintiff,
against
The Millerton Iron Company, The National Mining Company of Pawling, George S. Frink as an officer and trustee of the National Mining Company of Pawling, The Mercantile Trust Company as trustee for bondholders of said Millerton Iron Company, Charles J. Canda as receiver of the property, etc., of The Millerton Iron Company, The Dannemora Iron Company, The Peninsular Car Company, George T. Wilson, Louis F. Eaton, The First National Bank of Amenia, The First National Bank of Plattsburgh, Lucien L. Sheddon, Henry Maurer, Eugene Kelley, and William H. Chapman, defendants.

The plaintiff complains of the defendants and, upon information and belief, alleges the following as his cause of action:

I. That the defendants the *National Mining Company of Pawling*,

1. That the rights of the parties be declared in the premises.

2. That an account be taken of the amounts remaining unpaid upon the capital stock of the corporation defendant.

3. That an assessment be levied, in such a manner and form as this court may direct, for the amounts due upon the subscriptions aforesaid of the stockholders defendant respectively, or so much thereof as may be necessary to pay the ascertained debts of the said corporation defendant, and that thereupon the said stockholders defendant may be decreed to pay such respective balances so as aforesaid assessed.

4. That a receiver be appointed to collect and receive all and singular the assets, books, papers, and other property of the said corporation, and also all sum or sums due by the said stockholders defendant, or any of them, for their unpaid stock subscriptions, or for any balances thereof, or such part or parts thereof as may be necessary and sufficient to liquidate the ascertained indebtedness of the said corporation defendant, together with such other powers and duties as the court may deem just and equitable.

5. That such other and further relief be granted as may be necessary and expedient."

The court held that the allegations of the bill were sufficient as against the consolidated company and entered a final decree according to the prayer of the bill, upon the theory that the stockholders were subscribers for the stock of one of the prior companies merged and consolidated, and that as such they were liable to the extent of their subscriptions unpaid.

For other forms relating to the enforcement of the personal liability of stockholders consult the title STOCK AND STOCKHOLDERS.

1. This complaint is copied from the record in the case of Cole *v.* Millerton Iron Co., 133 N. Y. 164. The action was brought by the plaintiff, a judgment creditor of the constituent corporation, the National Mining Company, to set aside a conveyance made by it of all its property to the defendant, the consolidated company, and to release said property from the lien of the mortgage executed by the consolidated corporation to the defendant, the Mercantile Trust Company, and for the appointment of a receiver, etc. On appeal, the judgment of the general term of the supreme court, reversing the judgment in favor of the defendants, entered upon a decision in the court at special term, was affirmed, the court holding that the transfer by a corporation of all its property and effects, which has the effect of terminating the regular business, is illegal and not a consolidation according to law.

For the formal parts of complaints or petitions, generally, consult the title COMPLAINTS, vol. 4, p. 1019; of bills in equity, generally, consult the title BILLS IN EQUITY, vol. 3, p. 417.

the *Millerton Iron Company*, the *Dannemora Iron Company*, and the *Mercantile Trust Company*, are all domestic corporations duly organized under the laws of the state of *New York*. That the defendants the *First National Bank of Amenia* and the *First National Bank of Plattsburgh* are banking associations, duly organized under and in pursuance of the laws of the state of *New York* and of the United States, the former located and doing business in the town of *Amenia*, *Dutchess* county and state of *New York*, and the latter being located and doing business in the village of *Plattsburgh*, in the county of *Clinton* and state of *New York*; that the defendant the *Peninsular Car Company* is a foreign corporation duly organized under and in pursuance of the laws of the state of *Michigan*.

II. That the said plaintiff resides in the said county of *Dutchess*.

III. That on or about the *first* day of *October*, 1887, this plaintiff commenced an action in the *Supreme* Court of the state of *New York*, in *Dutchess* county, against the said defendant the *National Mining Company of Pawling*, for an injunction and damages, and such proceedings were duly had thereon that, on the *fourteenth* day of *July*, 1888, judgment was duly rendered and entered therein for an injunction as prayed in said action and for damages in the sum of *two thousand seven hundred and seventy-five* dollars; and for which sum, together with costs as duly allowed and taxed at the sum of *two hundred and eighty-eight* dollars and *seventy-four* cents, making together the sum of *three thousand and fifty-seven* dollars and *seventy-four* cents, judgment was duly docketed in the *Dutchess* county clerk's office on the *fourteenth* day of *July*, 1888. That an execution was duly issued upon said judgment on the *twenty-fourth* day of *October*, 1888, to the sheriff of the said county of *Dutchess*, that being the county in which are located the office and principal place of business of the said *National Mining Company of Pawling*, being the defendant in said execution, and said execution has been returned wholly unsatisfied and the said judgment remains wholly unpaid and unsatisfied.

IV. That at the time of the commencement of the said action the said defendant the *National Mining Company of Pawling* was the owner and in possession of various parcels of real estate situate in the said county of *Dutchess*, and of leases, minerals and mining rights and privileges therein, and which were conveyed to it by deeds as follows, to wit: (*Here was set out description of the conveyances.*) That the said defendant the *National Mining Company*, at the time aforesaid, was the owner and in possession of a certain mineral and mining lease, executed by and between *Stephen O. Davis* and *Hannah* his wife, of the one part, and *Cornelius J. Haight* of the other part, bearing date *December 1*, 1870, and recorded in said clerk's office in book No. 160 of Deeds, on page 319, and was also owner and in possession of a large amount of property, consisting of ores, machinery, tools, materials, goods, chattels, personal effects and fixtures situate upon the premises described in the foregoing deeds and elsewhere.

V. And the plaintiff further shows that the business and objects for which the said defendant the *National Mining Company of Pawling* was organized, as appears by its certificate of incorporation, was "the mining of iron ore and the preparation of the same for market,

and the selling thereof and the manufacture of iron," and its stock was full paid; and that, on or about the *twentieth* day of *February*, 1888, in disregard of the said lawful business and objects of the said corporation, and for a purpose foreign to its organization and in fraud of the rights and interests of its stockholders and creditors, among whom was the plaintiff, upon his claim in the said action then pending, *William H. Barnum*, since deceased, and *George S. Frink* as president and secretary of the said *National Mining Company of Pawling*, by two deeds bearing date on that day, did sell, assign, transfer and convey unto the defendant the *Millerton Iron Company* all the real and personal property owned and possessed by the said *National Mining Company of Pawling*, for the expressed consideration of *two dollars* and the assumption by the grantee of certain debts of the said *National Mining Company of Pawling*; that the said deeds of conveyance included all the property of every kind owned by the said *National Mining Company* and left the said corporation wholly insolvent and caused an entire suspension of its lawful business, which has ever since continued and still continues, being now more than a year; that the purpose and results of the said alienation of the property of the said *National Mining Company* were well known to the said grantee the *Millerton Iron Company*, the said *William H. Barnum* and *George S. Frink*, by whom the same was made, being also officers or trustees of the said *Millerton Iron Company*, which said company was then insolvent.

VI. And the said plaintiff further shows that, at a meeting of the stockholders of the said *Millerton Iron Company*, duly held pursuant to notice, on the *twenty-sixth* day of *December*, 1887, the capital stock of the said *Millerton Iron Company* was increased from *one hundred and fifty thousand* dollars to *five hundred thousand* dollars, in *ten thousand* shares of *fifty* dollars each, and in the certificate of such proceedings and increase, duly filed, it is declared that the "entire increase of *three hundred and fifty thousand* dollars shall be issued for property to be acquired by said company in its business." That on the said *twentieth* day of *February*, 1888, the said *Millerton Iron Company* acquired by purchase and conveyance from the said *Dutchess Mining Company* a large amount of real and personal property and minerals and mining rights for the expressed consideration of *three hundred and fifty thousand* dollars and the assumption of the debts and obligations of the said *Dutchess Mining Company*, which property the plaintiff believes and alleges to be the property proposed to be acquired by and in consideration of the issue of the said increase of stock made and declared as aforesaid.

VII. And the plaintiff further shows that on or after the said *twentieth* day of *February*, 1888, the said *Millerton Iron Company* executed and delivered to the defendant the *Mercantile Trust Company* a mortgage upon the property so acquired as above stated from the said *National Mining Company of Pawling* (except that part mentioned in subdivisions *8* and *9* of clause *IV.* of this complaint), and upon the property so acquired, as above stated, from the *Dutchess Mining Company*, and upon property previously acquired by the said *Millerton Iron Company* and then owned by it, to secure bonds of the said last

named company to be issued to the amount of *two hundred and fifty thousand* dollars, which said mortgage was made and executed by and with the consent of the holders of only *twenty-two hundred and eighty-two and 34-100* shares of the stock of said *Millerton Iron Company*, and was therefore, as plaintiff is advised and believes and alleges, unauthorized, unlawful and void for the reason that the number of shares of the stock of said company so consenting is less than *two-thirds* of the whole number of shares.

VIII. And the plaintiff further shows that an action has been commenced by the said *Mercantile Trust Company* for the foreclosure of the said mortgage, in which it is claimed that *two hundred and twenty-five* of said *two hundred and fifty* bonds were duly issued for value; but the plaintiff is informed and believes and alleges that, if said mortgage shall be held to be valid, not more than *twenty-five* of said *one thousand* dollar bonds are now held by corporations or persons who acquired the same in good faith and for value.

IX. And the plaintiff further shows that the defendants *George T. Wilson*, *Louis F. Eaton*, the *First National Bank of Amenia*, the *First National Bank of Plattsburgh*, the *Dannemora Iron Company*, the *Peninsular Car Company*, *Henry Maurer*, *Eugene Kelly*, *William H. Chapman*, and *Lucien L. Sheddon* are made defendants herein as judgment creditors of the said *Millerton Iron Company*, having liens on the property of the said last named company but subsequent to the claims of this plaintiff as against the property of said *National Mining Company* so transferred as above shown to said *Millerton Iron Company*, and said *Charles J. Canda* is made defendant as receiver of, etc., of the property of said *Millerton Iron Company*, duly appointed in said action by the *Mercantile Trust Company*, and no personal claim is made as against any of said defendants.

Wherefore, the said plaintiff demands judgment in this action:

1. Canceling and setting aside and declaring void and of no effect the alienation of the property of the *National Mining Company* made by the said *William H. Barnum*, now deceased, and *George S. Frink*, to the *Millerton Iron Company* as hereinbefore set forth.

2. Declaring unauthorized, unlawful and void the said mortgage made by the *Millerton Iron Company* to the *Mercantile Trust Company* as against the said property of the *National Mining Company of Pawling*; or, if the same shall be held to be valid, determining what portion of the bonds of the said *Millerton Iron Company* are entitled to be paid therefrom as against the claim and right of this plaintiff.

3. Sequestrating the said property of the defendant the *National Mining Company of Pawling*, and directing a just and fair distribution thereof, and of the proceeds thereof among its fair and honest creditors in the order and in the proportions prescribed by law in the case of voluntary dissolution of a corporation.

4. Enjoining and restraining the said defendant the *Mercantile Trust Company* from taking any further proceedings in its said action as against the said property of the *National Mining Company of Pawling*.

5. Appointing a receiver herein of the said property and effects of the said *National Mining Company of Pawling*, and directing a sur-

render of the said property and effects to him by the above named *Charles J. Canda* as receiver.

6. For such other or further judgment or relief as to this court may seem just and agreeable to equity.

William Downing, Attorney for Plaintiff.

(2) To Subject Property to Lien and Judgment against Constituent Corporation.

Form No. 6412.[1]

In the *Superior* Court of the County of *San Diego*, State of *California*.

Alfred Blanc, plaintiff, against *The Paymaster Mining Company*, defendant.	Complaint — Action to subject to a lien of a judgment property alleged to have been fraudulently conveyed.

Alfred Blanc, the plaintiff in the above entitled action, complaining of the *Paymaster Mining Company*, the defendant in said action, alleges:

I. That the *Esperanza Company* is a foreign corporation doing business in the *territory* of *Arizona*. That in *February*, 1884, it became indebted to the plaintiff upon *two* promissory notes, one for the sum of *one thousand* dollars payable on demand, and the other for the sum of *five thousand* dollars payable on the *twelfth* day of *February*, 1885; that thereafter the said *Esperanza Company* became indebted to its various stockholders, and a pretended assignment was made of all its property to its acting managing officer and agent, one *Blaisdell*, for the alleged purpose of paying the debts of such corporation, and that the said *Blaisdell* made a pretended sale of such property at public auction, at which sale he claims to have become the purchaser of the tools, machinery, stamp mills, engines and boilers belonging to said *Esperanza Company*, all of the value of *seventy-five thousand* dollars, at a purely nominal sum, to wit, the sum of *fifty* dollars.

II. That thereafter, the said *Blaisdell*, together with the principal officers, agents and stockholders of the said *Esperanza Company*, proceeded to organize the defendant company, and turned over to it all of said property, for the purpose of cheating and defrauding plaintiff and other creditors of the *Esperanza Company*. That the said

1. **The complaint in this action** is based upon facts set out in Blanc *v.* Paymaster Min. Co., 95 Cal. 527. Defendant interposed a demurrer to this complaint, which was properly overruled. On appeal it was held that the complaint stated a cause of action, and that the Esperanza company and Blaisdell were not necessary parties to the action, the court holding that while a creditor ordinarily must have recovered judgment and had execution returned unsatisfied before he can resort to equity to reach fraudulently transferred property, the rule does not apply where the managing agent of the insolvent corporation has fraudulently transferred all the property to a new corporation without consideration; and that in such a case the new corporation will be held liable for the indebtedness of the old to the extent of the value of the property received without consideration from it.

For formal parts of complaints, generally, consult the title Complaints, vol. 4, p. 1019; of bills in equity, generally, consult the title Bills in Equity, vol. 3, p. 417.

defendant the *Paymaster Mining Company* was so organized by the said *Blaisdell*, the officers and agents and stockholders of the said *Esperanza Company*, with the view of taking and receiving said property as a part of its plan for defrauding the creditors of the *Esperanza Company*, and particularly the plaintiff, and that the said defendant never paid any consideration whatever for said property.

III. That the said *Esperanza Company* has heretofore failed and refused to pay the just demands of the plaintiff, and so has the defendant herein, its alleged successor, although plaintiff has made repeated demands upon the *Esperanza Company*, its former officers and agents, and upon the defendant herein, the *Paymaster Mining Company*.

Wherefore, plaintiff asks judgment that the pretended sales of the said *Blaisdell*, the defendant herein, be declared void; that it be adjudged that the said defendant company holds the said property charged with the plaintiff's claim of *six thousand* dollars, and interest thereon to date, together with the costs of this action; that the said property be sold to satisfy the sum claimed and for such other and further relief as to the court may seem just.

Alfred Blanc.

(*Verification.*)[1]

e. By Trustee of Stock Asking Instructions.

ANSWER OF DIRECTORS DENYING INTENTION TO CONSOLIDATE.

Form No. 6413.[2]

In the *Superior* Court.
Norfolk, ss.

John W. Treadwell
against
The Salisbury Manufacturing company and (names of directors of said Company).

Answer.

1. The said defendants admit all the allegations of the bill previous to the statements therein as to the intended sale, the truth of which said statements they deny.

2. The defendants admit that a sale of the property of the *Salisbury Manufacturing Company* was contemplated, and that if such sale could be advantageously and satisfactorily effected they intended to take the necessary legal steps to close and wind up that company and surrender their charter.

1. Consult the title VERIFICATIONS.

2. **The bill in equity** in Treadwell *v.* Salisbury Mfg. Co., 7 Gray (Mass.) 393, was filed by the executors and trustees under the will of Thomas Cordis against the defendant and its directors, to obtain the instructions of the court as to their duties in case the corporation should consummate an alleged contemplated sale of all their property to a new corporation, the bill also seeking to restrain the corporation from making such sale. It was held that a trustee could not maintain such a bill. The answer in the text is based upon the facts set out in that case.

For the formal parts of answers, generally, consult the title ANSWERS IN CODE PLEADING; of pleas, generally, consult the title PLEAS.

3. The defendants deny that the said property could, if offered at public sale or thrown upon the public competition, be sold for more than *two hundred and fifty thousand* dollars.

4. The defendants deny that the votes of the company were illegal, and aver that it was not determined that the same persons making the same as directors would be interested as stockholders or directors in the purchase by the new corporation, though it was possible that they might be such stockholders or directors.

5. The defendants further allege that the votes were duly passed after notice to every stockholder and were legal and valid; that on full inquiry and on consideration of the various modes of selling and disposing of the property for the best interests of all the stockholders, none appeared or was so discreet and expedient as a sale of the real estate and fixtures to the *Salisbury Mills* at a price of *two hundred and fifty thousand* dollars, payable in stock of that corporation, and that the directors had therefore opened negotiations for such a sale, but had made no definite or binding offer, and were ready and desirous to sell on the best terms that could be had; that the stockholders and directors, in all their proceedings, had acted with sound discretion, and in good faith toward every stockholder, and for the best interests of all, and that they and the *Salisbury Mills* were desirous to admit every stockholder in the old corporation to take and hold an interest in the new one, to any extent he pleased, but that was and would be left optional with him; that it had been well understood ever since *February last*, by all the stockholders, that the stock in the new corporation would be to a very large extent held by the old stockholders; that by means of the establishment of such new corporation additional capital would be obtained, which could be had in no other way, and that, if such new corporation could be succcessfully organized, the existing business could be continued without interruption.

6. The defendants further deny that the court has jurisdiction of the bill filed herein; or that the corporation had surrendered their franchise or had offered to do so, or had done any act necessarily and certainly tending to or initiatory of a dissolution, surrender or winding up. That, on the contrary, they aver that now and ever after the sale that subject would be retained wholly in the control and at the discretion of the corporation, on a view of the ascertained fitness or unfitness of such a result; that the corporation were solvent, able to pay all their debts and have a surplus, if prudently and discreetly conducted, and if the administration was left in the hands of a majority of the stockholders, acting by directors in whom they and the business community have confidence; but, that if the administration was taken from their hands, or subjected to interference or control of others, great inconveniences and sacrifices must result; and that irreparable mischief would be occasioned to all persons interested in the company by the granting of an injunction.

7. The defendants further aver that it was not their intention or purpose to hold the stock as a corporation in another corporation, but to make a sale of the property for the purposes of paying the debts of the corporation and ultimately to wind up their affairs, and to distribute the stock obtained among the individual members, if they will

accept it, otherwise to reduce it to cash and distribute its value among such members; and that they, as a corporation, did not procure the charter of the new corporation, nor as a corporation do anything in relation thereto.

8. The defendants further aver that it was their purpose after such sale, if it should be effected, if it should appear expedient and needful, to apply to the legislature or to this court, for a dissolution of the corporation, according to law; and that it would be an expedient and just act toward themselves and their creditors if it should be dissolved and wound up and that the legislature or this court, on petition, might order the same, and this whether any new corporation had been or should be formed or not, and whether the contemplated sale should be consummated or not.

Jeremiah Mason, Solicitor for Defendant.

f. Upon Causes of Action Existing against Constituent Corporation.

(1) On Bonds.[1]

Form No. 6414.[2]

New York Supreme Court — *Kings* County.

Maria T. Polhemus, plaintiff,
against
The Fitchburg Railroad Company, defendant.[3]

The plaintiff above named, appearing herein by *Masten & Nichols*, her attorneys, complains of the above named defendant, and for cause of complaint alleges and shows to the court as follows:

First — For her first cause of action:

I. The plaintiff alleges that on or about the *second* day of *January*, 1875, the *Troy and Boston Railroad Company*,[4] a corporation created and then existing under and by virtue of the laws of the state of *New York*, made and executed its certain promissory note, duebill or coupon, dated on that day, wherein and whereby it promised to pay to the holder, or bearer, thereof the sum of *thirty-five* dollars on the *first* day of *July*, 1887, at the *Bank of Commerce*, in the city of *New York*.

1. For forms in actions on bonds or bills and notes, generally, consult the titles Bonds (Actions on), vol. 3, p. 528, and Bills and Notes, vol. 3, p. 260.

2. This complaint is copied from the record in the case of Polhemus *v.* Fitchburg R. Co., 123 N. Y. 502. Plaintiff company, the holder of bonds of the Troy and Boston Railroad Company, sued the defendant to recover upon certain interest coupons, on the ground that by the consolidation of the Troy company with the Fitchburg company the defendant, as a new corporation by force of consolidation, assumed liability upon the bonds. Recovery was properly had by plaintiff, which was sustained on appeal.

For the formal parts of complaints, generally, consult the title Complaints, vol. 4, p. 1019; of Bills in Equity, generally, consult the title Bills in Equity, vol. 3, p. 417.

3. Sued by New Name. — Where a railroad company, after the execution of promissory notes, is consolidated with another company and a new name assumed, the company may be sued by the new name. Columbus, etc., R. Co. *v.* Skidmore, 69 Ill. 566.

4. The name of the constituent corporation, against which the cause of action arose, must be stated. Langborne *v.* Richmond City R. Co., (Va. 1894) 19 S. E. Rep. 122.

That said promissory note, duebill or coupon was one of a series of *one hundred* such promissory notes, duebills or coupons, all bearing even date and similar in their tenor, except as to the respective dates of the payment thereof, attached and annexed to a certain bond or obligation in writing, numbered *two hundred and seventy*, dated the said *second* day of *January*, 1875, at the city of *Troy*, *New York*, and duly made and issued by the said *Troy and Boston Railroad Company*. That in and by said bond, or obligation in writing, the said railroad company promised and agreed to pay the holder, or bearer, thereof the principal sum of *one thousand* dollars on the *first* day of *July*, in the year *1924*, and interest thereon at the rate of *seven* per centum per annum, to be paid semiannually on the *first* days of *January* and *July* in each and every year, on presentation of the aforesaid promissory notes, duebills or coupons at the said *Bank of Commerce* in the city of *New York*.

II. This plaintiff further alleges, upon information and belief, that heretofore the *Fitchburg Railroad Company* was a foreign corporation, created and existing under and by virtue of the laws of the state of *Massachusetts*, and owning a line of railroad which formed a continuous line with the line of railroad owned by the said *Troy and Boston Railroad Company*; that on or about the *twenty-sixth* day of *March*, 1887, the said *Fitchburg Railroad Company* and its directors and the said *Troy and Boston Railroad Company* and its directors made and entered into an agreement in writing[1] bearing date the said *twenty-*

1. **The consolidation agreement** referred to in the text was as follows: "Articles of Agreement made this *twenty-sixth day* of *March*, A. D. eighteen hundred and *eighty-seven*, between the *Fitchburg Railroad Company*, a railroad corporation duly organized under the laws of the State of *Massachusetts*, and by the Directors of said Company of the first part, and the *Troy and Boston Railroad Company*, a railroad corporation duly organized under the laws of the State of *New York*, and by the Directors of said Company of the second part.

Witnesseth: That whereas, the said companies are owners and operating railroads which form a continuous and connected line of railroad with each other, extending from the City of *Troy* in the State of *New York*, to the City of *Boston* in the State of *Massachusetts*, and partly within and partly without each of said States, and partly within the State of *Vermont*, and desire to merge and consolidate the capital stock, franchises and property of said companies pursuant to law; now therefore, in consideration of the premises and of the agreements of each party with the other, it is hereby agreed that upon and after the *third* day of *May next*, the capital stock, franchises and property of the said companies shall be and remain merged and consolidated into one corporation upon the following terms and conditions:

1. The name of the new corporation shall be *The Fitchburg Railroad Company*.

2. There shall be a Board of *thirteen* Directors to manage the affairs of the consolidated company, and the following-named persons, residing at the places set opposite their names, shall be the first directors and officers of such consolidated company, to wit: (*Here was listed the names and residences of the president, secretary, treasurer and thirteen directors.*)

3. The capital stock of said consolidated corporation shall, until the amount thereof shall be changed according to law, consist of *fifteen million one hundred and ninety-four thousand six hundred* dollars ($15,194,600), divided into shares of *one hundred* dollars ($100) each, to be issued as below set forth. Of this amount of capital stock, *one hundred and one thousand nine hundred and forty-six* (101,946) shares shall be preferred stock, entitled to the same preferences and priority (except as herein below set forth) as the present preferred stock of the *Fitchburg Railroad Company*,

sixth day of *March*, 1887, and providing for a consolidation of the said two corporations from and after the *third* day of *May*, 1887, pursuant to the laws of the state of *New York*; that said agreement was afterward duly adopted by the stockholders of the said corporations in form and manner as required by the laws of the state of *New York*, and thereafter said agreement, with the certificates required by the laws aforesaid, was duly filed in the office of the secretary of state of the state of *New York*; that thereby pursuant to such agreement the said two corporations became and were consolidated into one corporation, to be known by the name of, and which is the defendant, the *Fitchburg Railroad Company*; that pursuant to said agreement all the capital

and *fifty thousand* (*50,000*) shares shall be common stock with the same rights, powers and privileges as the present common stock of the *Fitchburg Railroad Company*.

4. The capital stock of the present *Fitchburg Railroad Company* shall upon such consolidation be and become thereby capital stock of the new corporation, share for share, and of the same kind as to preference as the same now is: The capital stock of the *Troy and Boston Railroad Company* shall be surrendered and extinguished and the certificates therefor canceled, and there shall be distributed and delivered to the shareholders of the *Troy and Boston Railroad Company* at the time of such consolidation or within a reasonable time thereafter, having regard to the transaction of the necessary business, certificates for *ten thousand* shares of the preferred capital stock of the new or consolidated company, of the same kind and character, except as is herein below set forth, as the preferred stock of the present *Fitchburg Railroad Company*; such shares shall be distributed to the shareholders of the *Troy and Boston Railroad Company pro rata* according to the number of shares held by them at the time of such consolidation; there shall also be issued and held by the said new or consolidated company *three thousand three hundred and thirty-three* shares of the said preferred capital stock of said company, which, or such portions of the same as the directors of the consolidatcd company may at any time deem necessary, shall be held by it in trust for the shareholders of the *Troy and Boston Railroad Company*, but as an indemnity to the consolidated company against any outstanding claims against or liabilities of said *Troy and Boston Railroad Company* which said new company shall be compelled to pay for the protection of its property; which said above mentioned *three thousand three hundred and thirty-three* shares of stock or so much of the same as is not in the judgment of said directors required for the purposes of said trust, shall be distributed to the said stockholders of the *Troy and Boston Railroad Company pro rata* as in the distribution of the above mentioned *ten thousand* shares of stock, and all shares of stock when distributed shall entitle those who shall receive them to all dividends thereon, which shall have been declared on the other preferred stock of the new or consolidated company, subject, however, to such deductions therefrom and agreements in relation thereto as are hereinafter contained or provided for: No part of such shares so held in trust shall be sold to pay any such claims against the *Troy and Boston Railroad Company* until after the trustees, provided for in the eighth article of this agreement, shall have had reasonable notice to pay the same, and if the same shall not be paid by said trustees, upon such notice, the shares so held in trust or such part thereof as is necessary for that purpose shall be sold at public or private sale and without further notice, and the proceeds applied to the liquidation of any of said claims. In case of shares remaining to be distributed to the shareholders of the *Troy and Boston Railroad Company* after all have been distributed and delivered, which can be done by the delivery of full shares in the manner hereinbefore provided for, the treasurer of the new or consolidated company shall sell the same at open sale, and the proceeds of such sale shall be apportioned, distributed and paid to the shareholders of the *Troy and Boston Railroad Company* at the time of said consolidation, with any dividends payable to shareholders of the *Troy and Boston Railroad Company* thereon, so that all stockholders

stock, property and franchises which were of the said *Troy and Boston Railroad Company* have been transferred and surrendered to, and are now held by, the defendant, the *Fitchburg Railroad Company*; that said defendant, in and by said agreement and act of consolidation, undertook, covenanted, promised and agreed, and under and by virtue of the laws of the state of *New York* authorizing such consolidation became, was and is obliged to pay said bond and the interest thereon, and to pay said promissory note, duebill or coupon which became due and payable on the *first* day of *July*, 1887, as aforesaid.

III. That this plaintiff, after the issue of said bond or obligation in writing, as aforesaid, for value purchased the same, and became

of the *Troy and Boston Railroad Company* shall share alike *pro rata* according to their holdings of the shares of the capital stock of said last named company in the capital stock of the new or consolidated company so far as practicable, by full shares and for fractional parts of shares in the amount of proceeds representing the fractional parts of shares.

5. The by-laws of the present *Fitchburg Railroad Company*, except so far as the same may be inconsistent with this agreement, or with the provisions of law, shall constitute the by-laws of the consolidated corporation until legally changed, and the officers and agents of the present *Fitchburg Railroad Company*, together with the addition of three to the present Board of Directors as hereinbefore provided, shall constitute the officers and agents of the consolidated corporation until others are chosen in their places, and the directors shall, until otherwise provided, be chosen by ballot at the annual meeting of the stockholders on the *last Tuesday* of *January* of each year.

6. The new or consolidated company shall, upon the order or request of the trustees hereinafter provided for, furnish the sum of *three millions of* dollars with interest at *four* per cent. per annum, from the date of consolidation, of which sum not more than *seventy-five thousand five hundred* dollars and interest at *four* per cent. per annum, shall be used for the payment of the bonds of the *Troy and Boston Railroad Company*, secured by a mortgage bearing date the *2d* day of *June*, 1851; not more than *one million five hundred thousand* dollars and interest at *four* per cent. per annum, shall be used for the payment of the bonds of the *Troy and Boston Railroad Company*, secured by a mortgage bearing date the *7th* day of *September*, 1874; not more than *one million dollars* and interest at *four* per cent. per annum, shall be used for the payment of the bonds of the *Troy and Boston Railroad Company*, secured by a mortgage bearing date the *9th* day of *November*, 1878; not more than *two hundred and fifty thousand* dollars and interest at *four* per cent. per annum, shall be used for the payment of the bonds of the *Troy and Boston Railroad Company*, secured by a mortgage bearing date the *26th* day of *July*, 1882; and the residue of said *three millions of* dollars and interest shall be used by said trustees for the payment of the indebtedness of the *Troy and Boston Railroad Company* other than that secured by said mortgages: said *Troy and Boston Railroad Company* agrees that said sum of *three millions of* dollars and interest shall be sufficient to pay and discharge all the indebtedness of the said *Troy and Boston Railroad Company* at the time of the consolidation, whether absolute or contingent, and if said new or consolidated company shall be obliged to pay any sum or sums on account of said indebtedness, or the interest thereon over and above said sum of *three millions of* dollars and interest as above stated, said new or consolidated company, after exhausting the indemnity hereinbefore provided for by sale of stock held in trust, shall retain from the dividends upon the shares of stock distributed to the shareholders of the *Troy and Boston Railroad Company*, a sufficient sum to make good and repay the amount so paid over and above said sum of *three millions of* dollars, and interest, and the proceeds of said trust stock and its dividends. The said new or consolidated company shall, at the election of such of the stockholders of the securities of the *Troy and Boston Railroad Company* as may on or before the *1st* day of *July next*, in writing request,

and she is now the lawful holder and owner thereof, and by reason thereof became and she is now the lawful holder and owner of said above mentioned promissory note, duebill or coupon.

IV. That on the *first* day of *July*, 1887, the plaintiff presented said promissory note, duebill or coupon at the *Bank of Commerce* in the city of *New York*, and demanded payment thereof, which was refused.

V. That no part of said promissory note, duebill or coupon has been paid, and the defendant wholly neglects and refuses to pay the same.

Second. For her second cause of action: (*Then followed other causes of action with similar allegations counting upon the other notes, duebills or coupons.*)

Wherefore, the plaintiff demands judgment against the defendant

issue and deliver bonds of the new or consolidated company in exchange at par for each of the bonds of the *Troy and Boston Railroad Company*, held by them at the time this agreement shall go into effect as the bona fide owners of the same, such bonds to be payable in *twenty* years from the date thereof, and to bear interest at the rate of *four* per cent. per annum, payable semi-annually.

7. In consideration of the sums required to be expended upon the *Troy and Boston Railroad Company's* railroad, the shares herein agreed to be distributed and delivered to the shareholders of the *Troy and Boston Railroad Company* shall be entitled to the same rights as the preferred stock of the *Fitchburg Railroad Company*, excepting that for and during the term of *four* years from the date of said consolidation such shares shall receive only *three-fifths* of the amount of dividend paid upon the remaining preferred stock in said new and consolidated company, and for and during the next succeeding *four* years thereafter shall receive only *four-fifths* of the amount of dividend paid upon such remaining preferred stock.

8. Said sum of *three millions of* dollars and interest in cash or bonds as hereinbefore provided for, shall be paid upon the order of the persons constituting the directors of the *Troy and Boston Railroad Company* at the time of such consolidation, as trustees for the new and consolidated company for whom the treasurer of the new company, for the time being, shall act as treasurer, and they shall also have confided to them the settlement, prosecution and collection of all claims, debts, bills, notes, rents, accounts and things in action, outstanding for or against the *Troy and Boston Railroad Company*, and for such purposes may use the name and agencies of the new company so far as is required by or convenient for such trustees. Trustees dying or resigning may, in the discretion of the survivors or remaining trustees, be replaced by choice of the remaining trustees from among the former shareholders of the *Troy and Boston Railroad* Company.

9. Whenever the consolidation shall have been effected under the provisions of this agreement, the stock of the *Troy and Boston Railroad Company* shall cease to have any voting power or participation in profits or dividends, and shall have no vitality or value except to preserve the rights of creditors and liens upon its property, or to close up the affairs of the *Troy and Boston Railroad Company*, and for the purpose of exchange, as aforesaid, for stock of the new or consolidated company, and no more stock of the *Troy and Boston Railroad Company* shall be issued, and the stock books of the *Troy and Boston Railroad Company* shall be closed, except for the purpose of effecting or facilitating said exchange.

10. Whenever this consolidation takes effect such new or consolidated company shall thereupon and thereafter have, hold, possess and enjoy all the rights, privileges, exemptions and franchises, and all the property, real, personal and mixed, claims, debts and demands subject to the terms of this agreement then had or held by either party hereto, and shall be subject to all the duties, obligations, restrictions, disabilities, debts and liabilities to which either party hereto is then subject, excepting so far as the consolidated company is not liable for the mortgages of the *Troy and Boston Rail-*

for the sum of *three hundred and fifty* dollars, with interest on the sum of *one hundred and seventy-five* dollars from the *first* day of *July*, 1887, and on the sum of *one hundred and seventy-five* dollars from the *first* day of *January*, 1888, besides the costs and disbursements of this action.

Masten & Nichols, Attorneys for Plaintiff,
Office and postoffice address,
No. *146 Broadway, New York City.*

(*Verification.*)[1]

(2) On Judgment.[2]

Form No. 6415.[3]

In the *Circuit* Court of *La Salle* County,
January Term, 1898.

State of *Illinois*, }
County of *La Salle.* } sct.

Mary L. Ashling, as administrator of the estate of *Edward W. Ashroad Company*, and bonds and interest secured thereby, according to the provisions of section 5 of chapter 917 of the laws of the state of New York, passed in 1869.

11. After the consolidation shall have been complete and effectual, each of said railroad companies, parties hereto, shall continue only for the purpose of perfecting said consolidation and preserving the rights of all creditors and liens upon property, and doing all such acts and things as may be necessary therefor, and in closing up its outstanding affairs, and shall do all things and execute all such transfers, conveyances and assignments as the consolidated corporation may deem necessary or expedient to vest in itself any property or estates, rights or claims, except as aforesaid, which do not vest in it by virtue of these articles.

12. This agreement shall be, according to law, submitted to the stockholders of each of the companies, parties hereto, and when duly adopted by the respective companies, shall become effectual, and the same, or a copy thereof, shall be filed pursuant to the statutes in such case made and provided.

In witness whereof, the Directors of the said *Fitchburg Railroad Company* and the Directors of the *Troy and Boston Railroad* Company have executed these presents and affixed the corporate seal of each company." (*Signatures and corporate seals.*)

1. See the title Verifications.

2. For forms in actions upon judgments, generally, consult the title Judgments.

Consideration need not be averred or proved, where a judgment creditor sues a consolidated company on a judgment obtained against a constituent company. It is sufficient if it appear by proper averment that the judgment was obtained for work and labor performed, and that it has not been satisfied. St. Louis, etc., R. Co. *v.* Miller, 43 Ill. 199.

3. **This declaration is based upon the facts** set out in Chicago, etc., R. Co. *v.* Ashling, 160 Ill. 375. The plaintiff, as administratrix, brought suit against the Chicago and St. Louis Railroad Company to recover damages for an alleged negligent killing of her intestate. Afterward, and before judgment against the St. Louis Company was rendered, but while suit was pending, said company consolidated with the Santa Fe Company. After judgment recovered against the St. Louis Company, plaintiff brought her action against the defendant, the Santa Fe Company. The judgment in favor of the plaintiff was affirmed in the appellate court, and subsequently in the supreme court, the court holding that a consolidated company is not relieved from liability upon a judgment rendered against one of its constituent corporations after the consolidation upon a cause of action accruing before the consolidation.

For formal parts of declarations, generally, consult the title Declarations; of complaints, generally, consult the title Complaints, vol. 4, p. 1019.

ling, deceased, plaintiff, by *Oliver Ellsworth*, her attorney, complains of the *Chicago, Santa Fe and California Railway Company*, defendant, of a plea of debt: For that whereas, the plaintiff, in the *May* term of the said *Circuit* Court, in the year of our Lord one thousand eight hundred and *ninety-one*, to wit, on the *seventh* day of *May* in the same year, by the consideration and judgment of the said *Circuit* Court, recovered against the said *Chicago and St. Louis Railway Company*, in a certain action of trespass on the case, the sum of *five thousand one hundred and eighty-three* dollars and *eighty-five* cents damages, and also the costs of plaintiff in that behalf, taxed at the sum of *one hundred* dollars, whereof the said *Chicago and St. Louis Railway Company* was convicted, as by the record thereof, remaining in the said court, more fully appears; said judgment still remains in force.

And the *Chicago and St. Louis Railway Company* was duly consolidated with the said *Chicago, Santa Fe and California Railway Company*, a corporation then existing under the laws of the state of *Illinois*, and the defendant in that suit, under the statutes of the state of *Illinois*, and thereby became part and parcel of the said *Chicago, Santa Fe and California Railway Company*, the defendant, and incorporated therewith, and that the two companies became one company under the name of the *Chicago, Santa Fe and California Railway Company*; that said consolidated company, the *Chicago, Santa Fe and California Railway Company*, the defendant, by reason of said consolidation, became liable for all the debts and liabilities of the said *Chicago and St. Louis Railway Company*, existing or accrued prior to such consolidation, among which was the judgment hereinbefore recited; that the liability against the *Chicago and St. Louis Railway Company* accrued on the *twenty-third* day of *February*, 1*886*. An action was commenced against said company prior to said consolidation, to wit, on the *sixth* day of *June*, 1*886*: Yet the defendant herein, the *Chicago, Santa Fe and California Railway Company*, has not paid to the plaintiff the said sums of money so by her recovered as aforesaid, altogether amounting to the sum of *five thousand two hundred and eighty-three* dollars and *eighty-five* cents, or any part thereof, but refuses so to do, to the damage of the plaintiff of *five thousand three hundred and eighty-three* dollars and *eighty-five* cents; and therefore she brings her suit, etc. And the said plaintiff brings into court here the letters of administration to her granted by the *County* Court of the said county of *La Salle*, which gives sufficient evidence to the said court here of the grant of administration of the said estate to the said plaintiff, etc.

Oliver Ellsworth, Plaintiff's Attorney.

(3) On Mortgage.[1]

COMPLAINT IN FORECLOSURE.

Form No. 6416.[2]

1. For forms connected with the enforcement of mortgage liens, generally, consult the title Foreclosure of Mortgages.

2. **This complaint is based upon the facts** set out in Eaton, etc., R. Co. *v.* Hunt, 20 Ind. 459. The court held in that case that the Ohio company having acquired title to the road in Indiana after the execution of said two mortgages,

State of *Indiana*, } ss. *Wayne Circuit* Court.
Wayne County. } ——— Term, 18—.

John Hunt and (*naming the other plaintiffs*), plaintiffs,
against.
The Eaton and Hamilton Railroad Company, *George Carlisle*, *trustee*, *and* (*naming the other defendants*), defendants.

John Hunt and (*naming the other plaintiffs*), plaintiffs, complain of the *Eaton and Hamilton Railroad Company* and (*naming the other defendants*), defendants, and say that on the *first* day of *November*, 1852, there existed a corporation in the state of *Indiana* created under a law of that state, with power to construct a railroad from *Richmond*, in the state of *Indiana*, to the *Ohio* state line, a distance of about *six* miles. That said corporation was known by the name of the *Richmond and Miami Railroad Company*. That on the day named, said corporation issued *sixty* bonds of *one thousand* dollars each, payable to *George Carlisle* or bearer, and on the same day executed to said *Carlisle*, as trustee, a mortgage on the *six* miles of road named as security for the payment of the principal and interest of said bonds, which mortgage was duly filed for record in the recorder's office of ——— county on the ——— day of ———, in liber —, pages —, —. That said bonds were guaranteed by a railroad company in the state of *Indiana*, called the *Eaton and Hamilton Railroad Company*, created by or under a law of that state, and vested with power to construct a railroad from *Hamilton*, in the state of *Ohio*, to the state line of *Indiana*, in the direction of *Richmond*, in the latter state. That in 1853 the *Richmond and Miami* road was completed.

That on the *first* day of *January*, 1854, *forty* additional bonds were issued by the *Richmond and Miami Railroad Company*, and a second mortgage was executed thereby to said *Carlisle*, as trustee, upon the *six* miles of road to secure the payment of said bonds, which mortgage was also duly filed for record in the recorder's office of ——— county, on the ——— day of ———, in liber —, pages —, —.

That the said first-mortgage bonds above referred to became due on the *first* day of *November*, 1862, and the interest on them was payable semiannually, but neither the principal nor the interest has been paid, and no part thereof. That plaintiffs are the owners of *fifty-seven* of said first-mortgage bonds, and that they had requested said *Carlisle*, the trustee, to proceed and enforce their rights against the defendant railroad company under the mortgage, but that said trustee had refused so to do. That the remaining *three* bonds are in the hands of persons to plaintiffs unknown. That (*Here follow the names of the holders of second-mortgage bonds, and an allegation that they claim liens on said road subject to plaintiffs' lien*).

That legislative acts of the states of *Ohio* and *Indiana* authorize

took the same subject thereto, and the holders of said first-mortgage bonds had a right to enforce the payment thereof by the foreclosure of said mortgage in the Indiana courts, and the sale of said road there. The same doctrine is laid down in Wright *v.* Bundy, 11 Ind. 398.

For the formal parts of complaints, generally, consult the title COMPLAINTS, vol. 4, p. 1019; of declarations, generally, consult the title DECLARATIONS.

the *Eaton and Hamilton Railroad Companies* to consolidate upon such terms as might be agreed upon, but none of said acts contained any provisions surrendering the jurisdiction of either state to the other over the consolidated company. That the two companies aforesaid executed the following articles of consolidation: (*Here was set out copy of consolidation articles*).[1]

That, prior to said consolidation, bonds and mortgages had been issued by the *Eaton and Hamilton Railroad Company*, which were liens upon the road of that company in *Ohio*. And that, after said consolidation bonds were issued, secured by mortgages on the entire line of the road, in addition to those bonds prior thereto by the separate companies hereinabove referred to.

Wherefore, the plaintiffs pray judgment for *sixty thousand* dollars, the foreclosure of said mortgage, and that said railroad upon which the said mortgage hereinabove referred to has been laid, or so much

1. **Articles of consolidation** referred to in the text were as follows:

"An agreement made and entered into by and between the *Richmond and Miami Railroad Company*, duly incorporated by the General Assembly of the State of *Indiana*, of the one part, and the *Eaton and Hamilton Railroad Company*, in like manner incorporated by the General Assembly of the State of *Ohio*, of the other part, witnesseth: That,

First. These companies, their capital stock, their roads, debts, dues, rights in action, franchises, interests, and property of every kind, character and description, shall be, and hereby are, merged, united and consolidated into one joint-stock company, one road, one interest, and one property, upon the terms following, that is to say:

Second. The corporate name, franchises, rights, immunities and organization of the *Eaton and Hamilton Railroad Company* shall be preserved and remain intact, and the said consolidated company shall be known by, and its business transacted, in that name, in every sense, as if this consolidation had not taken place, except so far merely as the enlarged interests of the company, and a compliance with the laws of *Indiana*, may modify the same.

Third. The debts, dues and rights in action, owing to, and accruing in favor of, the said *Richmond and Miami Railroad Company*, all and singular the rights and franchises, the road with its right of way, fixtures and appurtenances, depot and other station grounds, buildings and water tanks, with all other rights and interests and property, real, personal, and mixed, of every kind, character, and description, and all and singular the interest, right and titles therein, whether legal or equitable, of the said *Richmond and Miami Railroad Company*, are to be, and are hereby, granted, transferred and conveyed to, and merged in, those of said *Eaton and Hamilton Railroad Company*, its successors and assigns forever, as fully and completely, to all intents and purposes, as they are now vested in the said *Richmond and Miami* company.

Fourth. The said *Eaton and Hamilton Railroad Company* is to, and does hereby, assume the franchises, rights, immunities and liabilities of the said *Richmond and Miami Railroad Company*, and especially is to assume, liquidate and pay all debts, dues, and liabilities, outstanding against it, and to that end is, so far as the unfunded indebtedness extends, to apply *semiannually*, to its liquidation, an amount equal to *one-seventh* of the net surplus earnings of the entire road, until the whole shall be paid, and is, upon the surrender of certificates, or other evidence of ownership of the capital stock of the said *Richmond and Miami* company, to issue to the party in interest evidence of ownership of a like amount of the capital stock of said *Eaton and Hamilton Railroad Company*.

Fifth. This agreement shall take effect and be in force on and after the *1st* day of *December*, 1854, at which time the name and organization of the *Richmond and Miami* company shall cease, and its separate legal identity, franchises, rights, interests, property, etc., vest and merge into those of the said *Eaton and Hamilton* company. In witness," etc.

thereof as may be necessary, be sold to satisfy said claim and the costs herein laid out and expended.

Oliver Ellsworth, Plaintiffs' Attorney.

(*Verification.*)[1]

III. REORGANIZED CORPORATIONS.[2]

1. Proceedings by or on Behalf of.[3]

a. For Mandamus.[4]

TO COMPEL SECRETARY OF STATE TO FILE CERTIFICATE WITHOUT PAYMENT OF TAX.

Form No. 6417.[5]

To the *Supreme* Court of the State of *New York:*

The petition of the *Consolidated Kansas City Smelting and Refining Company* respectfully shows as follows:

First. Your petitioner is a domestic corporation, organized and incorporated under an act entitled "An Act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical

1. Consult the title VERIFICATIONS.

2. **Reorganization on foreclosure sale** or on insolvency is provided for by the statutes of most of the states. With the exception of *Connecticut* and *Virginia* the reorganization is effected without recourse to the courts. Conn. Laws (1895), p. 467. See also list of statutes cited *supra*, note 1, p. 527.

Reorganization is Distinguished from Reincorporation. — See Matter of Consol. Kansas City Smelting, etc., Co., 13 N. Y. App. Div. 50. Close *v.* Potter, 2 Misc. (N. Y.) 1; People *v.* Blake, 19 Cal. 579.

Reorganization must be Averred. — Where the name of the corporation has been changed on reorganization, it is sufficient to aver that the company was originally incorporated under another name, and that under authority of law it amended its charter and changed its name. Hyatt *v.* McMahon, 25 Barb. (N. Y.) 457.

An amendment substituting the reorganized corporation in place of the receiver of the old corporation is allowable in an action against a receiver who was discharged from his receivership more than sixty days before the reorganization. Abbott *v.* Jewett, 25 Hun (N. Y.) 603; Tighe *v.* Pope, 16 Hun (N. Y.) 180.

Specific averments in a complaint showing that defendant was a new corporation must control averments therein charging that the defendant is the same corporation under a different name from that under which it entered into contractual relations with plaintiff. Moyer *v.* Fort Wayne, etc., R. Co., 132 Ind. 88.

3. **Proceedings by and against corporations,** generally, see *supra*, note 1, p. 527.

4. **For forms relating to mandamus** proceedings, generally, consult the title MANDAMUS.

5. **This petition is copied from the record** in the Matter of Consol. Kansas City Smelting, etc., Co., 13 N. Y. App. Div. 50. In that case on appeal, by petitioner, from an order of the supreme court, made at special term, denying its application for a temporary writ of mandamus to compel the secretary of state to review a certificate to increase its capital stock, the order was reversed and the motion for the writ granted, the court holding that the reorganization of a corporation, originally corporated under the General Manufacturing act, under the Business Corporation law does not create a new corporation which is bound to pay the organization tax required by law.

purposes," that is to say, chapter 40 of the Laws of 1848 of the State of New York, and the acts extending and amending the same. On the *twenty-sixth* day of *March*, 1887, a certificate of its incorporation in the form, and containing the statements, required by the said act, was duly filed, as thereby required, in the office of the clerk of the *city and* county of *New York*, that being the city and county in which the principal part of the business of the said company within the state of *New York* was to be, and has been, carried on. On the *twenty-fourth* day of *March*, 1887, a duplicate of the said certificate was duly filed, as required by said act, in the office of the secretary of the state of *New York*. The amount of your petitioner's capital stock, as stated in the said certificate, was the sum of *two million* dollars ($*2,000,000*), and prior to such filing of the said duplicate certificate in the office of the said secretary the sum of *twenty-five hundred* dollars ($*2500*) was paid by your petitioner to, and was received by, the treasurer of the state of *New York* in full payment of the tax of *one-eighth of one* per cent. upon the amount of such capital stock required by chapter 143 of the Laws of 1886 of the State of New York for the privilege of the organization of your petitioner as aforesaid. A copy of the said certificate is hereto annexed and is made a part hereof.

Second. Thereafter such proceedings were had that on the *twenty-ninth* day of *June*, 1891, at a meeting of the stockholders duly and regularly called for that purpose in accordance with the statute in such case made and provided, there was duly adopted by stockholders owning and holding more than two-thirds of the stock of your petitioner a resolution authorizing an increase of the amount of the capital stock of your petitioner from the sum of *two million* dollars ($*2,000,000*), to the sum of *two million five hundred thousand* dollars ($*2,500,000*). On the *twenty-seventh* day of *January*, 1892, a certificate, setting forth the said resolution and the proceedings had at the said meeting, duly executed and acknowledged by *A. R. Meyer* as chairman and *Edward Brush* as secretary of said meeting, was duly filed, in the office of the clerk of the *city and* county of *New York*. On the *twenty-sixth* day of *January*, 1892, a duplicate of the said certificate was duly filed in the office of the said secretary. Prior to the filing of such last mentioned duplicate certificate in the office of the said secretary the sum of *six hundred and twenty-five* dollars ($*625*) was paid by your petitioner to, and was received by, the said treasurer in full payment of the tax of *one-eighth of one* per cent. upon the amount of such increase, to wit, the sum of *five hundred thousand* dollars ($*500,000*), required by the said chapter 143 of the Laws of 1886 of the state of New York for the privilege of such increase. A copy of the said last mentioned certificate is hereto annexed and is made a part hereof.

Third. Thereafter such proceedings were had that on the *twenty-fifth* day of *January*, 1894, at a meeting of the stockholders duly and regularly called for that purpose, in accordance with the statute in such case made and provided, there was duly adopted by stockholders owning and holding more than two-thirds of the stock of your petitioner a resolution authorizing an increase of the amount of

the capital stock of your petitioner from the sum of *two million five hundred thousand* dollars ($*2,500,000*) to the sum of *three million five hundred thousand* dollars ($*3,500,000*). On the *sixteenth* day of *March*, 1*894*, a certificate setting forth the said resolution and the proceedings had at the said meeting, duly executed and acknowledged by *Nathaniel Witherell* as chairman and *Edward Brush* as secretary of said meeting, was duly filed in the office of the clerk of the *city and* county of *New York*. On the *fourteenth* day of *March*, 1*894*, a duplicate of the said certificate was duly filed in the office of the said secretary. Prior to the filing of such last mentioned duplicate certificate in the office of the said secretary the sum of *twelve hundred and fifty* dollars ($*1250*) was paid by your petitioner to, and was received by, the said treasurer in full payment of the tax of *one-eighth of one* per cent. upon the amount of such last mentioned increase, to wit, the sum of *one million* dollars ($*1,000,000*), required by the said chapter 143 of the Laws of 1886 of the State of New York for the privilege of such increase. A copy of the said last mentioned certificate is hereto annexed and is made a part hereof.

Fourth. Thereafter such proceedings were had that on the *fourth* day of *June*, 1*896*, at a meeting of the stockholders duly and regularly called for that purpose, in accordance with the statute in such case made and provided, there was duly adopted by stockholders owning and holding more than two-thirds of the stock of your petitioner a resolution authorizing an increase of the amount of the capital stock of your petitioner from the sum of *three million five hundred thousand* dollars ($*3,500,000*) to the sum of *four million five hundred thousand* dollars ($*4,500,000*). On or about the *twelfth* day of *June*, 1*896*, a certificate setting forth the said resolution and the proceedings had at the said meeting duly executed and acknowledged by *Nathaniel Witherell* as chairman and *Edward Brush* as secretary of said meeting, was duly filed in the office of the clerk of the *city and* county of *New York*. On the *eleventh* day of *June*, 1*896*, a duplicate of the said certificate was duly filed in the office of the said secretary. Prior to the filing of such last mentioned duplicate certificate in the office of the said secretary, the sum of *twelve hundred and fifty* dollars ($*1250*) was paid by your petitioner to, and was received by, the said treasurer in full payment of the tax of *one-eighth of one* per cent. upon the amount of such last mentioned increase, to wit, the sum of *one million* dollars ($*1,000,000*) required by the said chapter 143 of the Laws of 1886 of the State of New York, for the privilege of such increase. A copy of the said last mentioned certificate is hereto annexed and is made a part hereof.

Fifth. On the *fourth* day of *June*, 1*896*, at a special meeting of the stockholders of your petitioner, duly and regularly called by the trustees of your petitioner in accordance with the statute in such case made and provided, that is to say, the statute of the state of New York known as the Business Corporations law, being chapter 691 of the Laws of 1892 as amended by chapter 671 of the laws of 1895, for the purpose of voting upon the proposition to reincorporate your petitioner under the said Business Corporations law, the following resolution was duly adopted by stockholders owning and holding more than two-

thirds of all the stock of your petitioner: (*Here was set out copy of resolution.*)[1]

A certificate, setting forth the said resolution, the proceedings had at the said meeting, a copy of the notice thereof and the manner of its service, and containing the certificate required by sections four and two of the said statute, and also a duplicate of such certificate, were thereupon duly made, executed and acknowledged, in accordance with the provisions of the said statute, by *A. Foster Higgins* as chairman and *Edward Brush* as secretary thereof. A copy of said certificate is hereto annexed and is made a part hereof. On the *twenty-second* day of *July*, 1896, the said certificate was duly tendered to the said secretary, together with the sum of *fourteen and fifty one-hundredths* dollars ($14.50), the amount in full of his fee for filing and recording the same, and at the same time he was requested by or on behalf of your petitioner to file and record the said certificate in his office, as required by the said statute. The said secretary received and has retained the said sum of *fourteen and fifty one-hundredths* dollars ($14.50). He has refused, however, and he still refuses, either to file or to record the said certificate, assigning and he did assign, and does assign, as the sole reason for such refusal, the failure on the part of your petitioner to pay to the state treasurer the sum of *five thousand six hundred and twenty-five* dollars ($5,625), being a tax of *one-eighth of one* per cent. on the amount of your peti-

1. **The resolution referred to in the text** was as follows:

"Resolved, That this corporation be reincorporated under the statute of the state of New York known as the Business Corporation law, being chapter 691 of the Laws of 1892 as amended by chapter 671 of the Laws of 1895. Resolved, That the capital stock of the reincorporated company shall be *four million five hundred thousand* dollars ($4,500,000), divided into shares and with preferences and privileges as stated in the certificate hereinafter directed; and that the name of the company, the purpose for which it is to be formed, the location of its principal business office, its duration, and the number of its directors shall also be as stated in the certificate hereinafter directed to be executed. Resolved, That the officers of this meeting and the officers of this company be, and they hereby are, directed to execute a certificate of the proceedings of this meeting in conformity with the provisions of the said Business Corporation law; which certificate, in addition to such other matters as may be required by law, shall contain in substance the following clauses:

1. (*Name of corporation reincorporated.*)
2. (*Purposes of incorporation.*)
3. (*Amount and classification of capital stock; stating preferences; attributes of preferred stock, etc.*)
4. (*Number of shares, and par value of each.*)
5. (*Amount of capital with which to commence business.*)
6. *Location of principal business office.*)
7. Its duration to be *one hundred* years.
8. The number of its directors is *eleven.*
9. The names and post-office addresses of the directors for the first year are respectively as follows (*names and post-office addresses*).
10. In case any increase of the corporate stock shall hereafter be authorized, and such increased stock shall be used, the corporation may grant to such new stock such preference over the common stock as shall be determined by the vote of a majority of the stockholders in meeting assembled; provided, however, that the preferred stock hereinbefore refered to, amounting in all to the sum of *two million* dollars ($2,000,000) in par value, shall never lose its preference over all other stock of the company, issued or to be issued, without the written concurrence to that effect of the holders of *three-fourths* of such preferred stock then outstanding."

tioner's capital stock, to wit, the sum of *four million five hundred thousand* dollars (*$4,500,000*) claimed by the said secretary to be due from your petitioner under the said chapter 143 of the Laws of 1886. As your petitioner is informed and believes, the total amount of such tax has already been paid by your petitioner to the said treasurer, as is hereinbefore set forth, and neither the said sum of *five thousand six hundred and twenty-five* dollars (*$5,625*) nor any part thereof is due from your petitioner to the said treasurer, and, as your petitioner is further informed and believes, it is the present official duty of the said secretary to receive the said certificate and to file and record the same, which duty he refuses to perform.

Wherefore, your petitioner prays from this honorable court an order directing that there issue out of and under the seal of said court a peremptory writ of mandamus requiring and compelling the said secretary to receive the said certificate and to file and record the same and for such other and further relief as may be just.

Dated *New York City, September 18*, 1896.

Con'l Kansas City Smelting and Refg. Co.
By *Edward Brush*, A. Sec'y.

(*Verification.*)[1]

b. Answer of Secretary of State to Order to Show Cause.

Form No. 6418.[2]

Supreme Court, *Albany* County.

The People ex rel. Carl Schurz et al.,
against
Frederick Cook, Secretary of State, etc.

And now comes the said *Frederick Cook*, as secretary of state, by *D. O'Brien*, attorney-general, and for answer to the application of the said relator and in answer to the order to show cause made herein, makes and states the following objections to the filing of the certificate[3] referred to in the moving papers herein, as good and valid reasons for his refusal to file the same:

1. See the title VERIFICATIONS.

2. **This answer to the order to show cause** is copied from the record in the case of People *v.* Cook, 110 N. Y. 443, On appeal from the general term of the supreme court affirming the special term denying the motion of the relators in this case for a peremptory writ of mandamus directed to the secretary of state to require him to file in his office a certificate of organization of certain railroad companies organized under the Reorganization act of New York (Laws (1874), c. 430, as *amended* Laws (1876), c. 446), the orders of both the general and special terms were affirmed and the motion for mandamus denied, the court holding that a new corporation had been created by the reorganization subject to the payment of the corporation tax.

3. **The certificate of organization** of the Western New York and Pennsylvania Railway Company of New York, as appears in the record of the case of People *v.* Cook, 110 N. Y. 443, is as follows:

"Whereas, on the *10th* day of *September*, 1887, under and in pursuance of a judgment of the *Supreme* Court of the State of *New York*, entered in the office of the Clerk of *Erie* County, dated *June 13th*, 1887, in a suit therein pending wherein *Henry Martin* and *Franklin D. Locke* were plaintiffs, and the *Buffalo, New York and Philadelphia Railway Company*, the *Buffalo, New York and Philadelphia Railroad Com-*

I.

That the said company offering the said certificate, to wit, the *Western New York and Pennsylvania Railway Company of New York*, refused and still neglects and refuses to pay the tax of *one-eighth of one* per cent. upon the amount of capital stock which said company is authorized to have or upon the increase thereof, in accordance with chapter 143 of the Laws of 1886.

II.

Said articles or certificate of incorporation, so offered, are defective and insufficient in law for the following reasons:

The said company has decreased the capital stock of the corporation sold by the judgment of the court referred to in the moving papers from *twenty million three hundred and fifty thousand* dollars to the sum of *fifteen million* dollars as the maximum amount, without

pany and others were defendants, which judgment was made or given to execute the provisions and enforce the lien of a mortgage or deed of trust executed by the *Buffalo, New York and Philadelphia Railway Company* to *Joseph Seligman* and *Henry Martin*, dated *July 1*, 1871, *William L. Marcy, Esq.*, as Referee, sold at public auction: All the railroad formerly of the said *The Buffalo, New York and Philadelphia Railway Company*, and forming part of the railroad of the *Buffalo, New York and Philadelphia Railroad Company*, beginning at (*Here was inserted description of line of railroad*), and all and singular the right of way of said company, and the lands, real estate, rails, tracks, bridges, buildings, depots, station-houses, shops, warehouses, structures, erections, fixtures and appurtenances thereunto belonging, or in anywise appertaining, and also all the locomotives, engines, tenders, carriages, shop tools and machinery, and all the franchises, rights and privileges, and all other property, real or personal, of the said Railway Company, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said Railway Company, of, in and to the same and every part and parcel thereof, with the appurtenances;

And whereas, on the *15th* day of *September*, 1887, under and in pursuance of a decree of the *Circuit* Court *of the United States* for the *Western* District of *Pennsylvania*, dated *May 14*, 1887, in a suit therein pending wherein *Archer N. Martin* was complainant and the *Buffalo, New York and Philadelphia Railroad Company* and the *Fidelity Insurance Trust and Safe Deposit Company* were defendants, and under and in pursuance of a decree of the *Circuit* Court *of the United States* for the *Northern* District of *New York*, dated *June 11*, 1887, in a suit therein pending between the same parties, which decrees were made and given to execute the provisions and enforce the lien of a mortgage or deed of trust executed by the *Buffalo, Pittsburgh and Western Railroad Company* to the *Fidelity Insurance Trust and Safe Deposit Company*, dated *April 1*, 1881, *Sussex D. Davis, Esq.*, as Special Master, sold at public auction all and singular the entire line of railway of the *Buffalo, Pittsburgh and Western Railroad Company*, now part of the *Buffalo, New York and Philadelphia Railroad*, being partly situate in the State of *New York* and partly in the State of *Pennsylvania*, together with all branch lines, and more particularly described as follows, that is to say: (*description of railroad property sold*).

And whereas, on the *15th* day of *September*, 1887, under and in pursuance of a decree of the *Circuit* Court *of the United States* for the *Western* District of *Pennsylvania*, dated *May 14th*, 1887, in a suit wherein the *United States Trust Company* was complainant, and the *Buffalo, New York and Philadelphia Railway Company*, the *Buffalo, New York and Philadelphia Railroad Company and others* were defendants, and under and in pursuance of a judgment of the *Supreme* Court of the State of *New York*, entered in the office of the Clerk of *Erie* County, dated *June 13*, 1887, in a suit therein pending between the same parties, which decree and

the approval of the comptroller, and contrary to and without a compliance with the provisions of chapter 264 of the Laws of 1878 as amended by chapter 306, Laws of 1882.

III.

And the said certificate of incorporation proposed to be filed is defective and not in compliance with the provisions of chapter 446 of the Laws of 1876, in that neither the said certificate or articles and agreement contain suitable provisions enabling the bondholders therein mentioned to vote by proxy, as provided by section one of said act.

Albany, October 12, 1887.

D. O'Brien, Attorney-General, for Deft.

judgment were made and given to execute the provisions and enforce the lien of a mortgage or deed of trust executed by the *Buffalo, New York and Philadelphia Railway Company* to the *United States Trust Company*, dated *July 1*, 1882; *Sussex D. Davis, Esq.*, as Special Master and Referee, sold at public auction all and singular the entire line of the *Buffalo, New York and Philadelphia Railway Company*, and of its successor, the *Buffalo, New York and Philadelphia Railroad Company*, being partly situate in the State of *New York* and partly in the State of *Pennsylvania*, more particularly described as follows, that is to say: (*description of roads and property sold*).

And whereas, on the *15th* day of *September*, 1887, under and in pursuance of a decree of the *Circuit* Court *of the United States* for the *Western* District of *Pennsylvania*, dated *May 14*, 1887, in a suit therein pending wherein *Edward W. Kinsley* was complainant and the *Buffalo, New York and Philadelphia Railroad Company* and the *Fidelity Insurance Trust and Safe Deposit Company* were defendants, and under and in pursuance of a decree of the *Circuit* Court *of the United States* for the *Northern* District of *New York*, dated *June 11*, 1887, in a suit therein pending between the same parties, which decrees were made to execute the provisions and enforce the lien of a mortgage or deed of trust executed by the *Buffalo, New York and Philadelphia Railroad Company* to the *Fidelity Insurance Trust and Safe Deposit Company*, dated *January 1*, 1884, *Sussex D. Davis, Esq.*, as Special Master, sold all and singular the entire line or lines of railroad of the *Buffalo, New York and Philadelphia Railroad Company*, being partly situate in the State of *New York* and partly in the State of *Pennsylvania*, as the same now is located or constructed, and more particularly described as follows, that is to say: (*description of railroad property sold*).

And whereas, *Carl Schurz, Clarence H. Clark, Charles M. Fry, Isaac N. Seligman* and *T. H. Adrian Tromp*, became the purchasers of all the railroads, property and franchises sold at the several sales before mentioned;

And whereas, *The Buffalo, New York and Philadelphia Railway Company* was a corporation organized under an Act of the Legislature of the State of *New York*, known as Chapter 672 of the Laws of 1866, and entitled 'An Act for the consolidation of the Buffalo and Washington Railway Company with the Sinnomahoning Portage Railroad Company of Pennsylvania,' passed April 18, 1866, and under the Laws of *Pennsylvania*;

And whereas, *The Buffalo, Pittsburgh and Western Railroad Company* was a corporation organized under an Act of the Legislature of the State of *New York*, known as Chapter 917 of the Laws of 1869, entitled 'An Act authorizing the consolidation of certain railroad companies,' passed May 20, 1869, and of the acts amendatory thereof and supplementary thereto, and of an Act of the said Legislature known as Chapter 256 of the Laws of 1875, entitled 'An Act relating to the consolidation of certain railroad companies,' passed May 7, 1875, and of the acts amendatory thereof and supplementary thereto, and under the Laws of *Pennsylvania*;

And whereas, *The Buffalo, New York and Philadelphia Railroad Company* was a corporation organized under the said Act of the Legislature of the State of *New York*, known as Chapter 917 of the Laws of 1869, and of the acts amend-

2. Proceedings against.[1]

a. To Recover Bonds and Prevent Issue of Other Bonds.

Form No. 6419.[2]

To the *Circuit* Court for the County of *Berrien*. In Chancery.

Your orator, *William Dester*, assignee of *Reeves, Patterson and*

atory thereof and supplementary thereto, and under the said Act of the said Legislature known as Chapter 256 of the Laws of 1875, and amendatory thereof and supplementary thereto, and under and in pursuance of the Laws of *Pennsylvania*;

And whereas, The said purchasers have acquired title to the railroad property and franchises sold as aforesaid, pursuant to a plan or agreement for or in anticipation of the readjustment of the respective interests therein of the mortgage creditors and stockholders of the *Buffalo, New York and Philadelphia Railroad Company*, the company which last owned such property and franchises at the time of the said sales, and for the representation of such interests of creditors and stockholders in the new corporation to be formed, which plan or agreement is hereinafter set forth;

And whereas, The said purchasers have associated with themselves *George Zabriskie* (*names of other associates*);

Now, therefore, the said *Carl Schurz, Clarence H. Clark, Charles M. Fry, Isaac N. Seligman* and *T. H. Adrian Tromp*, the said purchasers, and their said associates above named, hereby certify that they have associated themselves together under and in pursuance of an Act of the Legislature of the State of New York, known as Chapter 430 of the Laws of 1874, entitled 'An Act to facilitate the reorganization of railroads sold under mortgage, and providing for the formation of new companies in such cases,' passed May 11, 1874, and the acts amendatory thereof and supplementary thereto, for the purpose of becoming and being a body politic and corporate, and as such, of taking, holding and possessing the railroads, titles and properties included in the aforesaid sales, and all the franchises, rights, powers, privileges and immunities which were possessed before such sales by the *Buffalo, New York and Philadelphia Railroad Company*, or by *G. Clinton Gardner*, its Receiver, or by the *Buffalo, New York and Philadelphia Railway Company*, or by the *Buffalo, Pittsburgh and Western Railroad Company*; and do further certify:

That the name of the new corporation intended to be formed by the filing of this certificate is '*Western New York and Pennsylvania Railway Company of New York*';

That the maximum amount of the capital stock of the said new corporation is *fifteen million* dollars, and the number of shares into which the same is to be divided is *one hundred and fifty thousand*, all of which shall be common stock;

That the number of directors by whom the affairs of the said new corporation is to be managed is *thirteen*, and that the names and residences of the persons selected to act as directors for the first year of its organization are: (*names and residences of directors*).

That these articles may be altered or amended from time to time, and in such manner as the holders of two-thirds of the stock of the company may direct or approve;

That the aforesaid plan or agreement for readjustment is as follows: (*Here was set out the agreement for adjustment.*)

In witness whereof, the subscribers have hereunto set their hands and seals the *30th* day of *September*, 1887." (*Signatures, seals and acknowledgment.*)"

1. Proceedings by and against corporations, generally, see *supra*, note 1, p. 527.

2. This bill is based upon the facts in Dester *v.* Ross, 85 Mich. 375. By it plaintiff sought to compel the discharge of two mortgages executed by the St. Joseph Valley Railroad Company and held by Albert F. Ross and William R. Rough and Ed. M. Rough, as executors. The court duly overruled a general demurrer interposed to the bill, which ruling was sustained on appeal, the court holding that a case of equitable relief was made out by the bill.

For formal parts of bills in equity, generally, see the title BILLS IN EQUITY, vol. 3, p. 417; of complaints or petitions, generally, see the title COMPLAINTS, vol. 4, p. 1019.

Company, brings this bill as plaintiff against *Alfred F. Ross*, cashier *Farmers and Merchants' Bank of Buchanan*, and *William R. Rough* and *Ed. M. Rough*, executors of *George H. Rough*, deceased, *Charles A. Johnson*, *Jonas J. Burns*, *the St. Joseph Valley Railway Company*, and the *American Loan and Trust Company*, as defendants.

Thereupon plaintiff avers:

I. That the defendant, the *St. Joseph Valley Railroad Company*, is a corporation which was duly formed, organized and incorporated under and by virtue of the laws of this state.

II. That said *St. Joseph Valley Railroad Company* became insolvent on the *twentieth* day of *January*, 1886, and thereupon in due course of law passed into the hands of a receiver.

III. That the said *St. Joseph Valley Railroad Company* had, prior to the *twentieth* day of *January*, 1886, operated a narrow-gauge railroad between *Buchanan* and *Berrien Springs*, in this state, a distance of *ten* miles.

IV. That the said *St. Joseph Valley Railroad Company* had, to wit, prior to the said *twentieth* day of *January*, 1886, made, executed and delivered *two* certain mortgages, each for about the sum of *twenty thousand* dollars, one made, executed and delivered some time in *November*, 1880, to and in favor of the said defendant, *Alfred F. Ross*, and the other made, executed and delivered some time in *January*, 1883, to one *George H. Rough*.

V. That the said *George H. Rough* died on the *tenth* day of *May*, 1884, leaving a last will and testament, whereby the said defendants, *William R. Rough* and *Ed. M. Rough*, were appointed as executors of said last will and testament, and that the said *George H. Rough* was, at the time of his death, a resident of *Berrien* county, *Michigan*, and that on the *first* day of *June*, 1884, said last will and testament of the said *George H. Rough*, deceased, was duly proved in the *Probate* Court of the said county of *Berrien*, in the state of *Michigan*, and duly admitted to probate by said court; and that immediately thereafter, on the *first* day of *June*, 1884, letters testamentary were regularly and duly issued by said *Probate* Court to the said *William R. Rough* and *Ed. M. Rough*, said defendants, the said executors named in said last will and testament, and that the said defendants, *William R. Rough* and *Ed. M. Rough*, thereupon duly qualified and entered upon the discharge of the said duties of their said office as said executors, and ever since that time have been and are now, and were at the times hereinafter mentioned, acting as such executors.

VI. That the said *Ross* has assigned an undivided one-half of his said mortgage unto the said *William R. Rough* and *Ed. M. Rough*, the said defendants and said executors, and that they, the said *William R. Rough* and *Ed. M. Rough*, the said defendants and said executors, have assigned unto the said *Ross* an *undivided half* of the said mortgage made, executed and delivered to the said *George H. Ross* by the said *St. Joseph Valley Railroad Company* as hereinabove mentioned.

VII. That on the *twentieth* day of *April*, 1889, all that remained of the property and effects of the *St. Joseph Valley Railroad Company* was *ten* miles of unused right of way, the road-bed, and the iron rails thereon.

VIII. That on the *twentieth* day of *April*, 1889, the said defendants, *Ross*, *William R. Rough* and *Ed. M. Rough*, as parties of the first part, and *Jonas J. Burns*, party of the second part, entered into a written agreement, by the terms of which *Burns* was to bid in the title, rights, franchises and property of the said railroad company at the receiver's sale thereof, which had been fixed for the *seventh* day of *May* following; that within *thirty* days thereafter he, the said *Burns*, would rebuild and reconstruct said road as a standard-gauge road, and within *ninety* days the same should be finished and in operation between *Buchanan* and *Berrien Springs*. That in consideration of the premises, the parties of the first part agreed to execute and place in the hands of defendant *Charles A. Johnson* discharges of the mortgages held by them, and also of a judgment which defendant *Ross* held. That in consideration of these releases, *Burns* agreed that a mortgage executed by the legal corporation then owning said road, for the sum of *fifty thousand* dollars, should be placed thereon, to secure *fifty* bonds of *one thousand* dollars each, running *thirty* years, at *five* per cent., and that *sixteen* of said bonds should be delivered to said *Johnson*, *eight* for said *Ross*, and *eight* for the said *William R. Rough* and *Ed. M. Rough*.

IX. That the receiver's sale was had, and said *Burns* bid in all the said railroad property, franchises, etc., and received a conveyance thereof. That a new corporation was formed, to be known as the "*St. Joseph Valley Railway Company*," to construct and operate said road from *Buchanan* to *Berrien Springs*, and to extend the same southerly to *South Bend*, *Indiana*, and northerly to *St. Joseph* or *Benton Harbor*; and the title to all the property acquired at said receiver's sale was conveyed by *Burns* to said new company.

X. That within the *ninety* days named in said agreement the said road had been reconstructed as a broad-gauge road, at an expense of about *thirty thousand* dollars, and regular trains were running thereon, carrying passengers and freight between *Buchanan* and *Berrien Springs*.

XI. That at a meeting of the stockholders of said company held on the *first* day of *August*, 1889, the following preamble and resolutions were unanimously adopted: (*Here was set out copy of resolutions.*)[1]

1. **Resolutions referred** to in the text were as follows:

"Whereas, it is necessary for this company to borrow money or pledge its credit for the purpose of securing money to construct and complete its road; therefore be it Resolved, That the board of directors are hereby authorized, empowered and directed to execute a mortgage covering all the property of the company in the State of *Michigan* in a sum not exceeding $*10,000* per mile of completed road, and to issue bonds of this company, secured by said mortgage, from time to time, as may be proper and necessary, of the denomination of *one thousand* dollars each, bearing *5* per cent. per annum interest, payable *semiannually*, and running *30* years from date, which said mortgage and bonds shall bear date of *August 1*, 1889. It is further Resolved, That the amount of bonds to be issued on the railroad of said railway company between the villages of *Buchanan* and *Berrien Springs* be limited to *fifty thousand* dollars ($*50,000*), and that no further sum shall be issued on the aforesaid portion of the railroad of the said railway company without the consent of all the holders of the aforesaid bonds, numbered *one* to *fifty*,

XII. That pursuant to authority conferred by said resolutions, the board of directors, on the *first* day of *August*, 1889, executed and delivered to the *American Loan and Trust Company* of *New York*, as trustee, a mortgage upon all the property of said railway company, and all further extensions thereof, without specifying the amount for which given, but providing that it was to secure bonds to be certified and issued by said trustee to said railway company, "not exceeding at any time, in either certification or delivery, $*10,000* for each mile of such railroad completed so that cars may be run thereon," and further providing that the said bonds should be certified and issued only "upon the written application of the railway company, expressed through a resolution of its board of directors or its executive committee, adopted at a regular meeting, or at a special meeting called for that purpose."

XIII. That *one hundred* bonds were printed, but *fifty* of which have been certified and issued. That *sixteen* of said bonds have been delivered to *Charles A. Johnson* under said agreement. That the said *Ross* and the said *William R.* and *Ed. M. Rough* have executed and delivered to said *Johnson* discharges of the aforesaid mortgages, but have refused to accept said bonds, and have directed said *Johnson* not to deliver to the *St. Joseph Valley Railway Company* the discharges of said mortgages.

XIV. That, after the execution of the aforesaid agreement between said mortgagees and said *Burns*, the latter applied to *Reeves, Patterson and Company*, complainant's assignors, for moneys with which to reconstruct the said road, and that said *Reeves, Patterson and Company*, relying upon the performance of said agreement by both parties thereto, advanced the sum of *twenty thousand six hundred and twenty* dollars, which moneys were used in the reconstruction of said road; that because of the furnishing of said moneys, and the refusal of the said mortgagees to discharge said mortgages as agreed, the said *Reeves, Patterson and Company* became embarrassed financially, and indebted to banking houses at *Chicago* and elsewhere, and finally made an assignment to complainant.

XV. That, to secure said *Reeves, Patterson and Company*, certain of said bonds were delivered to them, and others were purchased by them, and all of said bonds so issued and all so purchased, aggregating in amount *thirty-four thousand* dollars, were hypothecated by said *Reeves, Patterson and Company* to secure their creditors; that the *fifty* bonds printed, but not certified by said trustee, as aforesaid, have not been used, but are in the safe of the said *Reeves, Patterson and Company*, and can be surrendered to be destroyed if the court shall so order.

XVI. That no attempt has been made to negotiate said *fifty* bonds, except that some negotiations have been had with said *Ross* and the *Roughs*, whereby a few of them could be used, but the negotiations fell through.

XVII. That since the appointment of complainant as assignee he has prosecuted said claim to judgment against the *St. Joseph Valley*

inclusive. And be it further Resolved, That the *American Loan and Trust Company* be, and is hereby, made the trustee of said mortgage."

Railway Company, upon which an execution has been issued, which has been levied upon all the property of said railway company.

XVIII. That if the agreement aforesaid is carried out, and said mortgages discharged, complainant will be able to pay in full all the creditors of said *Reeves, Patterson and Company*; otherwise he will not be able to pay more than *ten* or *fifteen* cents on the dollar of that indebtedness.

XIX. That a large amount of aid has been pledged to said railway company, and in case said mortgages are discharged, the bonds issued, and the said contract performed according to its terms, that the said railway company will be able to pay the aforesaid judgment and the bonds in full.

XX. That said *Reeves, Patterson and Company* were not aware that the said mortgage was for more than *fifty thousand* dollars, but always understood that the said *Burns* and the new company organized by him were carrying out said agreement according to its terms.

Wherefore plaintiff prays,

I. That the *fifty thousand* dollars in bonds that have not been certified be delivered up for cancellation; that the railway company may be enjoined from issuing any other or further bonds than the *fifty thousand* dollars upon said *ten* miles of road already certified, except with the consent of all of the holders of said bonds.

II. That said company and said *Burns* may be required and decreed to perform the aforesaid contract.

III. That the mortgagees aforesaid may be ordered to discharge the said mortgages.

IV. That said *Charles A. Johnson* be directed to deliver over to said mortgagees the *sixteen* bonds in question.

V. That the *American Loan and Trust Company* of *New York* be directed to certify no more bonds except upon the order of the court.

William Dester.

Oliver Ellsworth, Solicitor and of Counsel for Plaintiff.

(*Verification.*)[1]

b. Answer Alleging Nonliability.

Form No. 6420.[2]

City Court of *New York.*

William Fernschild, plaintiff,
against
D. G. Yuengling Brewing Company, defendant. } Answer.

The defendant answering the complaint herein by *Guggenheimer*,

1. See the title VERIFICATIONS.

2. **This answer is copied from the record** in Fernschild *v.* D. G. Yuengling Brewing Co., 15 N. Y. App. Div. 29. The plaintiff brought action against the reorganized company to recover the amount of securities held by him against the pre-existing company. Defendant prevailed at the trial term of the city court and in the general term of the same court, but in the appellate term of the supreme court in the city of New York, which succeeded the court of common pleas as a reviewing tribunal in cases from the city court, it was held that plaintiff was entitled to judgment. On appeal, however, of the appellate division, the judgment of the appellate

Untermyer & Marshall, its attorneys, respectfully shows to this court as follows:

First. It denies all knowledge or information sufficient to form a belief as to the allegations contained in paragraphs *first*, *second* and *third* of the complaint.

Second. It admits that it acquired title to the property sold under the foreclosure sale referred to in paragraph *fourth* of the complaint, but denies that in consideration of a bill of sale duly executed, conveying to the defendant certain personal property, effects and chattels, including the stock in trade, good-will and book accounts of the *D. G. Yuengling, Jr., Brewing Company*, this defendant assumed certain debts, obligations and liabilities of said *D. G. Yuengling, Jr., Brewing Company*, among which was the indebtedness due to the plaintiff as alleged in paragraph *fourth* of the complaint at folios *9* and *10* thereof, but alleges that it did not then or at any other time assume the debts and obligations of the *D. G. Yuengling, Jr., Brewing Company*, nor did it then or at any other time promise or agree to pay the said debts or the indebtedness due the plaintiff herein.

Third. This defendant denies that, at the time of the delivery of the bill of sale and transfer thereunder, and in consideration thereof, as alleged in paragraph *fourth* of the complaint, the defendant duly passed a resolution, a copy of which is set forth in the complaint at folios *10*, *11* and *12* in paragraph *fourth* thereof; and it further denies that the indebtedness due the plaintiffs as aforesaid was, by the said resolution and agreement, or by any resolution or agreement, of the defendant, assumed by it.

For a defense to the second cause of action set forth in the complaint the defendant alleges.

Fourth. It denies all knowledge or information sufficient to form a belief as to the allegations contained in paragraphs *fifth*, *sixth* and *seventh* of the complaint.

Fifth. It admits that it acquired title to the property sold under the foreclosure sale referred to in paragraph *eighth* of the complaint, but denies that, in consideration of a bill of sale duly executed conveying to the defendant certain personal property, effects and chattels, including the stock in trade, good-will and book accounts of the *D. G. Yuengling, Jr., Brewing Company*, this defendant assumed certain debts, obligations and liabilities of said *D. G. Yuengling, Jr., Brewing Company*, among which was the indebtedness due to the plaintiff as alleged in paragraph *eighth* of the complaint, at folios *20* and *21* thereof; but alleges that it did not then, or at any other time, assume the debts and obligations of the *D. G. Yuengling, Jr., Brewing Company*, nor did it then, or at any other times, promise or agree to pay the said debts or the indebtedness due the plaintiff herein.

term was reversed, and the judgment of the general term of the city of New York was affirmed, the court holding that where the reorganized corporation accepted a bill of sale of assets of the old corporation and covenanted to assume its debts, except mortgage bonds and excepting all other indebtedness otherwise provided for in the plan of reorganization, the reorganized company was not bound to pay the mortgage bonds of the old company.

For formal parts of answers, generally, consult the title ANSWERS IN CODE PLEADING, vol. 1, p. 799.

Sixth. This defendant denies that at the time of the delivery of the bill of sale and transfer thereunder, and in consideration thereof, as alleged in paragraph *eighth* of the complaint, the defendant duly passed a resolution, a copy of which is set forth in the complaint at folios *22*, *23* and *24* in paragraph *eighth* thereof; and it further denies that the indebtedness due the plaintiff as aforesaid was by said resolution and agreement or by any resolution or agreement of the defendant, assumed by it.

Wherefore the defendant demands judgment dismissing the complaint herein, with costs.

Guggenheimer, Untermyer & Marshall,
Attorneys for defendant,
46 Wall Street, *New York City.*

(*Verification.*)[1]

c. Answer of Reorganization Committee to an Attack upon their Powers.

Form No. 6421.[2]

Supreme Court, *Kings* County.

Josiah J. White, plaintiff,
against
George C. Wood, Samuel D. Davis, Jerry Collins and Anson Maltby, defendants.
} *Amended* Answer.

The defendants above named answering the complaint by their *amended* answer, respectfully say:

I. The defendants admit that the plaintiff purchased *seven* "*Sinking Fund*" bonds and *twenty* "*Gold Mortgage*" bonds issued by the *Chattaroi Railway Company*, but they aver that they have not any knowledge or information sufficient to form a belief as to the truth of the allegations that the plaintiff continued to own said bonds up to the time of the foreclosure by the *Union Trust Company* of the city of *New York* of the mortgages made to secure the payment of said bonds or that plaintiff holds and owns said bonds, and therefore they deny the same.

II. They deny that said *Union Trust Company* began a suit to foreclose said mortgages in the *United States Circuit* Court for the District of *Kentucky* in or about the year 1887, and they aver that the said trust company began said suit long prior to the year 1887, to wit, in the year 1885.

1. See the title VERIFICATIONS.

2. **This answer is copied from the record** in the case of White *v.* Wood, 129 N. Y. 527. That was a proceeding to restrain defendants from conveying or turning over the franchise and property of the Chattaroi Railway Company to any person or corporation except the Ohio and Big Sandy Railroad Company. Decision was in favor of the plaintiff in special term, which was affirmed in the general term of the supreme court. On appeal, however, to the court of appeals the judgment was reversed on the theory that the evidence did not show bad faith on the part of the defendants, but, on the contrary, showed that they acted in good faith.

For formal parts of answers, generally, see the titles ANSWERS IN CODE PLEADING, vol. 1, p. 799; ANSWERS in EQUITY, vol. 1, p. 854; of pleas, generally, see the title PLEAS.

III. They deny that they entered into any trust or other agreement with the holders of "*Sinking Fund*" and "*Gold Mortgage*" bonds issued by the said *Chattaroi Railway Company* whereby they agreed after purchasing the property of the said *Chattaroi Railway Company*, on foreclosure sale under the mortgages given by said *Chattaroi Railway Company*, to secure said bonds, and after forming a new corporation to take possession of and operate the property of said *Chattaroi Railway Company* that they would or were required to distribute all of the stock of the said new company among the holders of the said bonds *pro rata* according to the holdings of each.

IV. They deny that the deed of conveyance under any judicial sale of the franchise and property of the said *Chattaroi Railway Company* was executed or delivered to them, as joint tenants or otherwise, on or about the *fourteenth* day of *May*, 1887, and they deny that on or about said date they took possession of said franchise and said property or have ever since been operating the railway, and have been receiving the incomes and revenues thereof, but they aver that such delivery was made the latter part of *April*, 1888, since which time they have been in possession of and have operated said railroad until the *twenty-fourth* day of *August*, 1889.

V. They deny that they did in or about the month of *July*, 1889, organize a new corporation under the laws of the state of *Kentucky*, naming it the *Ohio and Big Sandy Railroad Company*, and making its capital stock *two million* dollars, divided into shares of *one hundred* dollars each, and defendants aver that they did begin to organize such company in *July*, 1889, and that said organization was never completed, and was discontinued before completion, but they aver that since that time they have organized a corporation under that name with the same nominal but not actual amount of capital stock.

VI. They deny that in and by the terms of the trust agreement alleged in said complaint to have been made between these defendants and the owners of said "*Sinking Fund*" and "*Gold Mortgage*" bonds it was the duty of the defendants, having turned the franchise and property of said *Chattaroi Railway Company* over to said new corporation or any new corporation by adequate deed of conveyance; to then divide the capital stock of the said new corporation or any new corporation *pro rata* among said bondholders. They deny that they entered into an agreement outside of said trust agreement and hostile thereto, but beneficial to themselves personally with one *Collis P. Huntington* whereby they agreed, in consideration of *fifty-six thousand* dollars or thereabouts to be paid to them by said *Huntington*, to obtain for the said *Huntington* a majority in value of the said bonds for the cash price of *fifty* per cent. of the par value thereof to be paid by the said *Huntington* and thereupon to turn the said new corporation over to said *Huntington*, whereupon, according to the terms of the said alleged agreement which they are alleged to have so made with the said *Huntington* without authority, stock of the said new corporation of the par value of *nine hundred and ninety-four thousand* dollars only is to be distributed *pro rata* among the said bondholders instead of *two million* dollars of the stock of the new corporation, and they deny that said trust agreement provides that said *two million*

dollars of stock shall be so distributed, and they deny that they have entered into the said agreement or any agreement with said *Huntington* whereby they have combined with him and have designed and concluded to so distribute stock of the said new corporation or to any new corporation of the par value of *nine hundred and ninety-four thousand* dollars instead of the entire stock of the said new corporation for the purpose of wronging the said bondholders and depreciating the value of their said bonds and compelling them to part with the same at *fifty* per cent. of the par value thereof sooner than to enter into a litigation with them and the said *Huntington* and his associates.

VII. They deny that they are now about to carry out said alleged agreement with said *Huntington* and the organization thereof and the distribution of the said stock thereof to the said bondholders and are about to convey the franchise and the property of the said *Chattaroi Railway Company* to be disposed of as aforesaid and not in accordance with said alleged trust agreement, and they deny that in pursuance of the alleged so-called agreement the stock of the said new corporation of the par value of *nine hundred and ninety-four thousand* dollars only is to be distributed among said bondholders, and they deny that said plaintiff will thereby or in any way be wronged and will not receive the benefit of the said trust agreement and will not obtain the stock which he is entitled to thereunder.

VIII. They deny that they claim and pretend that the said *fifty-six thousand* dollars, which it is alleged in the said complaint is to be paid by said *Huntington* in cash to them, is to be their individual property, and they deny that they intend to distribute the same among themselves or that they allege that that amount is due to them for money disbursed by them in the management and running of the *Chattaroi Railway Company* after they became the owners of the same as joint tenants in trust, and they deny that no sum is due to them, and they deny that they ever owned and operated the said *Chattaroi Railway Company*, as trustees or otherwise, from *May*, 1887, to *July*, 1889, or at any other time, and they deny that they ever received large sums of money or any sums of money the earnings of said company, and they deny that they still hold or ever held any of the earnings of said company. They admit that they never accounted for said earnings, for they never received them. They deny that they are about to turn the said franchise and property over as aforesaid without rendering any account or that they intend to retain unaccounted for all of the said alleged earnings, and they deny that if they render a just and true account of the money so received by them and are allowed all legal expenses it will be found that they have in their hands a large sum in excess of all legal expenses, and they deny that instead of the said company or the said bondholders being in any way indebted to them they have in their hands money for which they are justly accountable to the said bondholders.

IX. They aver that the only trust agreement with owners of bonds issued by the said *Chattaroi Railway Company* into which the defendants have entered is that set forth in a certain agreement dated *February 15*, 1889, a copy of which is hereunto annexed, marked

Schedule *A*,[1] and made a part of this answer.

X. They deny all allegations of the complaint in respect to the contents, purport or effect of said trust agreement except as by reference to said schedule they may be found correct and true.

1. Schedule A, containing a copy of the trust agreement referred to in the text, was as follows:

"This Trust Agreement, made and entered into this *fifteenth* day of *February*, A. D. 1887, between the holders of the '*Sinking Fund*' and '*Gold Mortgage*' bonds of the *Chattaroi Railway Company* (secured by mortgages of said Company respectively bearing date *August, 12th*, 1880, and *March 1st*, 1882), first party, and *George C. Wood*, of *Brooklyn, New York; Samuel D. Davis*, of *Lakewood, New Jersey; Jerry Collins*, of *Glens Falls, New York*; and *Anson Maltby*, of *New York*, second party, witnesseth:

First. Each holder of any of the said bonds who shall deposit them with the *Union Trust Company of New York*, under this trust agreement, agrees for himself and not for the others, but to and with the other, and with the second party.

Second. Each bondholder of '*Sinking Fund*' and '*Gold Mortgage*' bonds shall deposit his bonds with the *Union Trust Company of New York*, and shall in place of said bonds receive from said *Trust Company* its receipt as set forth in 'Schedule *a*' hereto annexed. Such receipts shall be transferable by indorsement and delivery, and when issued to a depositor hereunder, shall be deemed a part of this agreement, and its terms shall, in connection herewith, control the parties hereto.

Third. The stock and '*Income Bonds*' of the *Chattaroi Railway Company* belonging to depositors [hereunder] of '*Sinking Fund*' and '*Gold Mortgage*' bonds shall be deposited with said *Trust Company*, for which said *Trust Company* shall give a certificate of deposit as set forth in 'Schedule *b*' hereto annexed, and shall be subject to the control of the second party, and shall be delivered to the *Charleston, Cincinnati and Chicago Railroad Company*, or to any company or persons to whom the second party shall sell said property, as hereinafter provided, or to any new company organized by them, as hereinafter provided, and by such transfer, all rights as owners of such bonds and stock shall become the rights of such transferee.

Fourth. In this instrument the word 'receipt' refers to receipts of '*Sinking Fund*' and '*Gold Mortgage*' bonds as set forth in 'Schedule *a*,' and the words '*Certificate of Deposit*' refer to certificates of deposit of '*Income Bonds*' and capital stock as set forth in 'Schedule *b*.'

Fifth. Second party, their survivors and survivor, shall have power to fill any vacancy or vacancies, which may exist in their number.

Sixth. Second party shall be and constitute a purchasing committee. At any sale of the property covered by the mortgage aforesaid, which may be made pursuant to any decree in the foreclosure proceedings now pending in the *Circuit* Court or *Circuit* Courts of the United States, second party shall have and is hereby given full power and authority to purchase all and singular the property covered by said mortgages in their own names as joint tenants, and not as tenants in common, but for and behalf of the first party hereto, and at a price within their discretion. Second party shall have power and authority to appropriate and use the bonds deposited with said *Trust Company* under this agreement in payment for the purchase price for said property, so far as the same can be used, and said *Trust Company* is hereby instructed to hold said bonds to the order and direction of second party for such purpose, and the purposes hereinafter mentioned, and to deliver said bonds to second party upon their written request, or otherwise dispose of said bonds as second party may direct, in order to apply the same bonds in payment of such purchase price. Second party may designate any one or more of its members, or any other person or persons, to attend the said sale and bid off the property, and may generally employ such agents or attorneys or counsel as second party shall find necessary and proper.

Seventh. Second party shall have power to borrow such money as may be necessary to the carrying out of this agreement, and security for payment of such money, to pledge the bonds deposited hereunder, and to mortgage and give a lien on the property purchased by them hereunder;

XI. They aver that during the month of *August*, 1889, before the service of the summons in this action, they organized the *Ohio and*

and to contract for the extension of the time of repayment of such loans from time to time.

Eighth. In case said party shall purchase said property, as aforesaid, second party shall take, hold and operate the same until they shall sell the same, or until a new company shall be formed to hold and operate the same, if it, at any time, becomes necessary so to do to carry out the purposes hereof.

Ninth. At any time within *six* months from the date when said second party shall obtain possession of said road and property, they shall have power in accordance with the proposition of the *Massachusetts and Southern Construction Company*, dated *October 26th*, 1886, and assented to by the first parties hereto, to sell such property and road unto the *Charleston, Cincinnati and Chicago Railroad Company*, or [on their failure to purchase] to any corporation, or person, for a cash sum, which shall equal *seventy-two* per cent. of the par value of the outstanding '*Sinking Fund*' and '*Gold Mortgage*' bonds of said *Chattaroi Railway Company*, with interest at *six* per cent. on the par value of such outstanding bonds from *January 1st*, 1887, and the legitimate foreclosure expenses, and the legitimate floating debt.

Tenth. The purchase money for which said second party shall sell said property, shall be paid to said *Trust Company*.

Eleventh. After the second party shall have deducted or been reimbursed the expenses of carrying out this agreement, the sum remaining shall be divided among and paid to the holders of the receipts issued hereunder, in proportion to the number of bonds deposited for which the receipts were issued, upon the surrender to said *Trust Company* of such receipts.

Twelfth. Should said second party at any time deem it necessary, in order more fully to protect the rights of the persons composing the first party hereto, to form a company to take possession and operate said property and railroad under the present franchise or a new charter, they are hereby fully empowered to form such company. The stock of such company shall be issued to and divided among the holders of the receipts issued by the said *Trust Company* hereunder, in proportion to the number of bonds deposited for which the receipts were issued, upon the surrender to said *Trust Company* of such receipts.

Thirteenth. Second party shall be invested with full power and authority to carry out the purposes of this trust agreement, to make and execute all such instruments as they deem necessary hereunder, and generally to do all acts and things necessary and proper in their judgment to execute the provisions of the agreement, and shall be entitled to a reasonable compensation for their services.

And in all cases second party shall be authorized to pay such reasonable compensation as they may deem proper to all counsel, servants and agents whom they may reasonably employ in carrying out the purposes of this agreement; shall have full power and authority to make due provisions, in their discretion, in case of any defect of their express powers hereunder, and shall nevertheless proceed to carry out the true intent, meaning and purpose of this agreement by conforming as near as may be to the provisions thereof. And they may assist in the prosecution of, or become parties to, all suits now pending or hereafter to be brought, or commence and prosecute all such other suits or proceedings as they may deem necessary in the premises.

Fourteenth. Second party shall act by a majority of their number, either at regular or special meetings or by writing signed by such majority without a meeting as they shall determine from time to time. They shall determine all questions that may arise concerning the construction and effect of any provision of this agreement, which determination shall be final and conclusive in every case.

Fifteenth. The several members of the second party shall not be personally responsible for the acts or omissions of their associates, nor for those of their agents, servants and employees employed by the second party as such committee.

Sixteenth. By the acceptance of the receipts hereinbefore referred to, the parties of the first part, respectively depositing their bonds with the said

Big Sandy Railroad Company under, by virtue of, and in accordance with the acts of the general assembly of the *commonwealth* of *Kentucky* entitled (*title of acts and dates of approval*).[1]

XI*a*. They aver that said act entitled "An Act to incorporate the purchasers of railroads" provides as follows: (*Here was set out provisions of act.*)[2]

XI*b*. Chapter 56 of General Statutes requires that in incorporating companies under said chapter the amount of capital stock authorized and the times when and the conditions upon which it is to be paid in shall be provided for.

XI*c*. They aver that said act entitled "An Act to incorporate the Chattaroi Railway Company" provides that the capital stock of the said *Chattaroi Railway Company* shall be *two million of* dollars divided into shares of *one hundred* dollars each, and that it may at any time be increased by a vote of the majority of the stockholders to any sum necessary for the completion and equipment of said railway, not exceeding *ten million* dollars, and said act provides further that said stock shall be paid for in money, work, property, material, or in such kind and manner as may be agreed upon.

XI*d*. They aver on information and belief that the original cost of the construction of the said railroad of the said *Chattaroi Railway Company* and of the equipment purchased for use on said railroad was not exceeding *twelve hundred and fifty thousand* dollars (*$1,250,000*), and said railroad is not half completed.

XII. That in order to comply with the terms of said act entitled

Trust Company, become parties to this agreement with the same force and effect as if they had severally affixed their signatures and seals at the foot of this instrument.

Seventeenth. Holders of bonds and stocks not depositing the same hereunder within a period of *sixteen* days (which may be extended at discretion by second party) shall be deemed nonassenting bondholders, and shall not be entitled to any benefit hereunder.

Eighteenth. The several persons composing the second party hereby accept the trusts imposed upon them by this agreement.

In witness whereof the parties hereto set their hands and seals the day and year first aforesaid." (*Signatures and seals.*)

(*Schedules a and b attached.*)

1. The titles of the acts referred to in the text were "An Act to incorporate the Chatteroi Railway Company," approved March 11, 1873; "An Act to amend the charter of the Chattaroi Railway Company," approved February 23, 1882; "An Act to incorporate the purchases of railroads," approved March 1, 1876; "An Act to adopt the general statutes," approved April 22, 1873, under which latter act chapter 56 of the General Statutes of the Commonwealth of Kentucky was enacted.

2. The act referred to in the text provided as follows:

"That whenever a railroad hereafter may be sold under and in pursuance of a decree or judgment of a Court of Equity or other court having jurisdiction, the purchasers thereof or their assigns, together with such persons as may be associated with them, shall be authorized to become a body politic and corporate for the purpose of operating and completing said railroad and shall be entitled to exercise all the franchises, powers, rights and privileges, and shall be subject to all limitations, restrictions and liabilities contained in the charter granted by the General Assembly of the Commonwealth of Kentucky, under which said railroad was constructed and operated as they existed at the time of such sale. The mode by which said purchasers or their assigns and associates as above mentioned shall become incorporated shall be as prescribed in Chapter 56 of the General Statutes," etc.

"An Act to incorporate the Chattaroi Railway Company" the defendants, in the articles of incorporation of the *Ohio and Big Sandy Railroad Company* as finally organized by them, fixed the nominal amount of the capital stock of the said company at *two million* dollars, and further provided in said articles that "*Nine hundred and ninety-four thousand* dollars of said capital stock is to be delivered to the purchasing and reorganization committee above mentioned (meaning these defendants), in part payment for the property purchased by said committee at the sale above mentioned" (meaning the property formerly of the *Chattaroi Railway Company* held by these defendants under said trust agreement of *February 15*, 1887), and also that "The balance of the said capital stock may be disposed of from time to time by the board of directors at its discretion, and is to be paid in from time to time upon calls by the board of directors."

XIII. They aver that by such provisions these defendants intended that the actual capital stock should be but [$*994,000*] *nine hundred and ninety-four thousand* dollars, and that the whole thereof should be delivered in payment for the transfer of said property, and should be distributed in accordance with the terms of said trust agreement. And that thereafter, when in the proper administration of the affairs of said railroad company it should be deemed necessary, the remainder or any part of the nominal capital of *two million* dollars should be issued in a lawful manner for a distinct, valuable and proper consideration.

XIV. They aver that the foregoing is the true and proper construction of said articles of incorporation, and that such intent and the acts of these defendants in the premises have been in strict fulfilment of said trust agreement and of said acts of said assembly.

XV. They aver that on or about the *twenty-fourth* day of *August*, 1889, they conveyed all the property formerly of the *Chattaroi Railway Company*, or acquired by them as trustees, and held under said trust agreement to said *Ohio and Big Sandy Railroad Company*, in consideration of said *nine hundred and ninety-four thousand* dollars of capital stock and of a promissory note of said railroad company for [$*56,800*] *fifty-six thousand eight hundred* dollars payable on demand to the order of *George C. Wood*, one of these defendants, as chairman of said purchasing committee.

XVI. They aver that accordingly said *nine hundred and ninety-four thousand* dollars of capital stock, and that amount only, has been issued for delivery according to the provisions of said trust agreement, and of that amount *two hundred and seventy* shares, at the par value of *twenty-seven thousand* dollars, are ready for delivery in exchange for the trust receipts of the *Union Trust Company of New York*, given for the *twenty-seven* bonds of the *Chattaroi Railway Company* deposited as alleged in the complaint on compliance by the owner thereof with said trust agreement.

XVII. They aver that the amount of said promissory note was fixed by these defendants as an estimate to cover as nearly as possible sums of money borrowed and liabilities incurred by them in pursuance of their duties as such purchasing committee under said trust agreement, and such promissory note was made and given to these

defendants by said railroad company upon condition that after collection thereof any part of the said sum of *fifty-six thousand eight hundred* dollars not justly and properly payable by said defendants as such committee should be returned to said railroad company.

XVIII. They aver that apart from said promissory note and said shares of capital stock they have no property of themselves as said purchasing committee, or of said *Chattaroi Railway Company* or of any owner of said trust receipts or bonds in their possession or under their control; that they nor any of them have ever individually received any money or property, the earnings of said railroad, during their whole term of office as such committee, whether as commission or compensation for their services as trustees or otherwise, but that all moneys and property received during their said term of office, in the operation or on account of said railroad, were received, held and expended by the officers and agents of these defendants, except money borrowed by these defendants, and all of it paid out by them for the purposes of purchasing and operating said railroad and paying the small expenses of said purchasing committee. That all property and account books used in operating said railroad by these defendants and all accounts and property of these defendants as such committee were delivered to said railroad company on the *twenty-fourth* day of *August*, 1889, and are still held by said company.

XIX. They deny that they have received and still retain or that they hold control or are to receive from any person or source whatever any sum of money or property to which the plaintiff is or has ever been entitled as the alleged or real owner of said *twenty-seven* bonds or of the receipts of the said *Union Trust Company* for the deposit thereof under said trust agreement, and they deny that any accounting whatsoever will show that they have or are to have in their hands or under their control any sum whatever, whether in excess of all legal expenses or otherwise, or that they have or are to have in their hands or under their control money for which they are in any way accountable to any holder of any of said bonds or trust receipts or to this plaintiff.

XX. They aver on information and belief that the owners of trust receipts for *nine hundred and sixty-seven* bonds of the total *nine hundred and ninety-four* bonds deposited under said trust agreement dated *February 15*, 1887, have ratified and approved all of the various acts aforesaid of these defendants in reorganizing said railroad company and conveying said property to said *Ohio and Big Sandy Railroad Company*, and especially in the issuing and distributing but *nine hundred and ninety-four thousand* dollars of capital stock to the holders of trust receipts under said trust agreement, and that the owners of the *twenty-seven* bonds or trust receipts therefor, upon which this suit is based, are the only owners of any such bonds or trust receipts who have not so ratified and approved said acts of these defendants.

Wherefore, the defendants demand judgment against the plaintiff, that this complaint herein be dismissed with costs of these defendants.

Anson Maltby, Attorney in Person, and Attorney for Defendants *George C. Wood*, *Samuel D. Davis* and *Jerry Collins*.

(*Verification.*)[1]

IV. DISSOLUTION — WINDING UP.[2]

1. Proceedings to Dissolve, Generally.[3]

1. Consult the title VERIFICATIONS.

2. Involuntary dissolution of a corporation may be accomplished as provided by statute. Consult the following statutory provisions:

Alabama. — Civ. Code (1886), § 3167 *et seq.*

Arizona. — Rev. Stat. (1887), § 3191 *et seq.*

Arkansas. — Sand. & H. Dig. (1894), § 7364 *et seq.*

California. — Code Civ. Proc. (1897), § 802 *et seq.*

Colorado. — Mills' Anno. Code (1896), § 289 *et seq.*

Connecticut. — Gen. Stat. (1888), § 1321 *et seq.*; Laws (1889), p. 138, Laws (1893), p. 263, Laws (1895), pp. 467, 571.

Georgia. — 2 Code (1895), § 1879 *et seq.*

Idaho. — Rev. Stat. (1887), § 4329.

Illinois. — Starr & C. Anno. Stat. (1896), p. 1011, § 25 *et seq.*

Indiana. — Horner's Stat. (1896), § 1141.

Iowa. — Code (1897), § 4313.

Kansas. — 1 Gen. Stat. (1897), p. 700, § 45 *et seq.*

Kentucky. — Stat. (1894), § 569.

Louisiana. — Rev. Laws (1897), § 688.

Maine. — Rev. Stat. (1883), p. 403, § 27 *et seq.*

Maryland. — Pub. Gen. Laws (1888), art. 23, § 264 *et seq.*

Massachusetts. — Pub. Stat. (1882), p. 1075, § 17 *et seq.*

Michigan. — How. Anno. Stat. (1882), §§ 8155, 8165, 8618, 8657; Pub. Acts (1895), p. 41 *et seq.*

Minnesota. — Stat. (1894), §§ 359, 5899, 5962, 5965, 5968 *et seq.*

Mississippi. — Anno. Code (1892), § 3520 *et seq.*

Missouri. — Rev. Stat. (1889), § 2835.

Montana. — Code Civ. Proc. (1895), § 1410 *et seq.*

Nebraska. — Comp. Stat. (1897), §§ 1737, 1846.

Nevada. — Gen. Stat. (1885), §§ 3342 *et seq.*, 3711.

New Hampshire. — Pub. Stat. (1891), p. 410, § 22.

New Jersey. — Gen. Stat. (1895), p. 919, § 70.

New York. — Birds. Rev. Stat. (1896), p. 672, § 68 *et seq.*, p. 675, § 80.

North Carolina. — Code (1883), §§ 604, 694 *et seq.*

North Dakota. — Rev. Codes (1895), §§ 2912, 5762 *et seq.*

Ohio. — Bates' Anno. Stat. (1897), § 5651 *et seq.*

Oklahoma. — Stat. (1893), §§ 968 *et seq.*, 5357 *et seq.*, 6140.

Oregon. — Hill's Anno. Laws (1892), § 354 *et seq.*

Pennsylvania. — Bright. Pur. Dig. (1894), p. 411, § 31 *et seq.*

Rhode Island. — Gen. Laws (1896), p. 536, § 27 *et seq.*

South Carolina. — Code Civ. Proc. (1893), § 424 *et seq.*

South Dakota. — Dak. Comp. Laws (1887), § 5345 *et seq.*

Tennessee. — Code (1896), § 2054 *et seq.*

Texas. — Rev. Stat. (1895), art. 680 *et seq.*

Utah. — Rev. Stat. (1898), § 3623.

Vermont. — Stat. (1894), § 3741.

Virginia. — Code (1887), § 404 *et seq.*

Washington. — Ballinger's Codes and Stat. (1897), § 5780 *et seq.*

West Virginia. — Code (1891), p. 510, § 57 *et seq.*

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 1824 *et seq.*

Wyoming. — Rev. Stat. (1887), § 3092 *et seq.*

See also list of statutes cited *supra*, note 1, p. 527.

3. Action to procure judgment dissolving the corporation, and forfeiting its corporate rights, privileges and franchises, may be maintained: 1. Where the corporation has remained insolvent for at least one year. 2. Where it has neglected or refused for at least one year to pay off and discharge its notes and other evidences of debt. 3. Where it has suspended its ordinary and law-

a. Before Attorney-General.[1]

(1) Notice of Motion.

Form No. 6422.[2]

In the matter of the *Buffalo Stone and Cement Company*.

Byron M. Schultz: Please take notice that on the statement or petition, a copy of which is herewith served upon you, a motion will be made before the Hon. *Charles F. Tabor*, attorney-general of the state of *New York*, at the office of Messrs. *Tabor & Sheehan*, in the *Law Exchange*, corner of *Niagara* and *Eagle* streets in the city of *Buffalo*, county of *Erie* and state of *New York*, on the *second* day of *March*, 1889, at *eleven* o'clock in the *fore*noon of said day, that the proper proceedings be taken by said attorney-general to dissolve said company.

Dated the *twenty-fifth* day of *February*, 1889.

Strong & Brendell, Attorneys for Petitioners,
No. *41 E. Seneca* Street, *Buffalo, N. Y.*

(2) Submission of Statement of Facts.

(*a*) *By Written Request.*

Form No. 6423.[3]

To Honorable *Thomas B. Hancock*, Attorney-General of the State of *New York*:

You are hereby requested to bring an action against *The Northern Light Oil Company*, of the city of *New York*, *Charles W. Burton*, and others, *trustees* of said company, to vacate the charter and annul the existence of said company, and for the appointment of a receiver for its assets, and for an injunction restraining the corporation and its officers and agents from exercising any of its corporate rights and

ful business for at least one year. 4. If it has banking powers, or power to make loans and pledges or deposits, or to make insurances, where it becomes insolvent or unable to pay its debts, or has violated any provision of the act by or under which it was incorporated, or of any other act binding upon it.

New York. — Code Civ. Proc., § 1785 (Birds. Rev. Stat. (1896), p. 672, § 68). See also list of statutes cited *supra*, note 2, p. 658.

1. The attorney-general, in the name and in behalf of the people, may maintain the action, and whenever a creditor or stockholder submits to the attorney-general a written statement of facts, verified by oath, showing grounds for an action, and the attorney-general omits for sixty days after the submission to commence the action, then, and not otherwise, the creditor or stockholder himself may apply to the proper court for leave to commence such action, and on obtaining leave may maintain the same.

New York. — Code Civ. Proc., § 1786, as *amended* Laws (1880), c. 301 (Birds. Rev. Stat. (1896), p. 673, § 69). See also list of statutes cited *supra*, note 2, p. 658.

2. This notice of motion to dissolve was copied from the record in the case of People *v.* Buffalo Stone, etc., Co., 131 N. Y. 140. For notice of motion, generally, consult the title Motions.

3. This request to the attorney-general to sue was based upon the facts in Swords *v.* Northern Light Oil Co., 17 Abb. N. Cas. (N. Y. Supreme Ct.) 115. In that case the attorney-general was requested to commence an action in the name and on behalf of the people of the state to dissolve said corporation. More than sixty days elapsed, and the attorney-general omitted to commence

franchises. The grounds upon which the action is requested are as follows:

1. That the said corporation is now, and has been for over a *year* last past, insolvent, and has not paid any of its indebtedness owing to various persons, and has no adequate means of liquidating such indebtedness.

2. That the assets of said company consist almost entirely of oil-lands, the product from which has been exhausted so that the said company is not now, and has not been for some time, in the receipt of any income whatsoever.

3. That the undersigned are stockholders in said company, and make this request on behalf of themselves and of all others who are interested in said company, either as stockholders or creditors, and they offer to furnish security satisfactory to you to indemnify the people of the state of *New York* against costs in any action, or actions, brought upon this application.

William B. Jay,
15 Broadway, New York, N. Y.

New York, April 5, 1897.

(*Affidavits, setting forth in detail the facts should accompany this request.*)[1]

(*b*) *By Petition.*

Form No. 6424.[2]

To the Honorable *Charles F. Tabor*, Attorney-General of the State of *New York*, *Albany*, *N. Y.*:

Sir: The undersigned would respectfully represent that they are stockholders in the *Buffalo Stone and Cement Company*, a corporation duly incorporated and organized under the laws of the state of *New York*, on the *eighteenth* day of *August*, 1885.

That its capital stock was *nine hundred* shares, of the par value of *one hundred* dollars.

That it was organized for the purpose of carrying on the business of manufacturing of building and cut stone, of cement and gypsum, and the purchasing and improving real estate for residences and homesteads, to be leased or sold by said company.

That the term of its existence was to be *fifty* years.

That only an average of about *seventy-five* per cent. of its capital stock has been paid in, and that a number of its largest stock-owners, seeing the great mismanagement that is taking place, to call it by no harsher term, refused to pay any more assessments.

That the company, by reason of the gross mismanagement, has utterly failed to carry out the purposes for which it was organized, and

the action. N. Y. Code Civ. Proc., § 1785 *et seq.* (Birds. Rev. Stat. (1896), p. 672, § 68 *et seq.*). See also list of statutes cited *supra*, note 2, p. 658.

1. For such a statement of facts see facts set out in the petition given *infra*, Form No. 6424.

2. This petition is copied from the record in the case of People *v.* Buffalo Stone, etc., Co., 131 N. Y. 140.

For formal parts of petitions of this character, generally, consult the title PETITIONS.

has never done anything in the line of the purposes for which it was organized, to any considerable extent.

That all that is due upon said stock is $*23,500.00*, less the value of *one hundred and ten* shares, which have been forfeited.

That the par value of those forfeited shares is $*11,000.00*, which, deducted from the $*23,500.00*, leaves for available funds for carrying on the business on the full payment of all the stock sold, of only $*11,500.00*.

That there are *two* mortgages on the property of the company, one of $*32,140.00*, and one of $*20,000.00*, amounting in all to $*52,140.00*, drawing interest at the rate of *six* per cent. per annum, amounting to the sum of $*3,128.40* yearly.

That in the way the property is now and always has been managed, there is no money with which to pay this interest, except assessments upon the unpaid capital stock, as the company has never done business amounting to its expenses.

That said company has failed entirely to do or perform any business whatever for more than *one* year last past, and during all of said period of time said company has suspended its ordinary and lawful business.

That the board of directors have violated the law in such cases made and provided, by accepting notes instead of money, for the amount of the assessments on the stock held by certain of the stockholders, especially from *Mrs. Mary Shultz*, wife of *Byron M. Shultz* who is the nominal owner of *four hundred* shares of said stock.

That said board has taken her note for the sum of $*2,000.00*.

That it has been ascertained by the undersigned, and is alleged as a fact, that the mortgage of $*32,140.00* owned by said *Mary Shultz* has been hypothecated to a bank in this city for the sum of $*6,000.00*, and that said bank refuses to permit the sum of $*2,000.00* to be credited upon said mortgage, for said note, thus leaving the whole amount of said mortgage a lien upon the property of the company, without the company's having the right or power to offset her said note.

That said *Byron M. Shultz* or said *Mary Shultz* have neither of them ever paid any money for the shares of stock held by them, or either of them.

That until said mortgage was hypothecated all the assessments against the stock held by said *Shultz* or his wife have been credited upon said mortgage.

That part of the property now owned by the company was purchased of the said *Mary Shultz*, and the shares of stock now held by her were taken and credited upon the purchase price, but no money was ever paid for said stock.

That the undersigned have just ascertained that the acts of the said board of directors have been illegal and not in accordance with the laws of this state regulating such boards, and desire that said company be dissolved. (*Signatures of president, vice-president, trustees and stockholders.*)

(*Verification.*)[1]

1. Consult the title VERIFICATIONS.

b. Obtaining Leave to Sue.[1]

(1) Petition.

(a) *By Attorney-General.*

Form No. 6425.[2]

To the [*Superior* Court of *Buffalo*]:[3]

The petition of *Charles F. Tabor* respectfully shows that he is the attorney-general of the state of *New York*:

That application has been made to him by *Rufus M. Choate* and others, stockholders and trustees of the *Buffalo Stone and Cement Company*, for the purpose of having an action brought by the attorney-general, in the name of the people of the state of *New York*, against the above named corporation for a dissolution of its charter; and a hearing having been had on the part of said petitioners and the other stockholders and officers, opposed, and the attorney-general having determined that he believed that an action could be successfully maintained against said corporation, and the said petitioners having furnished the security required by law; application is hereby made for leave to bring an action upon the grounds and for the reasons stated in the annexed complaint, against the said corporation, reference being thereto had.

Your petitioner further shows that he has read the annexed complaint and believes that an action can be successfully maintained in behalf of the people for the reasons stated therein.

Chas. F. Tabor, Attorney-General.

(*Verification.*)[4]

(b) *By Stockholder.*

Form No. 6426.[5]

In the matter of the application of *Thomas Swords* for leave to commence an action to procure a judgment dissolving the *Northern Light Oil Company*, a corporation.

To the *Supreme* Court, *New York* County:

Petitioner *Thomas Swords*, appearing by *William B. Jay*, his attorney, by this his petition respectfully shows:

1. *New York.* — Code Civ. Proc., § 1786, as *amended* Laws (1880), c. 301 (Birds. Rev. Stat. (1896), p. 672, § 69). See also list of statutes cited *supra*, note 2, p. 658.

2. **This petition for leave to bring action** against a corporation for a dissolution of its charter is copied from the record in the case of People *v.* Buffalo Stone, etc., Co., 131 N. Y. 140. The court of appeals affirmed the judgment in favor of the plaintiff rendered at the general term of the superior court of Buffalo, affirming the decision of the special term of said court.

For formal parts of petitions of this character consult the title Petitions.

3. **The superior court of Buffalo** has been abolished and the jurisdiction formerly vested in it transferred to the supreme court. N. Y. Const. (1895), art. 6, § 5.

4. See the title Verifications.

5. **This petition of a stockholder** for leave to commence an action for dissolution of the corporation is based upon the facts in Swords *v.* Northern Light Oil Co., 17 Abb. N. Cas. (N. Y. Supreme Ct.) 115. In that case the attorney-general was requested to bring suit.

I. That the *Northern Light Oil Company* is a domestic corporation duly organized, formed and existing under and by virtue of the laws of the state of *New York*, having its principal business office in the city of *New York*, state aforesaid.

II. That petitioner is now, and ever since the *tenth* day of *May*, 1891, has been, a stockholder in the said *Northern Light Oil Company*.

III. That on the *eighth* day of *April*, 1897, in pursuance to section 1786 of the Code of Civil Procedure of the state of New York, as amended by the Laws of 1880, chapter 301, your petitioner duly applied to the attorney-general of *New York*, by submitting to him a written statement of the facts, verified by oath, reciting in substance all the matters and things proper to be alleged, showing grounds for an action against said corporation, under the provisions of section 1785 of the Code of Civil Procedure of the state of New York, a copy of which said application is hereto annexed and made a part of this petition, requesting the said attorney-general to commence an action in the name and behalf of the people of the state of *New York* to dissolve said corporation. That more than *sixty* days have elapsed since such application was made, and the attorney-general has omitted for *sixty* days after the written statement of facts, verified by oath, was submitted to him as aforesaid to commence an action or proceeding to dissolve said corporation, or any action specified in said section 1785 of Code of Civil Procedure of the state of New York, and that therefore plaintiff, as a stockholder as aforesaid, now has the right to bring an action in his own name, such as is by said sections 1785 and 1786 of the Code of Civil Procedure of the state of New York provided.

Wherefore, your petitioner asks for leave to commence an action in his own name to procure a judgment dissolving said corporation upon the grounds and for the purposes indicated in the said application to the attorney-general, so made as aforesaid and hereto annexed.

Thomas Swords.

(*Verification.*)[1]

(2) Order Granting Leave.

(*a*) *To Attorney-General.*

Form No. 6427.[2]

[At a *Special* Term of the *Superior* Court of *Buffalo*, held at the *City and County Hall*, in the city of *Buffalo*, *New York*, on the *twenty-third* day of *April*, 1889.

Having omitted to do so after sixty days, a stockholder asked leave to prosecute the proceeding in his own name.

For formal parts of petitions of this character consult the title Petitions.

1. Consult the title Verifications.

2. **This order granting leave** to the attorney-general to bring suit to dissolve a corporation is copied from the record in the case of People *v.* Buffalo Stone, etc., Co., 131 N. Y. 140.

For formal parts of orders, generally, consult the title Orders.

Present: *Hon. Edward W. Hatch*, Judge Presiding.][1]

In the matter of the petition of the *Attorney-General of the State of New York* for leave to bring an action against the *Buffalo Stone and Cement Company* to dissolve its charter.

On reading and filing the petition of *Charles F. Tabor*, attorney-general of the state of *New York*, verified on the *tenth* day of *April*, 1889, and the order to show cause granted thereon, and the affidavits of *B. Shultz*, *C. E. Almendinger* and *William Casterton*, and after hearing *Henry W. Brendel*, of counsel for the people, and *Gen. A. W. Bishop* and *Warren F. Miller*, *Esq.*, of counsel for the *Buffalo Stone and Cement Company*, it is

Ordered, that the said *Charles F. Tabor*, as attorney-general of the state of *New York*, be and he hereby is granted leave to bring an action in this court in the name of the people of the state of *New York* against the said corporation to dissolve its charter, upon the complaint annexed to the said petition and made a part thereof.

Enter: *E. W. H.*, J. *S. C.*

(*b*) *To Stockholder.*

Form No. 6428.[2]

(*Title of court as in Form No. 6427.*)

(*Title of cause as in Form No. 6427.*)

On reading and filing the annexed petition of *Thomas Swords*, a stockholder of the *Northern Light Oil Company*, a domestic corporation duly organized, formed and existing under and by virtue of the laws of the state of *New York*, and having its principal business office in the city of *New York*, state aforesaid, which said petition was verified on the *fifth* day of *September*, 1897, and it appearing that on the *eighth* day of *April*, 1897, said petitioner submitted to the attorney-general of the state of *New York* a written statement of facts, duly verified by oath, showing grounds for an action under section 1785 of the Code of Civil Procedure of the state of New York, to procure a judgment dissolving said *Northern Light Oil Company*; and it further appearing that the said attorney-general has omitted for *sixty* days after the said submission to commence an action, as specified in this section, for the dissolution of said corporation, and that the grounds stated in said submission stated a case proper for the dissolution of said corporation, and that under section 1786 of the Code of Civil Procedure of the state of New York said petitioner is now entitled to commence an

1. **The superior court of Buffalo** has been abolished, and the jurisdiction formerly vested in it transferred to the supreme court. N. Y. Const. (1895), art. 6, § 5.

2. **This order granting leave** to a stockholder to commence an action for dissolution after omission on the part of the attorney-general to institute the proceeding, having been properly and duly requested so to do, is based on the facts in Swords *v.* Northern Light Oil Co., 17 Abb. N. Cas. (N. Y. Supreme Ct.) 115.

For formal parts of orders, generally, consult the title ORDERS.

action under section 1785 of the Code of Civil Procedure of the state of New York to procure a judgment dissolving said corporation.

Now therefore, on motion of *William B. Jay, Esq.*, attorney for said petitioner, and *Oliver Ellsworth, Esq.*, of counsel for the said *Northern Light Oil Company*, it is

Ordered, that *Thomas Swords*, the said petitioner, be and he is hereby granted leave to commence an action under section 1785 of the Code of Civil Procedure of the state of New York in this court, for and on behalf of himself and all other stockholders who may come in and contribute to the expenses of the suit against the said *Northern Light Oil Company*, for the purpose of dissolving said corporation, upon the complaint annexed to said petition, and made a part thereof.

Enter: *J. M.*, J. *S.* C.

c. Bill for Dissolution.

BILL TO WIND UP AND DISTRIBUTE ASSETS, BY MEMBERS.

Form No. 6429.[1]

(*Address and commencement as in Form No. 6419.*)

I. That the *Northwestern Mutual Benefit Association* is a corporation organized in *April*, 1879, under an act entitled "An act to provide for the incorporation of co-operative and mutual benefit associations," approved April 3, 1869; that complainants are members of said association, and each of them holds a certificate of membership in the *second division*, otherwise known as the "*endowment division*"; that all of their certificates were issued prior to the *eighth* day of *June*, 1883; that from assessments paid by them, and the other members of said *endowment division*, the association had collected, and on the *eighth* day of *June*, 1883, had on hand, to wit, *sixty thousand* dollars and upwards, in money and securities, which sum constituted the "endowment fund" of the association, out of which complainants and other members of the *second division* were entitled to receive their respective endowments at the maturity thereof.

II. That Act No. 192 of the Public Acts of 1883 took effect June 8, 1883, and soon thereafter the said association applied to the *Commissioner of Insurance* for license thereunder, which he refused to grant, upon the ground that the endowment certificates issued by said association were not authorized by the act under which it was incorporated, and the amendments thereto.

1. This bill is based on the facts in Stamm *v.* Northwestern Mut. Ben. Assoc., 65 Mich. 317. In that case it was sought to wind up the affairs of the corporation and distribute its assets. The supreme court, on appeal, affirmed the decree of the lower court, granting the relief prayed for, upon the theory that while courts of equity have no jurisdiction unless conferred by statute, the decree of dissolution of the corporation by forfeiture of its franchise, either at the suit of an individual or a state court in view of its general jurisdiction over trusts and to afford remedies in cases where courts of law are inadequate to grant relief, it has jurisdiction to grant relief against a corporation upon the same terms as it might against an individual under similar circumstances.

For formal parts of bills in equity, generally, consult the title BILLS IN EQUITY, vol. 3, p. 417; of complaints and petitions, generally, consult the title COMPLAINTS, vol. 4, p. 1019.

III. That, after the refusal of the *Commissioner of Insurance* to issue a license, the officers, trustees or managers of the association organized a new one by the same name, but leaving out the endowment features, and obtained for said new association from the commissioner a license to do business under the act of 1883; that upon the organization of the new association, to wit, on the *fifteenth* day of *February*, 1884, *James M. Barbour*, the secretary of said association, by authority of the board of trustees thereof, issued and sent to complainants and the other members of the *endowment division* a printed circular, setting forth the failure to obtain license, and the cause thereof, and that the new association had been duly licensed; that there had been for some time a number of dissatisfied members in the old association, who had appointed a committee, who had met with the trustees of the association to arrange, if possible, the differences between them; that an arrangement was made by which the trustees agreed to pay for reinsurance in the new association whatever might be found to have been paid by each member beyond the actual cost of his insurance, or, in case he preferred to withdraw from both associations, to pay him in cash *one-half* that amount; that the complainants were not satisfied with the propositions, and they each refused to accept either of the offers therein made.

IV. That it is the intention of the trustees and officers of the association to turn over and appropriate to themselves, or to the new association organized by them, the said endowment fund of *sixty thousand* dollars; that the complainants are informed and believe, and charge the fact to be, that it is the intention of said trustees and officers to retain, as the supposed actual cost of insurance, a large portion of said fund of *sixty thousand* dollars, and to convert the same to their own use, or to the use of the new association so organized by them; that said association has no legal right or color of right, to transact business since it was refused a license, but that the trustees and officers thereof have not wound up its affairs, or instituted any proceedings for that purpose, nor have they rendered any account to the members of the disposition made by them of the funds of the association, or of their official management of its affairs; and they assert that said endowment fund is the property of the members of said *endowment division*, the same having been voluntarily paid in by them in the belief that it was competent for said association to issue said endowment certificates.

V. That this bill is filed for and in behalf of complainants, and all other members of said *endowment division.*

Wherefore your orators pray:

1. That the affairs of the association may be wound up.

2. That said endowment fund may be apportioned and distributed among the members of said *endowment division* according to their respective rights and interests therein.

3. That said association, and the officers and agents in charge thereof, may be decreed and required to pay to complainants, and to each of them, the amount due them, respectively, from the funds of the association.

4. That a receiver may be appointed to take possession of the endowment fund, and all other assets of the association

5. For general relief.

(*Signatures of complainants.*)

F. A. Baker, Solicitor and of Counsel for Complainants.

(*Verification.*)[1]

d. Complaint, Petition, Suggestion or Information.[2]

(1) For Abuse, Misuse or Nonuse of Franchise.[3]

(a) *In General.*

SUGGESTION FOR QUO WARRANTO TO FORFEIT FERRY FRANCHISE.

Form No. 6430.

(Precedent in Com. *v.* Sturtevant, 182 Pa. St. 324.)[4]

1. Consult the title Verifications.

2. **For the formal parts** of complaints or petitions, generally, consult the title Complaints, vol. 4, p. 1019; for informations, or suggestions for informations, in the nature of quo warranto, consult the title Quo Warranto.

3. Consult list of statutes cited *supra*, note 2, p. 658.

4. **Another Precedent.** — In State *v.* Council Bluffs, etc., Ferry Co., 11 Neb. 354, the information filed on behalf of the state to forfeit a ferry franchise for nonuser alleged "that on the 16th day of January, 1855, an act was passed by the territorial legislature 'to incorporate the Council Bluffs and Nebraska Ferry Company,' which act was approved February 21, 1855. That by the third section of said act the corporate business of said corporation should be managed by a board of directors of not less than *five* nor more than *seven*, who should be stockholders, and from their number they should choose a president and treasurer, who should hold their office for one year and until their successors should be chosen. That by the fourth section of said act exclusive power was conferred upon said corporation to keep a ferry and build a toll-bridge across the *Missouri* river at a point known as the *Lone Tree Ferry*, opposite the city of *Omaha*, the then place of crossing, or at any other practicable point on said river midway between the grade at or near the said *Lone Tree Ferry* landing in *Iowa*, and the ferry landing at *Florence*, and midway between said grade and the ferry landing at *Bellevue*. That by the fifth section of said act it was made the duty of said company to procure and keep a suitable boat or boats, or erect and keep in repair a substantial bridge, for the safe and speedy transportation of persons and property over said river at all reasonable and suitable times. That said act was duly published among the laws of the first session of said legislative assembly on page *448*, to which reference is made. That in pursuance of said act the said company, soon after the passage thereof, organized by the election of officers, and for a time performed the duty required of it by said fifth section by procuring and keeping a suitable boat for the transportation of persons and property over said river. That since the *first* day of *March*, 1877, the said company has utterly and wilfully failed and neglected to perform its duty in that behalf, and has not during all that time kept a suitable or any boat, nor erected nor kept in repair a substantial nor any bridge for the transportation of persons and property over said river at all reasonable and suitable times, or for any other purpose, whereby the rights, privileges and franchises of said company have become and are subject to be forfeited. That during all said time, until within a few months past, the said officers, provided by section three of said act, were not elected by the stockholders of said company, and no president and treasurer, or either of them, was chosen by the board of directors as required by said section three, but rela-

[*The Commonwealth of Pennsylvania ex relatione William U. Hensel, Attorney-General,*
against
Peleg Sturtevant and Henry F. Zaring, Owners and Operators of "The Liverpool Ferry."] In the Court *of Common Pleas* of *Perry* County, *November* Term, 1894, No. *12.*][1]

Be it remembered, on this *eleventh* day of *September*, A. D. 1894, comes *William U. Hensel*, the attorney-general of the *commonwealth* of *Pennsylvania*, and files this his suggestion, and gives the court to understand and be informed,*

1. That by an act of assembly approved the 21st day of March, 1865. (P. L. 1867, page 1356), there was established a public ferry on the *Susquehanna* river at the borough of *Liverpool*, *Perry* county, *Pa.*, from *Shank's Bridge* in said borough to a point at or near *Liverpool* station on the *Northern Central Railway* in *Dauphin* county, *Pa.*, to be known as "*The Liverpool Ferry*," and one *William Inch*, *Sr.*, his heirs and assigns were by the said act given the franchise to carry foot persons by the said ferry for tolls not to exceed *twenty* cents.

2. That by the said act the said *William Inch*, *Sr.*, his heirs and assigns were directed to keep the said ferry in good order and repair and furnish all needful facilities for ferrying foot persons across the said ferry, and upon condition that he or they should so do and continue so to do, he or they were given the exclusive right and franchise to conduct the said ferry, and it was further enacted that so long as the said duty was so performed no other ferry should be established for *one half* mile above or below the said "*The Liverpool Ferry.*"

3. That the franchise aforesaid has passed by devolution, purchase, assignment, etc., from the said *William Inch*, *Sr.*, to divers persons from time to time, and it is now vested in *Peleg Sturtevant* and *Henry F. Zaring*, who claim to be the sole owners of the said franchise at present and for some time past, and are now and have been conducting the said ferry.

4. That the present owners of the said ferry and their predecessors from time to time have failed to furnish all needful facilities for ferrying foot persons across the said river and to keep the said ferry in good order and repair, but on the contrary have conducted and maintained the said ferry in an inadequate, improper, negligent and unlawful manner, and not as required by the conditions of the said grant, which acts of omission, misuser, nonuser and illegal maintenance of the said ferry are specifically as follows: (*Statement of acts.*)[2]

tor is informed that the said *William W. Marsh* now claims to have been duly chosen as president, and the said *Frank Murphy* as treasurer of said corporation, and they have for the space of *five* days and more last past assumed to act as such officers, notwithstanding the forfeiture of the rights and franchises of the said corporation as aforesaid."

1. The words and figures in [ ] do not appear in the reported case, but have been added to complete the form.

2. **Acts of omission, misuser and nonuser** referred to in the text were enumerated as follows:

"(*a*) That they and their predecessors have for a long time past furnished for the said ferry inadequate, unfit and dangerous boats; (*b*) that they and their predecessors have for a long time past

All of which acts, matters and things in the premises have been and continue to be to the great loss, delay and damage of the public, whereby the condition upon which the exclusive grant to the defendants and their predecessors has been violated and failed, and the said exclusive grant and franchise has long since in fact and in law become forfeit.

Wherefore the said commonwealth prays the consideration of the court here in the premises, and that due process of law be awarded against the said *Peleg Sturtevant* and *Henry F. Zaring*, owners and operators of "*The Liverpool Ferry*," and that it be adjudged that the said *Peleg Sturtevant* and *Henry F. Zaring*, owners and operators of "*The Liverpool Ferry*" and their predecessors have forfeited all and singular the exclusive right, property and franchise to own and conduct the said "*The Liverpool Ferry*," as the sole and exclusive ferry between the points in the said act of grant named, and have in fact and in law no longer such sole and exclusive power and franchise, so that the *commonwealth* of *Pennsylvania* may, if it so is moved, grant to others than the defendants rights and franchises to establish and conduct ferries upon the said *Susquehanna* river between the points named according to law.

And further that a quo warranto be issued against the said *Peleg Sturtevant* and *Henry F. Zaring*, sole owners and operators of "*The Liverpool Ferry*," to show by what warrant or authority they claim to exercise the said sole and exclusive right to maintain the said "*The Liverpool Ferry*" as the exclusive ferry between the points named in the said act of March 21, 1865, so that the *commonwealth* of *Pennsylvania* may not at her pleasure and mere motion grant unto others than they, the said defendants, the franchise and right to establish and maintain other ferries between the said points, etc.

[*William U. Hensel*, Attorney-General.

(*Verification.*)[1]][2]

(*b*) *Illegal Business — Lottery.*

Form No. 6431.[3]

employed and placed in charge of said ferry-boats inexperienced, improper and negligent ferrymen; (*c*) that they and their predecessors have for a long time past refused and neglected to ferry foot persons on divers occasions, so that numbers of persons have been compelled to seek other ferries above or below the said '*The Liverpool Ferry*'; (*d*) that they and their predecessors have for a long time past charged extortionate, excessive and illegal tolls and refused to carry foot persons for the tolls and ferriage provided by the said act; (*e*) that they and their predecessors have for a long time past done other and different acts and omissions of misuser and nonuser through and by which they have failed to keep said ferry in good order and repair and furnish all needful facilities for ferrying foot persons across said ferry."

1. Consult the title VERIFICATIONS.

2. The words in [ ] do not appear in the reported case, but have been added to complete the form.

3. **This complaint is based on the facts** in State *v.* International Investment Co., 88 Wis. 512. In that case the defendant answered the petition, alleging, among other things, that the defendant had about five hundred members, and a large number of agents soliciting persons to become members, and that it had not yet paid a contract of membership for the reason that it had not

In the *Supreme* Court of the State of *Wisconsin.*

The State of Wisconsin ex relatione Philip Lederer, plaintiff,
against
The International Investment Company, defendant.

The above named plaintiff, *Philip Lederer*, by *Oliver Ellsworth*, his attorney, brings this action in the name of the state of *Wisconsin* against the above named defendant, the *International Investment Company*, and complains and alleges: That the defendant, the *International Investment Company*, is a corporation, which was duly incorporated on the *seventh* day of *July*, 1893, under and by virtue of the laws of the state of *Wisconsin*, that the original articles of organization of the said *International Investment Company* were amended on the *eighth* day of *December*, 1893, so as to contain among other things (*Here was set out the effect of the amendment*).[1]

That the contract of membership is prescribed in the rules, which are made a part of the articles, and among other things contains in effect the following (*substance of contract*).[2]

continued business long enough. Relator demurred to this answer, which demurrer was sustained and judgment directed vacating, dissolving and annulling the corporate existence of the defendant and ousting it of its franchises, on the theory that a corporation whose primary object is without statutory authority cannot legally exist, even though among its declared purposes are some for the promotion of which the law permits corporations to be formed.

1. The amendment of the articles of organization referred to in the text prescribed substantially in effect "the duties and salaries of each and every of the several officers, directors and agents of the company," and provided "that the business of said corporation shall be to encourage frugality and economy in its members, to create, husband and distribute funds from the monthly instalments, dues or investments from its members, to purchase, take, hold, sell, convey, lease, rent and mortgage real estate and personal property, to loan surplus accumulations, and to carry on and conduct a general investment business; that said corporation shall have no capital stock, but shall be composed of incorporators and members, who shall be admitted in the manner therein particularly defined; that said corporation shall issue incorporators' shares, originally, only to the persons who signed the original articles of incorporation, and to such other persons as the said incorporators or their assigns shall nominate: provided" (*stating other provisions relating to membership, issuance of shares, forfeitures, expulsions, etc.*).

2. Contract of membership referred to in text provided:

"That for and in consideration of a membership fee of $5, and the promise and agreements of the second party herein expressed, the first party doth hereby grant unto the second party, his heirs, representatives and assigns, so long as he and they shall keep the said promises and agreements, but not longer, all the rights and benefits provided by the articles of organization and rules of the company; and the second party therein promises and agrees to pay unto the company each month, from the date thereof until the contract is retired or forfeited, the sum of $2, and also agrees to comply with all the requirements of the rules of the company; that if he keeps his agreements therein contained, but not otherwise, then, in consideration of the premises, the company will pay to him, his heirs, executors, administrators, or assigns, out of the reserve fund (referred to in the rules) accumulated for that purpose, on or before *forty-three* years from and after the date heroef, the sum of $1,000, provided that this contract is then in force, and has not been reached and paid under the further provisions hereof; *or* the company doth further agree that, if the holder hereof shall

That the rules further provide that every person desiring to become a member shall make written application for the number of contracts he desires, not less than *four*, and shall accompany his application with a membership fee of *five* dollars for each contract applied for, but the company shall have the right to reject any application upon the return of the membership fee; that upon receipt of such application this company shall immediately return to such applicant a statement showing the numbers of the contracts that will issue upon the application, and, if the applicant shall in writing agree to accept the contracts bearing the numbers so designated, the contract of membership shall be deemed complete; but if he shall refuse to accept such contracts he shall immediately notify the company in writing, at its home office of his refusal, and his membership fee shall be returned to him and his application canceled; that contracts issued shall bear the numbers agreed upon, and the holder shall pay unto this company, at his home office, unless otherwise ordered by the board, a monthly instalment of *two* dollars per month upon each contract, for each successive month from date of contract until cancellation; that the contracts issued shall be numbered in the numerical order issued, and to correspond with the numbers agreed to be given in pursuance of article seven, and shall be issued only in blocks of *four*; that, if any member shall fail or neglect to pay any instalment within *fifteen* days after it matures, he shall pay a fine of *fifty* cents for each such instalment; and if such instalments and fines shall not be paid within *fifteen* days from the time when such fine was assessed, together with the instalment then maturing, the contract upon which the instalment matured and the fine was assessed shall thereupon lapse and become null and void, and all payments and instalments theretofore made thereon shall be forfeited; nor shall this company give, or be required to give, any notice of the maturity of instalments or the assessment of fines, or of forfeiture or lapse of contract.

That the rules then provide (*statement of provisions*).[1]

well and truly keep his said agreement, this company will pay to him, his heirs, executors, administrators, or assigns, out of the members' trust fund (referred to in the rules) accumulated for that purpose, when there shall be sufficient money in that fund therefor, and when this contract is reached in its order of payment, and not before, the sum of $1,000, subject, however, to discount pursuant to the provisions of article 14 of the rules: provided, however, that this contract has not then been paid pursuant to the first foregoing provision thereof; that if the second party shall fail to pay any instalment within the time specified by the rules, or if he shall fail to obey and observe the said rules, this company shall have the right to cancel and revoke this contract and terminate this membership, without notice, proceeding or process."

1. **Provisions of the rules** referred to in the text were to the effect "that there shall be created and maintained what shall be known as a 'members' trust fund,' to which shall be applied $1 from each monthly instalment received, and all fines and transfer fees collected, and from which shall be made the payment upon contracts mentioned in article 12. Article 12 provides that, as often as there shall be in the members' trust fund the sum of $1,000, there shall be paid to the holder of one outstanding contract of membership the sum of $1,000, subject to certain conditions mentioned therein; that the first contract upon which payment shall be made shall be contract No. 1, the second payment shall be upon contract No. 4, the third payment upon contract No. 2, the fourth payment upon contract No. 8, and so on, reverting back to the first issued, unforfeited, unpaid nonmultiple contract

That the business of the defendant, the said the *International Investment Company*, is illegal, for the reasons that said alleged corporation has in it the element of chance and uncertainty, and is in violation of the statutes of the state of *Wisconsin* against the maintenance and operation of lotteries, and that its manner of doing business is and has been intended to deceive persons, and especially such persons as have become and may hereafter become members of said corporation, and that its business is illegal and contrary to law, and a common and public fraud in this, to wit: (*Here was set out the facts showing the method and manner of the business and operation of the corporation.*)

That your relator, the said *Philip Lederer*, is now and was at the time hereinabove mentioned a resident of the *city and* county of *Milwaukee*, in the state of *Wisconsin*, and an elector and tax-payer of and in said state, and a member of said corporation, the said *International Investment Company.*

That in pursuance of section 3242 of the Revised Statutes of the state of Wisconsin (Sanb. & B. Anno. Stat. (1889), § 3242) your relator, the said *Philip Lederer*, duly applied to the attorney-general of the state of *Wisconsin*, requesting him to bring an action for the purpose of vacating the charter and annulling the existence of said corporation, the said *International Investment Company*, for the reason hereinbefore specifically set out and enumerated; and that said attorney-general, upon said application, refused and has since hitherto ever since refused to bring such action, and that upon such refusal of the attorney-general to proceed as aforesaid your said relator duly applied to the *Supreme* Court after having given due notice of such application to the attorney-general and to the defendant, the said *International Investment Company*, for leave to bring this action; and that thereupon said court duly granted to the plaintiff leave to sue and bring this action, with like force and name as if the same had been brought by the attorney-general in the name and in behalf of the people of the state of *Wisconsin*, and that an order to that effect was duly made and entered on the ——— day of ———, 18—, as follows: (*Here set out the order granting leave to sue*),[1] a copy of which said order is hereto annexed and made a part of this petition.

and alternating with the lowest unpaid, unforfeited multiple of four, until like payments have been made to the holders of all issued, unforfeited, unpaid contracts; but the company shall be required to pay or make payment upon no contract until there is sufficient money in the members' trust fund therefor, nor until such contract is regularly reached in its order for payment; provided, however, that such contract has not been paid at expiration of time, or upon surrender, pursuant to the provisions of article 15. Article 14 provides that in case there shall have been less than *sixty* monthly instalments paid upon any contract of membership up to the time that such contract is canceled by payment, then there shall be deducted and reserved *twenty* per centum of the amount due upon every such contract; and article 15, after providing for a 'reserve fund,' provides further that whenever any contract shall mature, under the provisions for payment, *forty-three* years from and after the date thereof, provided it has not been paid before that time, there shall be paid to the holder thereof the sum of $*1,000* from said reserve fund. It is also provided that all instalments shall be paid at the home office, unless otherwise ordered by the board, and proper receipts given; that all receipts shall be numbered, and duplicate stubs with duplicate numbers to correspond with the receipt numbers shall be kept in the office."

1. **For form of such an order** see *supra*, Form No. 6428.

Wherefore relator demands judgment against the defendant, the said *International Investment Company*, vacating, dissolving and annulling the corporate existence of said corporation, and ousting the said corporation of its said franchises heretofore exercised by it.

Oliver Ellsworth, Attorney for the Plaintiff.

(*Verification.*)[1]

(*c*) *Illegal Combination — Monopoly.*

aa. Gas Trust.

Form No. 6432.[2]

In the *Circuit* Court of *Cook* County, ——— Term, 1888.

State of *Illinois*, } sct.
Cook County. }

Daniel Webster, attorney-general of the state of *Illinois*, who sues for the people of said state in this behalf, comes into court here on this day, and for the said people, and in the name and by the authority thereof,[3] at the relation of *Francis B. Peabody*, according to the form of the statute in such case made and provided, gives the court here to understand and be informed, that the *Chicago Gas Light and Coke Company* is a corporation, organized under and by virtue of a charter granted to it by the legislature of the state of *Illinois* in the year 1849. . (*Here was set out in full the charter, an amendatory act passed in 1855, and an enabling act of 1869, permitting said company to increase its capital stock.*)

That the *People's Gas Light and Coke Company* is a corporation organized under and by virtue of a charter granted to it by the legislature of the state of *Illinois*, in 1855. (*Here was set out in full the charter.*) That an ordinance was passed by the common council of the city of *Chicago*, in 1858, authorizing (*Here was set out in full the ordinance*).[4] That in *April*, 1862, an agreement was entered into by and between the said *Chicago Gas Light and Coke Company*, and the said *People's Gas Light and Coke Company*, which said agreement

1. Consult the title Verifications.

2. **This information is based on the facts** in People *v.* Chicago Gas Trust Co., 130 Ill. 268. Demurrers to defendant's pleas were overruled. On appeal from the judgment of the circuit court, the supreme court reversed and remanded the cause, with directions to sustain the demurrer. The court held in this case that a corporation formed under the general law for the manufacture and sale of gas cannot clothe itself with power to purchase and hold stock in other gas corporations merely by naming this as one of the objects of its incorporation in the articles filed with the secretary of state.

3. **An information filed in a court of equity** against a corporation, for the purpose of dissolving it, is not a criminal proceeding, and need not be prosecuted "in the name and by the authority of the people," for it is not an information in the nature of a quo warranto, but a civil procedure of a special statutory character. Chicago Mut. L. Indemnity Assoc. *v.* Hunt, 127 Ill. 258. But an information in the nature of a quo warranto must be "in the name and by the authority of the people of the state of Illinois," and conclude "against the peace and dignity of the same." Chesshire *v.* People, 116 Ill. 493; Hays *v.* People, 59 Ill. 94; Donnelly *v.* People, 11 Ill. 552.

4. **The ordinance referred to** in the text authorized the People's Gas Light and Coke Company to lay its mains and pipes, etc., in the streets, etc., of said city.

provided (*Here was set out in full the agreement and also the substance of a certain litigation between the two gas companies*).[1]

That the said *Chicago Gas Light and Coke Company* received subscriptions to its capital stock to the amount of *four million nine hundred and eighty-four thousand two hundred* dollars and issued certificates for *one hundred and ninety-nine thousand three hundred and sixty-eight* shares of such stock, each share for *twenty-five* dollars. That the *People's Gas Light and Coke Company* received subscriptions to its capital stock to the amount of *four million* dollars, and issued certificates for *forty thousand* shares, of *one hundred* dollars each. That the two said companies laid their mains and pipes in the streets of the city of *Chicago*, in the state of *Illinois*, and operated their works, and furnished gas to the city and its inhabitants, the former after *April*, 1862, in the *north* and *south* divisions and the latter after the same date in the *west* division of the said city.

That in *January*, 1882, the *Consumers' Gas, Fuel and Light Company of Chicago, Illinois*, was organized under the general Incorporation act of 1872, and was authorized, by an ordinance of the common council of *Chicago*, passed April 28, 1882, to construct and operate its works in that city and to lay its pipes and mains under the streets (describing them), and proceeded to lay its pipes in the *north* and *south* divisions and to supply the inhabitants with gas, and that, by reason of the foreclosure of a trust deed given by the last named company, its property, rights and franchises passed to and became vested in the *Consumers' Gas Company*, a corporation organized in *November*, 1886, under the general Incorporation act.

That the said *Consumers' Gas Company* was duly incorporated under the laws of the state of *Illinois*, with a capital stock of *five million* dollars, divided into *fifty thousand* shares of *one hundred* dollars each, and that said company after the date of such transfer to it, used the works and pipes and other machinery and apparatus in manufacturing and distributing gas in the said city of *Chicago*.

That the *Equitable Gas Light and Fuel Company of Chicago* was organized under the laws of the state of *Illinois*, in *August*, 1885, under the general Incorporation law, with a capital stock of *three million* dollars, divided into *thirty thousand* shares, of *one hundred* dollars each, and that an ordinance was passed by the common council of the city of *Chicago*, giving the said company the right to lay down gas pipes and mains in the streets of said city, and such other rights as were necessary and useful in carrying out its purposes, and that

1. **The agreement referred to** in the text provided in effect for an exchange of the mains and pipes of one company in one part of the city for the mains and pipes of the other company in another part of the city, each company agreeing with the other to have the exclusive right of supplying gas in its part of the city for one hundred years, neither to interfere with the business of the other in its territory. This contract was construed to be void as creating a monopoly, and being against public policy, in Chicago Gas Light, etc., Co. *v.* People's Gas Light, etc., Co., 121 Ill. 531.

The litigation referred to in the text was an action for specific performance of a contract between the two companies, the facts and result of which are given in Chicago Gas Light Co. *v.* People's Gas Light, etc., Co., 121 Ill. 530.

said company kept and maintained such gas mains, pipes and other apparatus needful and useful in its business of manufacturing gas, and sold the gas so manufactured in the *south* division of the said city of *Chicago*.

That the four companies above named, to wit: the *Chicago Gas Light and Coke Company*, the *People's Gas Light and Coke Company*, the *Consumers' Gas Company*, and the *Equitable Gas Light and Fuel Company of Chicago*, were on *April 29*, 1887, and have been and are the only gas companies engaged in that business and occupying the streets with gas mains in said city; that, in the ordinances giving to the *Consumers' Gas, Fuel and Light Company* (succeeded by the *Consumers' Gas Company*) and to the *Equitable Gas Light and Fuel Company* the right to occupy the streets, it was provided that such ordinances should not take effect until said companies had given bonds binding themselves respectively not to sell, lease or transfer their franchises and privileges to any other gas company and not to enter into any combination with any other company concerning the rate or price to be charged for gas; that each of said corporations was by law designed to be and of right ought to be a separate, distinct, independent and competing corporation for the manufacture, sale and furnishing of *illuminating gas* to the consumers thereof in said city; that said four companies when combined and operating under one management or power of control, having a common interest to subserve, form a monopoly of the business of supplying and selling *illuminating gas* to the said city and its inhabitants.

And that heretofore, to wit, on the *twenty-ninth* day of *April*, 1887, at the said county of *Cook*, the *Chicago Gas Trust Company* was, and from thence hitherto hath been, and still is, a corporation and body politic, organized and existing under the laws of the state of *Illinois*, to wit: "An Act entitled an act concerning corporations," approved April 18, 1872, and the several acts amendatory thereof; and that the said *Chicago Gas Trust Company* for and during the period of *twelve* months or more *last past*, at the county of *Cook* aforesaid, has usurped and unlawfully exercised, and now usurps and unlawfully exercises, powers, liberties, privileges and franchises not conferred by law, to wit, the power, liberty, privilege and franchise of obtaining, by purchase, or in exchange for its own stock, and holding and owning, and then and there did purchase and receive in exchange for its own stock, and now holds, a majority and controlling interest of and in the shares of capital stock of the said *Chicago Gas Light and Coke Company*, the said *People's Gas Light and Coke Company*, the said *Equitable Gas Light and Fuel Company of Chicago*, and the *Consumers' Gas Company*, respectively (as amended *May 27*, 1889), and hath thereby, in manner and at the place aforesaid, unlawfully acquired and holds the power to manage and control the said four corporations, to wit, the said *Chicago Gas Light and Coke Company*, the said *People's Gas Light and Coke Company*, the said *Equitable Gas Light and Fuel Company of Chicago*, and the said *Consumers' Gas Company*, and hath thereby, and in the manner and at the place aforesaid, destroyed the diversity of interest and motive for competition between them, which would otherwise exist, in the manufacture, distribution and sale of

illuminating gas to the city of *Chicago* and its inhabitants, in said county, and hath thereby usurped and unlawfully secured to itself, in manner aforesaid, and, by means of holding such majority and controlling interest in the shares of stock of said four last mentioned gas companies, now usurps and unlawfully holds, the power, liberty and franchise of maintaining, through said four several gas companies last mentioned, a virtual monopoly in the business of furnishing *illuminating gas* to said city of Chicago and the inhabitants thereof, and to the consumers of such gas in said city, to wit, at the place aforesaid, to the great detriment and injury of the people of the state of *Illinois*; all of which said powers, privileges and franchises so exercised by it as aforesaid, though not conferred by law, the said *Chicago Gas Trust Company*, at and within said county, upon the people of the state of *Illinois*, hath so usurped and unlawfully exercised, and now doth so usurp and unlawfully exercise, contrary to law and the form of the statute in such case made and provided, and against the peace and dignity of the people of the state of *Illinois*.

Whereupon the said *George Hunt*, attorney-general, for the said people and in the name and by the authority thereof, at the relation of the said *Francis B. Peabody*, prays the consideration of the court here in the premises, and that due process may be awarded against the said *Chicago Gas Trust Company* in this behalf to answer to this court by what warrant it exercises the powers and privileges hereinabove described.

George Hunt, Attorney-General.

(*Verification.*)[1]

bb. OIL TRUST.

BECAUSE OF CREATION OF MONOPOLY CAUSED BY TRANSFER OF STOCK TO CERTAIN TRUSTEES.

Form No. 6433.

(Precedent in State *v.* Standard Oil Co., 49 Ohio St. 137.)[2]

[In the *Supreme* Court of the State of *Ohio*.

The State of Ohio ex relatione David K. Watson, Attorney-General, plaintiff, against *The Standard Oil Company*, defendant. } *Amended* Petition.][3]

Now comes *David K. Watson*, the duly elected, qualified and acting Attorney-General of the state of *Ohio*, and gives the court to

1. Consult the title VERIFICATIONS.

2. **This action was brought to oust** the defendant of the right to be a corporation, because of an abuse of its franchises by becoming a party to an agreement which was against public policy. The supreme court rendered judgment ousting defendant from the right to make the agreement set forth in the petition and of the power to perform the same, holding that where stockholders transfer their stock to trustees on condition that other companies and individuals do the same, such a proceeding tends to create a monopoly, notwithstanding the stockholders act individually, where the result of their combined acts in effect becomes the act of the corporation.

3. The words within [ ] do not appear in the reported case, but have been added to complete the form.

understand and be informed,* that on or about the *10th* day of *January*, A. D. 1870, the defendant, *The Standard Oil Company*, was formed and organized as a corporation under and according to the laws of the state of *Ohio*.

That the only purpose of said defendant, as set forth in its articles of incorporation, is "*the manufacture of petroleum and to deal in petroleum and its products*"; that at the time of the defendant's incorporation, its capital stock was fixed at $*1,000,000.00*; that subsequently, to wit: on or about the *12th* day of *February*, A. D. 1872, the defendant's capital stock was increased to the sum of $*2,500,000.00*; that afterwards; to wit: on or about the *13th* day of *March*, A. D. 1875, said capital stock was increased to the sum of $*3,500,000.00*; and that after its organization, as aforesaid, said defendant entered upon and continued generally in the pursuit of its corporate objects, with its principal place of business in the city of *Cleveland*, in this state, until on or about the date of the trust agreements hereinafter complained of and set forth.

Plaintiff further avers, that in violation of law and in abuse of its corporate powers, and in the exercise of privileges, rights and franchises not conferred upon it, defendant, on or about the *2d* day of *January*, A. D. 1882, and again on or about the *4th* day of said month and year, entered into and became a party to certain trust agreements, and ever since then has, in the manner and to the extent below stated, observed, performed and carried out said agreements, copies of which are hereinafter set out. That said defendant so entered into and became a party to, and carried out and observed and performed the same as follows, to wit: All of the owners and holders of its capital stock, including all the officers and directors of the said defendant company, signed said agreements, without attaching the corporate name and seal of said defendant company thereto, and the official designations of its officers. That prior to the dates of the trust agreements aforesaid, defendant's capital stock consisted of *35,000* shares of $*100.00* each, and upon the signing of said agreements in the manner aforesaid, *34,993* shares of said stock, belonging to the persons who signed the agreements in manner above set forth (in what proportions, however, plaintiff is unable to state), were transferred, by defendant's transferring officers, upon defendant's stock-books, to the certain *nine* trustees who were appointed and named in the first one of said trust agreements, upon the request of the respective owners of said shares and in pursuance of said trust agreements, the remaining *seven* of said shares of stock being retained by, or transferred to, the directors of defendant company; that at the time said transfer of stock was made, there were *seven* directors of defendant company, and each one of the *seven* held *one* share of the stock aforesaid, but the number of said directors was thereafter reduced to *five*, who still hold and vote said *seven* shares of stock and no more. That in lieu of the transfer of said *34,993* shares, as aforesaid, to the *nine* trustees above mentioned, an equal amount, in par value of certificates of the *Standard Oil Trust*, which were provided for and described in said trust agreements, were issued and delivered by said *nine* trustees to the persons

aforesaid, from whom said *nine* trustees had received said *34,993* shares of stock in the defendant company; that the capital stock of said defendant company is still *$3,500,000.00*, and the *nine* trustees before mentioned still hold and control the *34,993* shares thereof which were transferred to them as above stated; that by virtue of so holding and controlling said shares, said *nine* trustees have been ever since the signing of said agreements, and still are, able to choose and have chosen annually such boards of directors of defendant company as they (said *nine* trustees) have seen fit, and are able to, and do, control the action of the defendant in the conduct and management of its business; that some of the directors of defendant company, including its president, have been, since the date of said agreements, and still are, members of the board of *nine* trustees provided for in said trust agreements as aforesaid, the president of the defendant company having been, and being now, the president of said board of *nine* trustees.

That defendant has never taken any corporate action, or made any complaint against its said stockholders or its directors and officers signing said trust agreements, or either of them, nor against its said stockholders or officers surrendering their stock in the defendant company to said *nine* trustees, nor against its stockholders or officers or directors receiving the *Standard Oil Trust* certificates which were issued and delivered to them as aforesaid by said *nine* trustees in exchange for the *34,993* shares of defendant's stock, nor against any of the acts herein recited; and that none of the officers, directors or stockholders of defendant company, have at any time objected or made complaint against such surrender and exchange of stock or against any of said recited acts, and on the contrary defendant, in its corporate capacity, and through its officers and stockholders, has ever since the acts in question acquiesced in such transfer and exchange, and in the annual election by said *nine* trustees of the directors for the defendant as well as in all said recited acts. That the directors of defendant company who are chosen in manner aforesaid, either directly or through their employees, manage the business of that company so as not to conflict with the policy fixed from time to time by the *nine* trustees aforesaid; that the net earnings of defendant company have been, ever since the signing of said agreements, and still are from time to time, declared and paid out as dividends upon its capital stock; that the *nine* trustees appointed under said trust agreements as aforesaid, have received the proportions of such dividends, which were properly distributable and payable upon the stock held by said *nine* trustees in defendant company; that there are a large number of other corporations (plaintiff being unable to ascertain or state the exact number) in the United States, whose organizations were made, stock is held, and directors elected, and whose affairs and business and dividends are conducted and paid under and pursuant to the provisions of the trust agreements hereinafter set forth, in a manner and to an extent similar to that herein described in respect to defendant, and from the dividends so accumulated in the hands of said *nine* trustees, dividends are, from time to time, as the interests of the trust justify, declared and paid out by said *nine* trus-

tees to the holders of the *Standard Oil Trust* certificates which have been issued by them, so that the holders of the *34,993* shares of said *Standard Oil Trust* certificates which were received in lieu of a like number of shares of defendant's stock transferred in manner aforesaid upon the books of defendant company, to said *nine* trustees, do not receive the dividends which are payable from the earnings of defendant company, but receive dividends only from the accumulated earnings aforesaid, which are derived from the various similar companies aforesaid, and held and distributed as aforesaid by said *nine* trustees.

The following are correct copies of two trust agreements hereinbefore mentioned and referred to: (*Here were set out the trust agreements.*)[1]

1. The trust agreements referred to in the text were as follows: "This agreement, made and entered into upon this *second* day of *January*, 188*2*, by and between all the persons who shall now or may hereafter execute the same as parties thereto, witnesseth:

I. It is intended that the parties to this agreement shall embrace three classes, to wit: (1) All the stockholders and members of the following corporations and limited partnerships (*naming the corporations*); also all the stockholders and members of such other corporations and limited partnerships as may hereafter join in this agreement at the request of the trustees hereinbefore provided for. (2) The following individuals, to wit: (*names of the individuals*); also all such individuals as may hereafter join in this agreement at the request of the trustees herein provided for. (3) A portion of the stockholders and members of the following corporations and limited partnerships, to wit (*names of the corporations and partnerships*); also stockholders and members (not being all thereof) of other corporations and limited partnerships who may hereafter join in this agreement at the request of the trustees herein provided for.

II. The parties hereto do covenant and agree to and with each other, each in consideration of the mutual covenants and agreements of the others, as follows:

(1) As soon as practicable, a corporation shall be formed in each of the following states under the laws thereof, to wit: *Ohio*, *New York*, *Pennsylvania* and *New Jersey*; provided, however, that instead of organizing a new corporation, any existing charter and organization may be used for the purpose when it can advantageously be done.

(2) The purposes and powers of said corporation shall be to mine for, produce, manufacture, refine and deal in petroleum and all its products and all the materials used in such business, and transact other business collateral thereto. But other purposes and powers shall be embraced in the several charters, such as shall seem expedient to the parties procuring the charter, or, if necessary to comply with the law, the powers aforesaid may be restricted and reduced.

(3) At any time hereafter, when it may seem advisable to the trustees herein provided for, similar corporations may be formed in other states and territories.

(4) Each of said corporations shall be known as the *Standard Oil Company of* ——— (*and here shall follow the name of the state or territory by virtue of the laws of which said corporation is organized*).

(5) The capital stock of each of said corporations shall be fixed at such an amount as may seem necessary and advisable to the parties organizing the same, in view of the purpose to be accomplished.

(6) The shares of stock of each of said corporations shall be issued only for money, property or assets, equal at a fair valuation to the par value of the stock delivered therefor.

(7) All of the property, real and personal, assets and business of each and all of the corporations and limited partnerships mentioned or embraced in class first shall be transferred to and vested in the said several *Standard Oil* companies. All of the property, assets and business in, or of, each particular

The plaintiff further avers that after the execution and delivery of the trust agreement aforesaid, to wit: on the *4th* day of *January*, A. D. 1*882*, in violation of law and in abuse of its powers and in exercise of privileges and franchises not conferred upon it, the defendant, acting through the same parties as before alleged in respect of the above recited agreement, together with the subscribers thereto, who were

state, shall be transferred to and vested in the *Standard Oil Company* of that particular state, and in order to accomplish such purpose the directors and managers of each and all of the several corporations and limited partnerships mentioned in class first are hereby authorized and directed by the stockholders and members thereof (all of them being parties to this agreement) to sell, assign, transfer, convey and make over, for the consideration hereinafter mentioned, to the *Standard Oil Company* or companies of the proper state or states, as soon as said corporations are organized and ready to receive the same, all the property, real and personal, assets and business of said corporations and limited partnerships. Correct schedules of such property, assets and business shall accompany each transfer.

(8) The individuals embraced in class second of this agreement do each for himself agree, for the consideration hereinafter mentioned, to sell, assign, transfer, convey and set over all the property, real and personal, assets and business mentioned and embraced in schedules accompanying such sale and transfer, to the *Standard Oil Company* or companies, of the proper state or states, as soon as the said corporations are organized and ready to receive the same.

(9) The parties embraced in class third of this agreement do covenant and agree to assign and transfer all of the stock held by them in the corporations or limited partnerships herein named, to the trustees herein provided for, for the consideration and upon the terms hereinafter set forth. It is understood and agreed that the said trustees and their successors may hereafter make the assignment of stocks in the same or similar companies upon the terms herein provided, and that whenever and as often as all the stocks of any corporation or limited partnership are vested in said trustees, the proper steps may then be taken to have all the money, property, real and personal, of such corporation or partnership assigned and conveyed to the *Standard Oil Company* of the proper state, on the terms and in the mode herein set forth, in which event the trustees shall receive stocks of the *Standard Oil* companies equal to the value of the money, property and business assigned, to be held in place of the stocks of the company or companies assigning such property.

(10) The consideration for the transfer and conveyance of the money, property and business aforesaid to each or any of the *Standard Oil* companies, shall be stock of the respective *Standard Oil Company* to which said transfer or conveyance is made, equal at par value to the appraised value of the money, property and business so transferred. Said stock shall be delivered to the trustees hereinafter provided for, and their successors, and no stock of any of the said companies shall ever be issued except for money, property or business equal at least to the par value of the stock so issued, nor shall any stock be issued by any of said companies for any purpose, except to the trustees herein provided for, to be held subject to the trusts hereinafter specified. It is understood, however, that this provision is not intended to restrict the purchase, sale and exchange of property by said *Standard Oil* companies as fully as they may be authorized to do by their respective charters, provided only that no stock be issued therefor except to said trustees.

(11) The consideration for any stocks delivered to said trustees as above provided for, as well as for stocks delivered to said trustees by persons mentioned or included in class third of this agreement, shall be the delivery by said trustees to the persons entitled thereto, of trust certificates hereinafter provided for, equal at par value to the par value of the stocks of the said *Standard Oil* companies so received by said trustees, and equal to the appraised value of the stocks of other companies or partnerships delivered to said trustees. (The said appraised value shall be determined in a manner agreed

the same as those whose names were subscribed to the other agreement aforesaid, entered into and became a party to, carried out and still continues to observe, perform and carry out, a supplemental trust agreement, which, if not in words and figures, is, in substance and effect, as follows: (*Here was set supplemental trust agreement.*)[1]

upon by the parties in interest and the said trustees.) It is understood and agreed, however, that the said trustees may, with any trust funds in their hands, in addition to the mode above provided, purchase the bonds and stocks of other companies engaged in business similar or collateral to the business of said *Standard Oil* companies, on such terms and in such mode as they may deem advisable, and shall hold the same for the benefit of the owners of said trust certificates, and may sell, assign, transfer and pledge such bonds and stocks whenever they may deem it advantageous to said trust so to do.

III. The trusts upon which said stocks shall be held, and the number. powers and duties of said trustees, shall be as follows:

(1), (2), (3), (4), (5), (6). (*Providing for the number of trustees, their terms of office, their manner of election, and right to vote.*)

(7). (*Providing for the annual and special meetings of the owners of trust certificates, also for the making, amendment and repeal of by-laws.*)

(8), (9). (*Providing for the filling of vacancies in the board of trustees.*)

(10). (*Providing for the transfer and vesting of stock when a change shall occur in the board.*)

(11), (12). (*Providing for the preparation and issuance of certificates, to be known as Standard Oil certificates.*)

(13). (*Relating to the sale, assignment, transfer and purchase of stocks.*)

(14). (*Providing for the disposal of interest and dividends, and the keeping of accounts, etc.*)

(15). (*Providing for the general supervision of the affairs of the Standard Oil Company, and the election by the trustees, of themselves, to positions.*)

(16). (*Providing for the appointment of committees and the number of trustees who may exercise powers, etc.*)

(17). (*The trustees may employ and pay all such agents and attorneys as they deem necessary in the management of said trust.*)

(18). (*Providing for salaries of trustees.*)

(19). (*Naming the principal office, and for the adoption of rules and regulations pertaining to the meetings of the board, and for the election of officers, and the management of the trust.*)

(20). (*Providing for an annual statement of trust affairs, and for the winding up of the trust upon its termination.*)

(21), (22). (*Providing for the continuance of the trust or its termination after ten years, and the distribution of the property and assets.*)

(23). This agreement, together with the registry of certificates, books of accounts, and other books and papers connected with the business of said trust, shall be safely kept at the principal office of said trustees. (*Signatures omitted.*)

1. The supplemental trust agreement referred to in the text is as follows:

"Whereas, in and by an agreement dated *January 2*, 188*2*, and known as the *Standard Trust* agreement, the parties thereto did mutually covenant and agree, *inter alia*, as follows, to wit: That corporations to be known as *Standard Oil* companies of various states should be formed, and that all of the property, real and personal, assets and business of each and all of the corporations and limited partnerships mentioned or embraced in class first of said agreement should be transferred to and vested in the several *Standard Oil* companies; that all of the property, assets and business in or of each particular state should be transferred to and vested in the *Standard Oil Company* of that particular state, and the directors and managers of each and all of the several corporations and associations mentioned in class first were authorized and directed to sell, assign, transfer and convey and make over to the *Standard Oil Company*, or companies, of the proper state or states, as soon as said corporations were organized and ready to receive the same, all the property, real and personal, assets and business of said corporations or associations; and, whereas, it is not deemed expedient that all of the companies and associations mentioned should transfer their property to the said *Standard Oil* companies at the present time, and in case of some com-

Plaintiff further avers, that the *nine* persons who were appointed and named as trustees in and under the provisions of said trust agreements, accepted their several positions and entered upon the discharge of the trust duties therein mentioned; and some of said trustees and others, to the number of *nine*, whose names are unknown to the plaintiff, have been reappointed and appointed at various times since the execution of said trust agreements, so that *nine* trustees have been ever since then, and still are, acting thereunder, and each and all of said trustees have been, and are, nonresidents of the state of *Ohio*; that the offices and principal place of business of said trustees have been, ever since the execution of said trust agreements, and still are, in the city of *New York*, and the elections of trustees and business transacted by them in their meetings have been had and done in said city of *New York*; and that plaintiff had no knowledge of the existence of either of the aforesaid trust agreements, or of the acts hereinbefore recited, until the latter part of the year 1889.

Plaintiff further avers, that by reason of defendant's stockholders, directors and officers signing and entering into said trust agreements and carrying out their provisions and surrendering their stock in defendant and accepting in lieu thereof certificates issued by the *nine* trustees aforesaid, and permitting the corporate powers, business and property of the defendant to be exercised, conducted and controlled by said trustees in manner aforesaid, and by reason of the acts and omissions of defendant hereinbefore recited, said defendant has forfeited its corporate rights, privileges, powers and franchises.

Wherefore, plaintiff prays that defendant be found and adjudged to have forfeited and surrendered its corporate rights, privileges, powers and franchises, and that it be ousted and excluded therefrom, and that it be dissolved, and that such other relief be granted in the premises as to the court may seem just and proper.

David K. Watson, Attorney-General.

panies and associations it may never be deemed expedient that the said transfer should be made, and said companies and associations go out of existence; and whereas it is deemed advisable that a discretionary power should be vested in the trustees as to when such transfer or transfers should take place, if at all.

Now it is hereby mutually agreed between the parties to the said trust agreement, and as supplementary thereto, that the trustees named in the said agreement and their successors shall have the power and authority to decide what companies shall convey their said property as in said agreement contemplated, and when the said sales and transfers shall take place, if at all, and until said trustees shall so decide, each of said companies shall remain in existence and retain its property and business, and the trustees shall hold the stocks thereof in trust, as in said agreement provided. In the exercise of said discretion the trustees shall act by a majority of their number, as provided in said trust agreement. All portions of said trust agreement relating to this subject shall be considered so changed as to be in harmony with this supplemental agreement.

In witness whereof, the said parties have subscribed this agreement, this *4th* day of *January*, 1882."

(*Signatures omitted.*)

cc. SUGAR TRUST.

Form No. 6434.[1]

Supreme Court of the State of *New York.*

The People of the State of New York, plaintiffs, against *The North River Sugar Refining Company*, defendant. } *Amended* Complaint.

The people of the state of *New York*, by their attorney-general, upon leave of court duly granted, in this their *amended* complaint, on information and belief, allege:*

I. For a first cause of action, that defendant is a corporation created and organized under and pursuant to the act of the legislature of New York, passed February 17, 1848, and entitled "An Act to authorize the formation of corporations for manufacturing, mining, mechanical and chemical purposes," and the acts amendatory thereof; that defendant's certificate of incorporation, filed on or about the *ninth* day of *February*, 1865, declares its name to be "*The North River Sugar Refining Company*," its place of business in the city of *New York*, and its object the manufacture and sale of sugar, syrups and molasses; that in violation of law and in abuse of its powers, and in the exercise of privileges and franchises not conferred upon it defendant, on or about the *first* day of *October*, 1887, in the city of *New York*, together with the other subscribers thereto, entered into and became a party to and carried out the following agreement, namely: (*Here was set out the agreement.*)[2]

That thereafter, and under and pursuant to the provisions of said agreement, the capital stock of defendant was transferred to said board, *The Sugar Refineries Company*, and in lieu thereof certificates were issued by said board; that, pursuant to said agreement, such of the parties thereto as were not then incorporated became corporate bodies, and their capital stock was transferred to said board and certificates issued in lieu thereof; that the greater part in number and value of said certificates is owned by the members of said board; that by means of said agreement, and the powers thereby conferred upon said board, said board monopolizes the manufacture and sale of *refined sugar* in the state of *New York*, and is enabled to control at will the production and price of said *sugar* in said state and in the

1. **This complaint was copied from the record** in People *v.* North River Sugar Refining Company, 121 N. Y. 582. The complaint alleged that defendant was a corporation organized under the general Manufacturing act, and that in violation of law and in abuse of its powers became a party to an illegal agreement. The court of appeals affirmed the judgment of the general term of the supreme court, finding that the corporation had violated its charter and failed in the performance of its corporate duties to such an extent as to justify a judgment of dissolution.

2. **The agreement referred to** in the text is a lengthy instrument in writing denominated a "Deed" providing for a board called "The Sugar Refineries Company," stating the objects of the company, defining the duties of the officers, enumerating the plans, fiscal arrangements, etc. For an agreement of analogous provisions and import see *supra*, note 1, p. 679.

United States; that, in exercise of the powers conferred by said agreement, said board controls the action of defendant and the other corporations, parties to said agreement, in the conduct of their business and controls and regulates the production and price of *refined sugar* in the state of *New York* and in the *United States*; that in the exercise of the said powers said board has limited the production and increased the price of said *sugar* in said state and in said *United States*, and that said agreement constitutes a combination to do an act injurious to trade and commerce, to which combination defendant is a party.

II. For another and separate cause of action, plaintiffs, repeating the allegations of the preceding count, aver that, for and during the year 1888, defendant wilfully neglected and omitted, and still wilfully neglects and omits, to make, file and publish any report as prescribed and required by section twelve of the act by and under which defendant was created a corporation.

III. For another and separate cause of action, plaintiffs, repeating the allegations of the first above count, aver that, in *December*, 1887, defendant went out of business and ceased its operations, and thenceforth to the present time omitted and neglected to refine or manufacture or sell *sugar*, *syrups* or *molasses*, and has failed and still fails to do any business or to exercise its powers.

Wherefore, plaintiffs demand judgment that defendant, the *North River Sugar Refining Company*, be dissolved, its charter vacated, and its corporate existence annulled; that it be enjoined from acting as a corporation, and a receiver of its property be appointed, and for such other and further relief as may be appropriate, with costs.

Chas. F. Tabor, Attorney-General,
Plaintiff's Attorney.

(*d*) *Improper Consolidation, Unlawful Lease and Nonuser.*

Form No. 6435.

(Precedent in State *v.* Atchison, etc., R. Co., 24 Neb. 143.)[1]

[In the *Supreme* Court of the State of *Nebraska*.

The State of Nebraska, ex rel. William Leese, attorney-general, plaintiff, against *The Atchison and Nebraska Railroad Company*, defendant.[2]	Information in the nature of Quo Warranto.

Now comes *William Leese*, attorney-general of the state of *Nebraska*, petitioner, and gives the court to understand and be informed:][3]

I. That] on the *25th* day of *April*, A. D. 1871, articles of incorpora-

1. **This petition** was sustained against a demurrer based upon two grounds: 1st, That there is a defect of parties defendant. 2d, That the facts stated in the information are not sufficient to entitle the state to the relief prayed for against the defendant.

2. **The only necessary party defendant** in a proceeding of this nature to forfeit franchises and oust the corporation from its franchises for misuser or nonuser is the corporation itself. State *v.* Atchison, etc., R. Co., 24 Neb. 143.

3. The words in [ ] do not appear in the reported case, but have been added to complete the form.

tion were duly filed in the office of the secretary of state of *Nebraska* by *A. J. Cropsey*, *A. A. Egbert*, *T. E. Calvert*, *George Morrison* and *O. Chanute*, duly incorporating, under the laws of the state of *Nebraska*, the *Atchison, Lincoln and Columbus Railroad Company*. [That] the object and purpose of this company was (*stating object of incorporation*).[1] A copy of the articles of incorporation is attached to the petition as an exhibit.

II. That on the *18th* day of *August*, A. D. 187*1*, and long before the aforesaid line of railroad was completed, the said *Atchison, Lincoln and Columbus Railroad Company* consolidated all of its stock and property, of every kind and nature, with the stock and property of every kind of the *Atchison and Nebraska Railroad Company*, a corporation organized under the laws of the state of *Kansas*, and it was agreed in said articles of consolidation, a copy of which was filed in the office of the secretary of state of this state, that the aforesaid two consolidating companies should constitute but one corporation in law, and to be known and named the *Atchison and Nebraska Railroad Company*. A copy of the said articles of consolidation is attached to the petition, and that part of the line of railroad of the defendant lying and being in the state of *Nebraska* is sought to be affected by this proceeding.

III. Your petitioner would further give the court to understand and be informed that, at the time of the incorporation of the *Atchison, Lincoln and Columbus Railroad Company*, as well as at the time of the consolidation, the financial circumstances of the defendant were limited, and they were unable to build the said railroad from the south line of the state of *Nebraska* to *Columbus*, as aforesaid, and the said company applied to the tax-payers of the several counties through which said line of railroad was to pass for aid, to enable the said company to construct and maintain their railroad as aforesaid.

IV. That the tax-payers and inhabitants along said proposed line of railroad, for the purpose of obtaining a railroad and getting direct communication with *Kansas*, *Missouri*, *Illinois*, and other eastern and southern states, did, as in such cases made and provided, vote, issue, and deliver to the defendant a large amount of ten per cent. coupon bonds, aggregating, from the counties of *Richardson*, *Pawnee*, *Johnson*, *Gage* and *Lancaster*, more than $*500,000*.

V. That on or about the *15th* day of *January*, 187*2*, said railroad was completed to *Lincoln*, in *Lancaster* county, *Nebraska*, and from said day until *January 1*, 188*0*, was operated and maintained as a competing line of railroad with the *Burlington and Missouri River Railroad Company in Nebraska* (a corporation organized under the

1. **The object and purpose of the company** as stated in the information was "to construct, maintain and operate a line of railroad, with single or double tracks, and with all the necessary branches, fences, bridges, warehouses, elevators, station houses, and such other appurtenances as might be thought necessary in extending said line of railroad from a point on the southern line of the state of *Nebraska*, where the *Atchison and Nebraska Railroad Company* crosses said state line, and from thence running northward and westward through the counties of *Richardson*, *Pawnee*, *Gage*, *Johnson*, *Lancaster*, *Seward* and *Butler*, by way of *Lincoln*, to the town of *Columbus*, at the union of the *Pacific* railway in *Platte* county."

laws of this state), for all the freight and passenger traffic lying and being between the road of this defendant and a branch line of the aforesaid *Burlington and Missouri River Railroad Company* running from (*describing branch lines*).[1] That during all of the time aforesaid there was a strong competition between the aforesaid lines, thereby producing a reasonable but low rate of charges for freight and passenger traffic, and the people living within the territory above described received a great advantage, by reason of the low and reasonable rates charged for the transportation of freight and passengers on the defendant's railroad, resulting from the competition aforesaid. That by the competition aforesaid, the freight belonging to the people using defendant's line of railroad was shipped south to the city of *Atchison*, in *Kansas*, and from there connected with other lines of railroads that were competing with the aforesaid *Burlington and Missouri River Railroad* for *Chicago* freight, and for other points east. That freight coming from *Chicago* and other eastern points to the people living along the line of the defendant's railroad was brought at greatly reduced rates, and all the people living in the southeastern quarter of our state received the many advantages derived from competing railroads.

VI. That on the *first* day of *January*, A. D. 1880, as aforesaid, for the purpose of defrauding the people living along the line of their railroad, and for the purpose of destroying the competition as aforesaid, the said defendant, the *Atchison and Nebraska Railroad Company*, disregarding its duties to the state and to the public, unlawfully and wilfully entered into an agreement with the aforesaid *Burlington and Missouri River Railroad Company* to (*stating substance of agreement*).[2] A copy of said lease is attached to and made a part of the petition. In pursuance with the terms of said lease, the defendant, on said day, gave to the said *Burlington and Missouri River Railroad Company* full and absolute possession and control of all its railroad, roadway, rights, privileges and franchises, its earnings, and property of every description. And that ever since the *1st* day of *January*, A. D. 1880, the defendant company has utterly and wilfully failed and neglected to maintain or operate their said railroad or any other railroad in this state, and has failed in the discharge of its duty to the state and to the public during all of said time, whereby the rights, privileges and franchises of said defendant in the state of *Nebraska* have become and are subject to forfeiture.

1. **The branch lines referred to** in the text were those running from Lincoln, in Lancaster county, to Nemaha City in Nemaha county by way of Nebraska City, on the east side, and with a branch line of said Burlington and Missouri River Railroad Company running from Lincoln by way of Crete to Beatris in Gage county, on the west side of the defendant's line.

2. **The agreement referred to in the text** was to "lease their said line of railroad, and all their rights, privileges, franchises, and property of every description, to the above last named railroad company, and on said last named day the defendant did grant, lease and demise to the said *Burlington and Missouri River Railroad*, for the full term of *nine hundred and ninety-nine* years, all of their railroad, roadway, lands connected with the use and operation of their road, and all machine shops, depots, and all easements and appurtenances thereunto belonging, as well as all such property as should thereafter be acquired."

VII. That afterwards, on the *5th* day of *April*, 1880, the defendant conveyed and assigned absolutely all of its lands, bonds, moneys, and property of every description, not included in the lease hereinbefore mentioned, to the aforesaid *Burlington and Missouri River Railroad Company.* A copy of said conveyance and assignment is attached to and made a part of the petition.

VIII. And your petitioner would further show to the court that the defendant's line of railroad and the line owned by the *Burlington and Missouri River Railroad Company in Nebraska* were not connecting or continuous lines of railroads, but in truth and in fact the two roads were parallel and competing lines, and the lease, conveyance and assignment as aforesaid were and are *ultra vires*, in violation of section three of article eleven of the constitution of the state of *Nebraska*, and against public policy.

IX. That on the said *first* day of *January*, A. D. 1880, the aforesaid *Burlington and Missouri River Railroad Company in Nebraska* sold, assigned and transferred all of their railroads, leaseholds, rights of action, contracts, stock, franchises, and all other property of every description whatsoever, to the *Chicago, Burlington and Quincy Railroad Company*, a foreign corporation, incorporated under the laws of the state of *Illinois* and *Iowa*, and not incorporated under the laws of *Nebraska*, nor has it filed a copy of its articles of incorporation with the secretary of state of *Nebraska*. A copy of the above mentioned deed of sale and assignment is attached to the petition and made a part thereof.

X. That after the defendant made the lease of its railroad and the transfer of all its property, as aforesaid, the management and control of the defendant's line was maintained and operated by the said *Burlington and Missouri River Railroad Company*, and by the transfer of the said last named company to the *Chicago, Burlington and Quincy Railroad Company*, and the said *Chicago, Burlington and Quincy Railroad Company* still continues to operate and maintain the defendant's line in this state, thereby consolidating all of the property, franchises and earnings of the defendant's line with the aforesaid competing and parallel lines of the said *Burlington and Missouri River Railroad Company*, as now owned and controlled by said *Chicago, Burlington and Quincy Railroad Company.*

XI. That from and after the date of the above transfer, to wit, *January 1*, 1880, the rates of freight for transportation on the defendant's lines were increased by the lessee and its assignee from *fifty* to *seventy-five* per cent. of the rate charged by the defendant, and in many cases it was doubled. That all competition was destroyed in the southeastern quarter of the state by reason of the aforesaid transfers, and all the grain, stock, and other classes of transfer along the defendant's line, shipped to eastern and southern points, was carried north by the lessee and the volume of business done along the defendant's line was diverted outside of the usual channel of trade. That the people living along the line of the defendant's road are defrauded by the transfers aforesaid, and the large amount of bonds voted and delivered to the defendant, to aid in the construction of the railroad, are without consideration, and yet the

said bonds are still presumed to be a legal liability against said counties.

XII. That the defendant corporation, the *Atchison and Nebraska Railroad Company*, has ceased to maintain and operate any railroad in the state of *Nebraska*. That said railroad corporation, the *Atchison, Lincoln and Columbus Railroad Company*, as consolidated with the *Atchison and Nebraska Railroad Company*, has wilfully failed and neglected to keep and maintain any railroad in this state, as by their articles of incorporation they are required to do, but on the contrary has abandoned its lawful business, and the end and object for which it was created, whereby the rights and privileges and franchises of said defendant corporation in this state have become subject to forfeiture. Wherefore plaintiff prays that the corporate rights, privileges and franchises may be declared forfeited, and the said defendant be ousted therefrom. That all the rights, privileges and franchises of the defendant within the state of *Nebraska* be canceled and annulled, and that said corporation be dissolved. That the court may appoint *three* trustees to take charge of the property of said corporation to collect the debts, and pay the liabilities, if any, and the surplus paid into the state treasury for the benefit of the school fund, as in other cases of forfeiture. And for such other and further relief as equity and justice may require.

[*William Leese*, Attorney-General.]

(*e*) *Improper Use of Funds by Building and Loan Association.*

Form No. 6436.

(Precedent in State *v.* Greenville Bldg., etc., Assoc., 29 Ohio St. 92.)[1]

(*Title of court and cause as in Form No. 6433.*)

John Little, Attorney-General of the State of *Ohio*, upon complaint to, and inquiry by him in that behalf made, now comes and gives the court here at the *December* term thereof, 1873, to understand and be informed that the defendant, the *Greenville Building and Saving Association*, is, and since April —, 1869, has been an incorporated company of said state, formed and organized under the act of the general assembly thereof, entitled "An Act to enable associations of persons to raise funds to be loaned among their members for building homesteads and for other purposes, and to become a body corporate;" and that it has continuously hitherto since said date, within said state, to wit, at the county of *Darke*, offended against the laws of the state, misused its corporate authority, franchises and privileges,

1. **Judgment was entered in this case** on the several findings as follows: 1. That the defendant be ousted from the assumed right of allowing any member more than *twenty* shares of stock in his own right. 2. That defendant be ousted from the assumed right of using its funds in making loans to members or depositors, upon their promissory notes, at the rates greater than the legal rate of interest, and from using its funds in loaning the same to or in purchasing and discounting notes of persons other than members or depositors. 3. That defendant be ousted from the assumed right of fixing a minimum premium upon loans and refusing to grant loans to members unless the premium paid equals or exceeds the amount so fixed.

not granted to it, and especially in the following particulars and matters, to wit:

1. It has unlawfully allowed its members to hold more than *twenty* shares of stock each in their own right, and it still doth the like.

2. It has unlawfully used its funds in buying orders and bonds and in discounting notes and mortgage securities and commercial paper, in doing a general banking business, and in loaning its funds to persons other than its members and depositors, by discounting their notes, orders, and securities, and it still doth the like.

3. It has unlawfully loaned its funds to others than its members and depositors, and charged and received on such loans usurious rates of interest, and it still doth the like.

4. It has unlawfully refused and declined to loan its funds to its members for use in building homesteads, and for other purposes, and it still doth the like. All which things the defendant will continue to do unless prevented by the judgment of this court.

Wherefore the plaintiff prays the process and judgment of the court in the premises, and for all proper relief.

John Little, Attorney-General.

(*f*) *Insolvency.*

aa. At Instance of Attorney-General.

Form No. 6437.[1]

(*Title of court and cause, and commencement as in Form No. 6434 to* *.)

I. That at the times (*continuing as in paragraph 1 of Form No. 6440*).

1. *New York.* — Code Civ. Proc., § 1785 *et seq.* See also list of statutes cited *supra*, note 2, p. 658.

Insolvent Banking Corporation. — In State *v.* Bank of New England, 55 Minn. 139, plaintiff's complaint prayed that the bank be adjudged insolvent, and that an injunction issue restraining it from exercising corporate rights, etc. On appeal from the district court refusing to appoint a receiver and grant an injunction, the case was reversed, the court holding that the action could be maintained notwithstanding the corporation had made an assignment under the insolvent law. A complaint based upon the facts in that case might be as follows:

(*Commencing as in Form No. 6439, and continuing down to* *.)

"1. That the defendant the *Bank of New England* is a corporation, having been duly organized in *December*, 189*1*, under chapter 3 of the General Statutes (1878) of the state of Minnesota, and having acquired banking powers under and by virtue of its said organization, located and having its principal business office in the *Guaranty Loan Building*, in the city of *Minneapolis* in the state of *Minnesota*, with a capital stock of *one hundred thousand* dollars, divided into *five hundred* shares, at *two hundred* dollars per share.

2. That under and by virtue of the authority to him granted under chapter 37 of the General Statutes (1878) of the state of Minnesota, and the acts amendatory thereto, the treasurer of the state of *Minnesota* deposited on the —— day of ——, 189*2*, in said bank the public funds of the state of *Minnesota*.

3. That on the —— day of ——, 189*2*, the said defendant, the said bank, became, and ever since that time has been, and now is insolvent and unable to pay on demand checks, drafts, and orders drawn upon it in the due course of business, and that on the *twenty-fourth* day of *June*, 189*3*, the said defendant, the said bank, closed its doors and suspended payment.

II. That the capital stock (*continuing as in paragraph 2 of Form No. 6440*).

III. That the said defendant the said corporation has become insolvent, and is unable to pay its debts in full, and has violated the various provisions of the statutes and acts amendatory thereto by and under which it was incorporated, and the acts of the legislature binding upon it. That for some years last past the said defendant has been greatly embarrassed financially in its corporate business, and that more than a year last past it became insolvent and was unable to discharge its debts and liabilities in full as they became due, and now is, and ever since that time has been insolvent and unable to pay and discharge its debts and liabilities as the same became due.

IV. That for at least *one* year last past the said defendant the said corporation has been unable to pay and discharge its notes and other evidences of debt, and during said year has neglected to pay and discharge its notes and evidences of debt, and is now unable to pay and discharge the same.

V. That the said defendant the said corporation is the owner, and has in its possession, a large quantity of real and personal property, to wit: (*Here describe the property, both real and personal, as nearly as can be.*)

VI. That the said defendant the said corporation is largely indebted to divers persons, firms and corporations, some of which said indebtedness is long past due and undischarged.

VII. That the said defendant the said corporation cannot dispose of its said property and pay said indebtedness, and is not now nor will it be able in the future to pay and discharge the same.

VIII. That several suits for debts due have been commenced against the said defendant, and the time for obtaining judgments therein will expire in a short time, to wit, by the *first* day of *June*, 1898, and that if such judgments are allowed to be obtained, and the executions issued thereon, the property of the said defendant the said corporation will be levied on and sold at a great sacrifice, as plaintiff verily believes, and the judgment creditors thereby obtain a

4. That the said defendant the said corporation was, at the time it closed its said doors and suspended payment as aforesaid, indebted to the state of *Minnesota* in the sum of *sixty-one thousand three hundred and thirty-one* dollars and *fifteen* cents, and to divers other creditors large sums of money.

5. That the said defendant the said corporation owned and had in its possession money, promissory notes of great value, choses in action, and property worth in the neighborhood of the sum of *one hundred thousand* dollars.

6. That the said state of *Minnesota*, through *Henry W. Childs*, its attorney-general, commenced this action against the defendant, the said defendant corporation, in the name and on behalf of the state of *Minnesota*, under and by virtue of the provisions of chapter 76 of the General Statutes (1878) of the state of Minnesota.

Wherefore, plaintiff asks judgment against the said defendant the said corporation, that it, the said *New England Bank*, be adjudged insolvent, and that an injunction be granted restraining it from exercising corporate rights, and from collecting debts, assets, or paying out or transferring any of its moneys or property, and that a receiver be appointed to take charge of all the properties of the said corporation and to collect and convert the same into money, and that the plaintiff may have such other and further relief as to the court may seem just and proper." (*Concluding as in Form No. 6439, infra.*)

preference over the other creditors of the said defendant the said corporation, and the other creditors thereby be greatly injured.

IX. That the said defendant the said corporation, in its present condition of financial embarrassment and insolvency, is not now able to and cannot continue its corporate business in a proper manner, and that it is to the best interests of all the creditors and stockholders of the said corporation that the same be dissolved and a receiver appointed, and its property distributed among its creditors in the manner by law in such cases made and provided.

Wherefore plaintiff demands judgment:

First. (*Continuing and concluding as in Form No. 6440.*)

bb. At Instance of Stockholder.

Form No. 6438.[1]

(Precedent in Peter *v.* Farrel Foundry, etc., Co., 53 Ohio St. 534.)

In the *Common Pleas* Court of *Lucas* County, *Ohio.*

William Peter, Sarah E. Peter, Horace S. Walbridge, S. Cornell Walbridge, Michael J. Cooney and Charles R. Faben, Jr., plaintiffs,
v.
The Union Manufacturing Company, defendant.
} Petition.

Plaintiffs say that the defendant is a corporation duly organized and existing under the laws of the state of *Ohio*; that said corporation

1. Under the petition in this case, the court of common pleas forthwith appointed a receiver, who at once went into possession of the property and assets of the defendant corporation.

Complaint by Stockholder. — In Swords *v.* Northern Light Oil Co., 17 Abb. N. Cas. (N. Y. Supreme Ct.) 116, the amended complaint, among other allegations, contained the following:

"Seventeenth.— That the corporation is indebted in large sums of money to various persons to these plaintiffs unknown, and has no means whatever of liquidating its outstanding indebtedness, nor has it had the means to do so for much more than *one* year last past. That its debts have remained unsatisfied for many years and will continue to remain so unsatisfied, as no means are at the command of the corporation to enable it ever to discharge its obligations by reason of the premises the plaintiffs charge; that the said corporation has become and is insolvent and unable to pay its debts, and has remained insolvent for at least *one* year last past, and that it is no longer entitled to act as a corporation, but that it is subject to be deprived of its franchises and rights by the act of this court and be dissolved.

Eighteenth. — That in pursuance of section 1786 of the Code of Civil Procedure, the said plaintiffs duly applied to the attorney-general of the state of *New York*, by submitting to him a written statement of facts verified by oath, reciting in substance all the matters and things alleged herein, and showing grounds for an action under the provisions of section 1785 of the Code of Civil Procedure, and requesting the said attorney-general to commence an action in the name and in behalf of the People of the State to dissolve said corporation. That more than *sixty* days have elapsed since such submission was made, and the attorney-general has omitted for *sixty* days after the written statement of facts, verified by oath, was submitted to him as aforesaid, to commence an action or proceeding to dissolve the said corporation, or any action specified in said section 1785, and these plaintiffs as stockholders as

was organized for manufacturing and is carrying on the business of *manufacturing and selling sewing machines, washing boards of various kinds, churns and flour-mill machinery*, and that its principal place of business is in the city of *Toledo, Lucas* county, *Ohio*; that these plaintiffs are all stockholders of said defendant corporation; that the amount of the paid up capital stock of said corporation is *seven hundred and twenty-four thousand and five hundred* (*$724,500.00*) dollars and is divided into *seven thousand two hundred and forty-five* (*7,245*) shares of *one hundred* (*$100.00*) dollars each; that plaintiffs are the owners of *three hundred and forty-five thousand* (*$345,000.00*) dollars of said paid up capital stock, and are the owners of *three thousand four hundred and fifty* (*3,450*) shares thereof.

Plaintiffs further say that for no one of the three last preceding years have the net earnings of the said defendant corporation been sufficient to pay, in good faith, an annual dividend of *six* per centum upon the paid up capital stock of the said corporation over and above the salaries and expenses authorized by the by-laws and regulations of the said corporation.

Plaintiffs further say that the bonded debt of said defendant corporation, is *one hundred thousand* (*$100,000.00*) dollars; that said defendant corporation has, in addition, an unsecured indebtedness of about *one hundred and sixty thousand* (*$160,000.00*) dollars; that the said corporation is indebted to these plaintiffs in the sum of not less than *fifty thousand* (*$50,000.00*) dollars in the aggregate; that a large part of said unsecured indebtedness, to wit: the sum of not less *five* thousand (*$5,000.00*) dollars, is now due and unpaid and the entire balance of said unsecured indebtedness will become due within a period of *four* months from this date and at least *two-thirds* thereof will become due within a period of *sixty* (*60*) days from this date.

Plaintiffs further say that the said defendant corporation is wholly unable to pay the portion of said indebtedness now past due and that it will not be able to pay the balance of said indebtedness as the same matures and that said corporation is insolvent; that said corporation has a large plant situated in *Toledo, Ohio*, consisting of

aforesaid now have the right to begin an action in their own name, such as is by the said sections 1785 and 1786 provided. That thereupon, upon such refusal of the attorney-general to proceed as aforesaid, the plaintiffs duly applied to the *supreme* court at a *special* term thereof, for leave to bring this action in their own name against the defendants, and thereupon the court duly granted the plaintiffs such leave to sue with like force and effect as if the action had been brought by the attorney-general in the name and in the behalf of the People of the State of *New York*, and thereupon an order to that effect was duly made and entered on *September 25*, 1883, at a *Special* Term of this court held at *the court-house* in the *city and* county of *New York*, entitled in this action, wherein and whereby it was amongst other things ordered that leave be and is hereby granted to the plaintiffs, stockholders in the said *Northern Light Oil Company*, to begin this action in their own name, pursuant to the provisions of section 1786 of the Code of Civil Procedure, and that they be empowered to conduct and carry on the same with like force and effect as if the said action had been commenced by the attorney-general in the name and in behalf of the People of the State of *New York*, as by reference to the said order, when the same shall be produced, will more fully and at large appear, and to which these plaintiffs pray leave to refer, if need be." These allegations were held to be sufficient upon demurrer.

an interest in real estate, factories, machinery, tools and implements; that it has been and is now engaged in its said business of *manufacturing sewing machines, washboards of various kinds, churns and flour-mill machinery*, and selling the same in said city of *Toledo* and elsewhere; that it has branch offices in different states and a large force of workmen engaged in said business in various capacities, that it has a large number of *unfinished machines, machinery, washboards and churns* on hand and also a large number of *finished machines, machinery, washboards and churns* on hand; that it has a considerable amount of material on hand to be used in the manufacture of such *machines, machinery. washboards and churns*, and in finishing said articles now unfinished, and said corporation is unable to meet its liabilities and current obligations.

Plaintiffs further say that by reason of the insolvent condition of said corporation, and by further reason of the liability of suits, the defendant corporation's property is in imminent danger of being sacrificed and its business brought to a standstill at a great and irreparable loss to these plaintiffs and all other creditors and stockholders of the defendant corporation.

Plaintiffs further say that if said business should be suddenly suspended it would unavoidably result in a very great loss to all the creditors and stockholders of the said defendant; the *finished machines, machinery, washboards and churns* could not be disposed of except at great sacrifice; the *unfinished machines, machinery, washboards and churns* would be an almost total loss, and there would also result great loss from inability to carry out subsisting contracts for material prepared expressly for the business of said defendant and which would have practically no value if thrown upon the general market.

Plaintiffs further say that a very large part of the assets of said defendant corporation, to wit, about *sixty thousand* (*$60,000.00*) dollars, consists of amounts due or to become due for machines sold on the installment plan, that is to say, machines sold to be paid for in small weekly or monthly installments, the corporation retaining the title to said machines until the purchase price is fully paid; that said accounts could not be sold unless at a very small per centum of the face value thereof, and all the outstanding accounts due or to become due to said corporation are of such a character that if the business of said corporation should be at once suspended, there would be a very great loss on said accounts result to said corporation and all of its creditors and stockholders, growing out of the inability to collect said accounts, or the great and disproportionate expense it would be necessary to incur in collecting the same or any part thereof.

Plaintiffs further say that the said defendant corporation has and is possessed of a good-will in its said business which is of a very great value to the said defendant, its stockholders and creditors, unless the same shall be destroyed in consequence of said defendant being compelled to cease business, but that if said defendant should be compelled to cease business, the said good-will would be a total loss to said defendant corporation, its stockholders and creditors.

Plaintiffs further say that the said defendant corporation owns and holds valuable rights, titles and interest in various letters patent of the United States especially necessary and valuable in the manufacture of said *sewing machines*.

Plaintiffs further say that unless a receiver be forthwith appointed for the defendant corporation its property will be sacrificed, its factory will have to be immediately closed and its business immediately closed and its business be immediately suspended, to the great and irreparable injury of these plaintiffs and all other creditors and stockholders of the said defendant corporation.

Wherefore plaintiffs ask that a receiver for the said defendant corporation may be appointed to take charge of its real and personal property of all kinds and descriptions, and wheresoever situated, including choses in action, with authority to continue the business of said corporation for the time being, under the direction and subject to the orders of this court, pending the final winding up and settlement of the affairs of said corporation; that he may be authorized by order of this court from time to time to borrow such sums of money for the purpose aforesaid, as to this court may seem necessary and proper, and issue his obligations therefor, that he may ascertain the indebtedness of said corporation and report the same to this court, that the said defendant corporation may be ordered to convey or transfer all its property, both real and personal, including choses in action and letters patent, wheresoever the same may be situated, whether within this state or any other state or country, to the said receiver to be appointed in this action, that the business and affairs of said defendant corporation may be ultimately wound up, all its property of all kinds and descriptions sold, and the proceeds thereof equitably distributed under and in accordance with the orders of this court, and plaintiffs pray for all such other and further relief as they may be entitled to, whether at law or in equity.

Oliver Ellsworth, Plaintiff's Attorney.

(*Verification.*)[1]

(*g*) *Neglect and Mismanagement.*

Form No. 6439.[2]

State of *Minnesota*, } *District* Court.
County of *Rice*. } *Fifth* Judicial District.

The State of Minnesota ex relatione Daniel Webster, Attorney-General, plaintiff,
against
The Cannon River Manufacturers' Association, defendant.

The *State of Minnesota*, plaintiff above named, by *Daniel Webster*, its attorney, complains of the defendant above named, and says:*

1. Consult the title VERIFICATIONS.

2. **Form based** on State *v.* Cannon River Mfg. Assoc., (Minn. 1896) 69 N. W. Rep. 621. The court held that the facts alleged in the above complaint were sufficient to justify a dissolution.

I. That the *Cannon River Manufacturers' Association* is a corporation duly organized and existing under and pursuant to the laws of the state of *Minnesota*.

II. That by an act of the legislature of the state of Minnesota, approved March 2, 1865, entitled (*Title of act*),[1] the state of *Minnesota* granted unto the *Cannon River Improvement Company*, a corporation theretofore duly organized and existing under and pursuant to the laws of the state of *Minnesota*, for the purpose of aiding the said last named company in the construction of slackwater navigation with the said *Cannon* river, in said state, and from thence by way of *Lake Elysian* to the *Minnesota* river, near *Mankato*, all the swamp lands belonging to said state, lying and being in the odd-numbered sections, within the *St. Peter* land district, as the said district was then constituted, and not otherwise appropriated, to an amount of not to exceed *three hundred thousand* acres.

That the said *Cannon River Improvement Company* was organized for the purpose of constructing canals, locks, dams, towpaths, and, generally, for the purpose of constructing slackwater navigation from the *Mississippi* river via the *Cannon* river to the lakes connected therewith, thence via *Lake Elysian* to the *Minnesota* river, near *Mankato*; but that, by an act of said legislature, entitled "An Act in relation to the Cannon River Improvement Company," approved February 28, 1872, the said *Cannon River Improvement Company* was authorized and empowered to amend and alter its articles of incorporation, so as to make it a purpose and object of said corporation, in addition to the rights and purposes theretofore enjoyed, to construct and operate a railroad, under and pursuant to the general laws of the said state, from the *Mississippi* river via the valley of the *Cannon* river along the route in said last named act described, and granted and extended to the said *Cannon River Improvement Company*, for the purpose of constructing the said railroad, the right to have, use and enjoy all and singular the moneys, capital stock, subscriptions, property, and rights of every nature and kind, acquired or pledged for the purpose of the construction of the said canal and slackwater navigation and works connected therewith, and upon substantially the same conditions, so far as the same could be made conformable to the change of public improvement contemplated by the said last named act. That, in pursuance of the said last named act, the said *Cannon River Improvement Company* did thereafter amend and alter its said articles of incorporation so as to make it a purpose and object of said corporation, in addition to the rights and purposes theretofore enjoyed by it, to construct and operate a railroad, under title 1 of chapter 34 of the General Statutes of said state, from the *Mississippi* river via the valley of the *Cannon* river along the route aforesaid; and that the amendments and alterations of the said articles were duly filed and recorded in the office of the secretary of state of said state.

1. **The title of the act** referred to was as follows: "An Act to aid the Cannon River Improvement Company in the construction of slackwater navigation on the Cannon river, from thence by way of Lake Elysian to the Minnesota river, at Mankato."

III. That pursuant to an act of the legislature of the said state entitled (*title of act*),[1] approved February 27, 1875, it was provided, among other things, that in case the said *Cannon River Improvement Company* should elect to apply the grant made in the act first hereinbefore named in the building of a railroad as authorized by chapter 111 of the Special Laws of 1872, at least one-twelfth of said grant should be selected *pro rata*, and set apart for the purpose of developing and improving the water-powers and manufacturing resources of the *Cannon* river, which said lands so selected and set apart should never be diverted from the said last named object, and that whenever a corporation of the proprietors of the mills of said *Cannon* river should be formed for that purpose the lands thus selected and set apart should be transferred by the said *Cannon River Improvement Company* to the corporation composed of the said proprietors, to be used and applied under its direction as in said last named act provided.

IV. That pursuant to the terms of the various acts under which the defendant became entitled to its land grant, it has selected, and the governor of the state has conveyed to it, in the aggregate, *24,181.45* acres; and that said corporation has disposed of the same, and received therefor the sum of *forty-one thousand seven hundred and twenty-three* dollars; and that it is entitled to receive, under the terms of its grant, an additional amount of *818.55* acres.

V. That the defendant has become entangled in much and expensive litigation, involving an expenditure of over *six thousand* dollars of its funds. That though receiving and disbursing large sums of money, defendant has never kept books of account, and has none but very crude records of such receipts and disbursements; and that the management of its affairs has been largely in the hands and under the control of one or two of its members. That during the latter years of the existence of the defendant, most of its members had ceased to own any mill property on the *Cannon* river, where the mills of the defendant were situated, or to have any pecuniary interest in the development of its water-powers; and that, previous to the commencement of this action, all such members had sold and conveyed away all their interest in the mills on said river in which they were formerly interested; and that not one of them is now the owner of or in any manner interested in any mill power on said stream. That all the members of defendant corporation have ceased to have any interest in the management of its affairs, or any concern for the best use of its remaining funds to complete the improvements for which they were granted, or in any other improvement of the water-powers of the said *Cannon* river; and that the moneys due such corporation, and the proceeds of a judicious sale of its remaining lands, would, if wisely expended, largely supplement the work already done, and greatly improve such water-powers, and benefit the present owners, who have succeeded to the rights therein of the original proprietors,

1. **The title of act** referred to in the text was as follows: "An Act to amend section 2 of chapter 67 of the Special Laws of 1865, as amended by chapter 118, Special Laws of 1870, relating to the Cannon River Improvement Company."

members of the defendant corporation. That the amount of funds which the defendant is likely to receive, applicable to the purpose of its trust, and exclusive of the additional land to which it is entitled, will depend very much on the outcome of the litigation in which it is engaged; but that the same will probably amount to but a few thousand dollars.

Wherefore plaintiff asks judgment that the defendant corporation be dissolved; its affairs wound up; that it be restrained from exercising its corporate privileges, and that a receiver be appointed to take charge of its property and effects, and apply the same to the purpose for which such corporation was organized.

Daniel Webster, Attorney-General.

(*Verification.*)[1]

(*h*) *Nonpayment of Stock.*

Form No. 6440.[2]

(*Title of court and cause, and commencement as in Form No. 6434 to* *.)

1. That at the several times hereinafter mentioned, the defendant was, and still is, a domestic corporation organized on or about the *eighteenth* day of *August*, 1885, under the laws of the state of *New York*, having its principal place of business in the city of *Buffalo*, state of *New York*.

2. That the capital stock of said company was *ninety thousand* dollars, represented by *nine hundred* shares of the par value of *one hundred* dollars each.

3. That three years and seven months have now elapsed since said company was organized, and only about *seventy-seven and one-half* per cent. of said capital stock has been paid in.

4. That said company was duly organized under chapter 40 of the Laws of 1848, and the acts amendatory thereof, for the purpose of carrying on the business of *manufacturing of building and cut stone, of cement and gypsum, and the purchasing and improving real estate for residences and homesteads, to be leased and sold by said company*, but that said company has done nothing during the year last past toward the purposes for which it was organized, and has for more than *one* year last past suspended its ordinary and lawful business.

5. That said company has, in violation of the statutes, in such cases made and provided, received and taken notes from sundry of its stockholders, instead of money, for assessments upon its capital stock, as and for its capital stock.

6. That said company has failed to file or make public the report required by the act under which it is incorporated, which should have been filed within *twenty* days after the *first* day of *January*, 1889.

7. That said corporation was organized for the purposes set forth in number fourth above, but has utterly and totally failed to do or perform any business whatever in furtherance of the purposes for

1. Consult title VERIFICATIONS.

2. **This complaint is copied from the record** in People *v.* Buffalo Stone, etc., Co., 131 N. Y. 140. See also *supra*, note 2, p. 662.

which it was organized, during the year last past, or to exercise its corporate powers during said period of time.

8. That it is for the best interests of the creditors and stockholders that said corporation be dissolved, and that a receiver be appointed, and its property distributed according to law.

Wherefore plaintiff demands judgment.

First. That the defendant corporation be dissolved, and its rights, privileges and franchises forfeited.

Second. That a receiver of the property and effects of the corporation be appointed pursuant to the provisions of the statute, with all the power and authority conferred by law, and subject to all the duties and liabilities imposed upon receivers in such cases.

Third. That the defendant, its trustees, directors, managers and other officers be restrained by injunction during the pendency of this action, from collecting or receiving any debt or demand and from paying out, or in any way transferring or delivering to any person any money, stock, property or effects of the said corporation, except by express permission of the court; and from exercising any of the corporate rights, franchises or privileges of the corporation, except by express permission of the court.

Fourth. That the plaintiff may have such other and further judgment or relief in the premises as may seem to the court proper to grant.

Fifth. That the plaintiff recover the costs of this action.

Chas. F. Tabor, Attorney-General,
Plaintiff's Attorney.

State of *New York*, }
County of *Erie*. } ss.

Rufus M. Choate, being first duly sworn, deposes and says, that he is a *stockholder* and former *secretary* of the above named defendant, the *Buffalo Stone and Cement Company*, and is conversant with the business of said company and with its affairs. That he has heard the foregoing complaint read, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Rufus M. Choate.

Sworn to before me this *ninth* day of *April*, 1889.
C. Louis Fritz,
Notary Public in and for *Erie* County.

(*i*) *Other Violations of Law.*

aa. Relating to Banks.

Form No. 6441.

(*Title of court and cause, and commencement as in Form No. 6430 to* *.)

I. That the said defendant, the *Commercial Bank of Pennsylvania*,

1. **This information is based on the facts** in Com. *v.* Commercial Bank, 28 Pa. St. 383. A motion to quash a writ of quo warranto was overruled.

at the several times hereinafter mentioned, was and still is a corporation, duly organized and incorporated by an act of assembly of the *commonwealth* of *Pennsylvania*, passed March 24, 1814.

II. That in and by said act of assembly it was expressly enacted and declared to be a fundamental article of said corporation, that the rate of discount at which loans might be made by the said corporation should not exceed *one-half of one* per centum for *thirty* days; that in and by said act it was also expressly enacted and declared to be a fundamental article of said corporation, that the said corporation should not deal or trade in anything but bills of exchange, gold or silver bullion, stocks of banks incorporated by the state of *Pennsylvania*, and United States treasury notes, or goods pledged to the said corporation for money lent and not redeemed in due time, or goods which might be the produce of their lands.

That by an act of the assembly of the *commonwealth* of *Pennsylvania*, passed March 25, 1824, the charter of said bank was continued to the *first Wednesday* of *May*, 1835.

III. That by several subsequent acts of the *commonwealth* of *Pennsylvania*, viz., its acts of March 2, 1831, April 26, 1844, and April 2, 1849, the said charter had been further continued from time to time by the legislature, subject to all the provisions, restrictions and limitations contained in the original act of incorporation.

IV. That the said bank has repeatedly violated and broken the fundamental articles of their act of incorporation, and greatly perverted and abused their corporate powers in this, that for many months past the said bank had been in the constant practice of discounting promissory notes at exorbitant and usurious rates of interest, far exceeding the rate of *one-half of one* per centum for *thirty* days; that the said bank received, in the month of *May*, 1854, *twenty-one hundred and fifteen* dollars and *fifty* cents for such usurious, unlawful and prohibited discount; in the month of *June*, *eighteen hundred and forty-five* dollars and *fifty* cents; in *July*, *twenty-two hundred and thirteen* dollars; in *August*, *seventeen hundred and twenty-seven* dollars and *fifty* cents; in *September*, *eleven hundred and sixty* dollars; in *October*, *two thousand and forty* dollars; that between *May* and *October* the said bank received between *eleven* and *twelve thousand* dollars, profits made exclusively from usurious discounts of promissory notes.

V. That the said bank had also for a long time past, to wit, from the *first* day of *May*, 1854, been engaged in dealing in promissory notes contrary to the express prohibition contained in the fundamental articles of incorporation.

That the said bank, in committing the several unlawful acts aforesaid, have wilfully abused their corporate powers, perverted the objects for which they were incorporated, usurped powers and functions which were expressly prohibited to them in their fundamental law, and by reason of the said abuses, usurpations and unlawful acts have forfeited the corporate rights and franchises conferred upon them by the several acts of assembly aforesaid.

Whereupon the said *Martin D. Hardy*, attorney for the said *commonwealth*, in the name and by the authority thereof, prays the consideration of the court here in the premises, and that due process

may be awarded against the said *Commercial Bank of Pennsylvania* in this behalf, to answer to this court by what warrant it exercises the powers and privileges hereinabove described. (*Signature of Attorney-General and verification as in Form No. 6430.*)

bb. Relating to Insurance Companies.

Form No. 6442.[1]

(*Title of court and cause, and commencement as in Form No. 6433 to* *) that the defendant is an incorporated company, formed and organized under the act of *May 1, 1852*, and the acts supplementary thereto, and that ever since its organization it has continuously, within this state, to wit, at the county of *Champaign*, etc., offended against the laws of this state, grossly abused and misused its corporate authority, franchises and privileges, and unlawfully assumed

1. This information is based on the facts in State *v.* Central Ohio Mut. Relief Assoc., 29 Ohio St. 399. In that case a forfeiture of all the corporate franchises and privileges of association was declared, and a judgment of ouster from its right to be a corporation entered against the defendant.

The information in equity against a mutual insurance company in Chicago Mut. L. Indemnity Assoc. *v.* Hunt, 127 Ill. 258, stated facts sufficient to justify a dissolution. The information, omitting formal parts, alleged in substance as follows: "That the Chicago Mutual Life Indemnity Association is a corporation organized January 13, 1885, under an act (*title of act*) approved June 18, 1883; that said association entered upon the exercise of its corporate franchise and the transaction of business under its certificate of organization on or about *January 13, 1885*, and had continued the same until the date of filing said information, its principal office being located in the city of *Chicago*. That on or before *March 1, 1887*, its president and secretary filed with the auditor of public accounts a statement under oath of its business for the year ending *December 31, 1886*, as required by law, showing its financial condition, assets, liabilities, total amount of indemnity in force, number of members, number whose membership had terminated during the year and cause thereof, total receipts and sources thereof, total expenditures and object thereof, and the average amount paid on each certificate; that said statement was wilfully false and untrue, and that the auditor so found on examination of the books and papers of the association and such other examination as he had deemed necessary; that the business of the association had been conducted fraudulently and in wilful violation of the provisions of said act, and that the association had transacted business different from that authorized by its certificate of incorporation; that the auditor had communicated such facts to the attorney-general as required by law, and that the attorney-general, in pursuance of the duty imposed upon him by law, applied to the court for relief, according to the statute in such case made and provided, and for cause of such application further and more particularly showed: (*Here were set out facts showing the fraudulent and illegal business operations of the company, which are enumerated in the reported case.*) (*Concluding with a prayer to the effect that*) "said officers be required to show cause why they should not be removed from office, or the business of the association closed, and that if it should appear that said officers or any of them had been guilty of fraud, or any material irregularity or violation of law to the injury of the association, or of noncompliance with any of the provisions of the act under which the association was organized, the court should decree a removal from office of the guilty party or parties, and the substitution of a suitable person or persons to serve until the regular annual meeting, or until a successor or successors should be regularly chosen or elected; or, if it should appear to the court that the interests of its members or the general public so require, that it decree a dissolution of the association and a distribution of its effects."

and usurped franchises and privileges not granted to it, and especially in the following particulars, to wit: (*Here followed seven specifications, the substance of all of which, so far as the testimony renders them material, is embodied in the eighth specifications.*)[1]

Wherefore (*continuing and concluding as in Form No. 6433*).

cc. RELATING TO RAILROADS.

Form No. 6443.[2]

(Precedent in Ford *v.* Kansas City, etc., R. Co., 52 Mo. App. 444.)[3]

Smith M. Ford and (*names of other plaintiffs*), plaintiffs,
against
The Kansas City and Independence Short Line Railroad Company and (*names of other defendants*), defendants.

In the *Circuit* Court of *Jackson* County, *Missouri*. To the *October* Term, 189*1*.

Plaintiffs state:

First. That the *Kansas City and Independent Short Line Railroad Company* is a corporation organized and existing under and by virtue of the laws of the state of *Missouri*; that the capital stock of said corporation is $*100,000*, divided into *one thousand* shares of the par value of $*100* each.

Second. That at the time of the organization of said corporation, all of the capital stock was subscribed for by parties in the state of *Missouri* and elsewhere, and *five* per cent. of the capital stock of said corporation was paid into the treasury of said corporation by the stockholders, and that no other sum of money has ever been paid into the treasury by any stockholder thereof.

Third. That *S. M. Ford*, one of the plaintiffs herein, subscribed for and is the owner of *fifty* shares of the capital stock of said corporation, and that *D. S. Orrison*, the other plaintiff herein, subscribed for and is the owner of *three* shares of the capital stock of said corporation.

Fourth. That there are about *fifty* stockholders in said corpora-

1. **The eighth specification** referred to in the text reads as follows:

"For hire and reward, it has unlawfully issued to various persons, for their use and benefit respectively, instruments of writing, denominated certificates of membership, being of the tenor and effect of wagering policies of life insurance, and thereby agreed and undertaken to pay to each of such persons, or his representatives, upon the death of a third person named in such instrument (such third person being a stranger to such pretended contract, and even to the parties thereto, and often in failing health, and the insured having no insurable or other interest in the life of such third persons), a large sum of money, to wit, *five thousand* dollars, more or less, and that, too, without the means or power of fulfilling such pretended contracts upon its part; and in consideration of hire and reward in each case, it has entered into a large number of such pretended contracts with the same person, undertaking to insure him thereby in a vast aggregate sum, to wit, in one instance, over *one hundred and fifty thousand* dollars, against the deaths of a large number of strangers, to wit, in one instance, over *fifty*; and it is still engaged in such unlawful and swindling operations."

2. *Missouri.* — Rev. Stat. (1889), § 2664. See also list of statutes cited *supra*, note 2, p. 658.

3. **This petition contained a good cause of action,** and was upheld on the authority of Thompson *v.* Greeley, 107 Mo. 577.

tion holding from *one hundred* shares to *one* share each, and that some of the stockholders in said corporation are nonresidents of the state of *Missouri*, and that quite a number of the stockholders of said corporation are insolvent.

Fifth. That the money heretofore mentioned and paid into the treasury by the stockholders has been expended, and other debts and liabilities contracted by said corporation amounting to about the sum of $\$2,000$, which has been unpaid by said corporation; that said corporation has no property or assets, and is wholly insolvent; that *Victor Bell* recovered a judgment which is of record in the *circuit* court of *Jackson* county, for the sum of $\$166.08$, and costs; that *Kevil & Waples* recovered a judgment against said corporation for the sum of $\$76.95$, which is of record in said *circuit* court; that after the obtaining of said judgment, the said judgment creditors in said respective judgments again filed a motion under the statute asking judgment against plaintiff, *D. S. Orrison*, and judgment in said two actions was rendered against plaintiff, *D. S. Orrison*, for said amounts above stated, which judgment so rendered was by *D. S. Orrison* paid.

That *C. S. Crysler*, in the said *circuit* court of *Jackson* county, *Missouri*, recovered a judgment against said corporation, which, together with costs, amounted to the sum of $\$1,070$; that after the obtaining of the said judgment, said judgment creditor filed a motion in said action under the statute asking judgment against plaintiff, *S. M. Ford*, upon his unpaid stock, and a judgment upon said motion was rendered against plaintiff, *S. M. Ford*, for the said sum of $\$1,070$. Plaintiffs further represent and show that there are other judgments and claims remaining unpaid that have been rendered against and owing by said corporation.

Sixth. That they, by reason of said judgments so rendered against them, and such other stockholders as may be compelled to pay said other judgments and outstanding claims, are entitled to contribution from the remaining stockholders of said corporation that are solvent; that no stockholder has paid into the treasury or expended any money for said corporation other than *five* per cent. paid in as heretofore stated, and that all of the stockholders of said corporation are liable to plaintiffs for their proper and proportionate share towards paying said judgments.

Seventh. That said corporation was organized in *April*, 1887, since which time and for the last *eighteen* months, there has been no meeting of the board of directors and officers of said corporation, and that said officers and directors have failed to call in any proportion of the unpaid instalments due from the stockholders upon the capital stock due by the stockholders to the corporation, and have failed and neglected to make any provision for the payment of the judgments rendered against said corporation and the debts owing by said corporation.

Eighth. That a number of the stockholders of said corporation are nonresidents of this state, a number are insolvent, and the only way in which a fair and equitable settlement of the debts of said corporation can be made by the solvent stockholders thereof is by

the appointment of a receiver, with the power to collect from such solvent stockholders their proper and proportionate share necessary to pay the debts of said corporation and the proper costs of these proceedings.

[Wherefore, plaintiffs pray that] said corporation may be wound up and dissolved, and to that end that a receiver be appointed herein, with full power and authority to take possession of the books, papers and property of said corporation, and that such receiver, under the order of this court, be given authority to collect the unpaid instalments of the stockholders sufficient in amount to properly reimburse your orators and pay such other and remaining judgments and debts as are owing by said corporation, together with the costs of these proceedings.

Oliver Ellsworth, Attorney for Plaintiffs.

(2) For Usurpation of Franchises.

Form No. 6444.[1]

State of *Indiana*, County of *Posey*. } ss. In the *Posey Circuit* Court, *October* Term, 1898.

The State of Indiana ex relatione Daniel Webster, prosecuting attorney of the ——— judicial circuit,
against
Henry Bailey and (names of other defendants).

Daniel Webster, prosecuting attorney within and for the ——— judicial circuit of the state of *Indiana*, comes here into the *Circuit* Court of the county of *Posey*, state of *Indiana*, and now here gives said court to understand and be informed:

1. *Indiana.* — Horner's Stat. (1896), § 1131 *et seq.* See also list of statutes cited *supra*, note 2, p. 658.

Mining Corporation — *Michigan.* — In Taggart *v.* Perkins, 73 Mich. 303, a proceeding to try the right of a corporation to renew for a term of thirty years, the attorney-general's information, omitting the formal parts, alleged in substance, that the persons named "are stockholders in a corporation, called the '*Pewabic Mining Company*,' purporting to be a renewed corporation, and for the space of *one* month last past and upwards, at *Hancock*, in the county of *Houghton*, in this state, have used, and still do use, without warrant, grant or charter, the liberties, privileges and franchises of being a body corporate in law, fact and name, by the name of the '*Pewabic Mining Company*,' purporting to be a renewed corporation, and by that name to plead and be impleaded, to answer and be answered unto; and also the liberties, privileges and franchises of *mining, smelting and manufacturing copper, iron and silver minerals and ores*, and for acquiring, holding, selling and conveying all property, real and personal, necessary or convenient for carrying on the same; and during all the time aforesaid the said persons have usurped, and still do usurp, upon the said people." Concluding with prayer for process against such persons "to answer the people of the state of *Michigan* by what warrant they claim to have, use and enjoy the liberties, privileges and franchises aforesaid." Judgment of ouster was entered against the defendants under this information.

Railroad Corporation—*Ohio.*— In State *v.* Sherman, 22 Ohio St. 411, the proceeding was in the nature of a quo warranto by the attorney-general, and the information charged in substance that the defendants "are acting and assuming to act as a corporation within the state of *Ohio*, without being legally authorized so to do; that they are assuming to exercise, and are exercising within said state, certain fanchises and authority not warranted by law; and that for the space of *one* year last past

That the defendants *Henry Bailey* (*naming the other defendants*) pretended to organize a corporation under the name of the *Bailey Manufacturing Company*, on the *twenty-fifth* day of *February*, 1896, and are now assuming to act as a corporation under the organization then made, and are now and have been for more than *two* years last past usurping the franchise of being a corporation under the name aforesaid, and by that name of pleading and being impleaded, answering and being answered, contracting and being contracted with, and of acquiring, holding, selling and conveying, and otherwise using and disposing of property, both real and personal, within the state of *Indiana*; that said persons, pretending to act as a corporation, organized under the name aforesaid, on the *first* day of *May*, 1896, in the office of the secretary of state of *Indiana*, filed false and fraudulent articles of association, whereby the corporation was claimed to be organized.

Wherefore, relator prays the court that the said defendants be

they have used, and still do use, without any grant, warrant or charter, the liberties, privileges and franchises following, to wit: That of being a body corporate and politic in fact, law and name, by the name of the '*Pittsburg, Ft. Wayne and Chicago Railway Company*,' and by the same name to plead and be impleaded with, answer and be answered unto, and to have and use a corporate seal; also that of building, owning and opening a line of railroad within said state, and of condemning and appropriating private property for the same and the use thereof; also, that of being a common carrier of passengers and freight within and across said state, and of charging and receiving a reward therefor; also, that of contracting and being contracted with, and of exercising all the rights, powers and privileges conferred upon incorporated railroad companies by an act of the general assembly of the state of Ohio, passed March 19, 1869, entitled 'An Act to amend section 24 of an act to provide for the creation and regulation of incorporated companies in the state of Ohio,' passed May 1, 1852. All of which liberties, privileges, franchises, and authority, the defendants have usurped, and do still usurp, upon the state of *Ohio*, and have exercised, and are still assuming to exercise in said state, without being legally authorized so to do, and without any warrant, grant, or authority of law, to the great damage and prejudice of the state." A judgment ouster was entered against the defendants as to the franchise being a corporation of *Ohio*, and a judgment in their favor as to the other franchises and privileges which they were charged with usurping.

Water Company — *Pennsylvania*. — In Com. *v.* Lykens Water Co., 110 Pa. St. 391, the suggestion for a writ of quo warranto filed by the attorney-general against the Lykens Water Co. to show by what warrant it claimed to exercise the rights of a corporation, set forth in substance the following facts:

"1. That the respondent, ever since *July 20th*, 1883, claims, without lawful warrant, to be a corporation in the name of *The Lykens Water Company*, with power to supply pure water to the borough of *Lykens*, in the county of *Dauphin*, and to provide, erect and maintain all the necessary appliances therefor.

2. That said respondent was not lawfully created for the purposes aforesaid, because on the *6th* day of *May*, 1880, another corporation was formed in the name of *The Lykens Water Company*, with exclusive power to furnish water to said borough of *Lykens*, until *eight* per cent. dividends had been made and divided among its stockholders.

3. That the *Lykens Water Company*, incorporated *May 6th*, 1880, was in full life and being, and that another company (respondent) was incorporated in the name of *The Lykens Water Company*, *July 20th*, 1883, and that the older company had not realized *eight* per centum upon its capital stock." Concluding with prayer to court "to award a writ of quo warranto against *The Lykens Water Company*, respondent, to appear and show cause by what warrant they claim to have the franchises and powers claimed."

required to show by what right, if any, they claim to have, use and enjoy the liberties, privileges and franchises aforesaid, and that they be ousted from using the same.

Daniel Webster, Prosecuting Attorney
for the *Eleventh* Judicial Circuit.

Form No. 6445.[1]

County of *Ingham*, ss.

Daniel Webster, attorney-general of the state of *Michigan*, who sues for the people of the said state in this behalf, comes here into the *Circuit* Court for the county of *Ingham*, on the *twenty-ninth* day of *March*, 1898, and for the said people gives the said court here to understand and be informed, that the (*president, directors and company of the Lansing Company*), to wit, at the city of *Lansing*, in the county aforesaid, for the space of ——— years now last past and upwards, have used, and still do use, without any warrant, grant or charter, the following liberties, privileges and franchises, to wit, that of being a body politic and corporate in law, fact and name, by the name of (*the president, directors and company of the Lansing Company*), and by the same name to plead and be impleaded, to answer and be answered unto; and also the following liberties, privileges and franchises, to wit, that of issuing and putting into circulation as money, in and by the name aforesaid, bank bills payable in money, and of discounting bills of exchange and promissory notes in and by the name aforesaid; all of which said liberties, privileges and franchises the said president, directors and company of the *Lansing Company* aforesaid, during all the time aforesaid, have usurped and still do usurp upon the said people, to their great damage and prejudice; whereupon the said attorney-general prays the advice of the said court in the premises, and due process of law against the president, directors and company of the *Lansing Company* aforesaid, in this behalf to be made, to answer to the said people by what warrant they claim to have, use and enjoy the liberties, privileges and franchises aforesaid.

Daniel Webster, Attorney-General.

Supreme Court, ss.

On motion of *Daniel Webster*, attorney-general, leave is granted by the supreme court to file the within information. [And the defendants therein named, having appeared before the said court by their counsel, and been heard in opposition to the motion for leave to file the same, it is ordered that on filing the said information, a rule be entered requiring defendant to appear and plead thereto within *twenty* days after service of a copy thereof and notice of such rule.]

Calvin Clark, Clerk.

AGAINST GAS COMPANY.

Form No. 6446.

(Precedent in State *v.* Cincinnati, Gas-Light, etc., Co., 18 Ohio St. 264.)[2]

(*Title of court and cause as in Form No. 6438.*)

1. This form is given in Green's Pr. (1866), p. 493.

2. **This information was held good** although the replication of the state to several of the pleas of the defendant was decided to be bad on demurrer.

William H. West, attorney-general of the state of *Ohio*, who sues for the said state in this behalf, comes here before the judges of the *Supreme* Court of the said state on the day of *December*, in the year *eighteen hundred and sixty-seven*, at the *December* term thereof, and, for the said state of *Ohio*, gives the said court here to understand and be informed that the *Cincinnati Gas-Light and Coke Company*, for the space of *one* year now last past and upward, at *Cincinnati*, in the county of *Hamilton*, to wit, at *Columbus*, in the county of *Franklin* aforesaid, in the said state, have used, and still do use, without any warrant, grant or charter, the following liberties, privileges, and franchises, to wit, that of being a body corporate and politic in law, fact and name, by the name of *The Cincinnati Gas-Light and Coke Company*, and by the same name to plead and be impleaded unto, answer and be answered unto; and also the following liberties, privileges and franchises, to wit, that of having and exercising an exclusive right to open and use the streets, lanes, alleys, commons and public grounds of the city of *Cincinnati* for the introduction of pipes and other apparatus for gas, for the purpose of conveying gas to the said city and citizens thereof; and also the following liberties, privileges and franchises, to wit, that of conveying gas through pipes and other apparatus laid in the streets, lanes, alleys, commons and public grounds of the said city of *Cincinnati*, and supplying the same to said city and the citizens, and charging as and for the price thereof at the rate of *two* dollars and *fifty* cents for every *thousand* cubic feet thereof, to each consumer of the same; all which said liberties, privileges and franchises the said *Cincinnati Gas-Light and Coke Company*, during all the time aforesaid, have usurped, and still do usurp, upon the state of *Ohio*, to its great damage and prejudice.

Whereupon, the said attorney-general prays the advice and judgment of the said court in the premises, and due process of law against *The Cincinnati Gas-Light and Coke Company* aforesaid in this behalf, to be made to answer to the state of *Ohio* by what warrant they claim to have, use, and enjoy the liberties, privileges and franchises aforesaid.

W. H. West, Attorney-General.

AGAINST RAILROAD COMPANY CLAIMING CANAL LANDS.

Form No. 6447.

(Precedent in Ohio *v.* Pittsburg, etc., R. Co., 53 Ohio St. 190.)[1]

(*Title of court and cause as in Form No. 6433.*)

Now comes *John K. Richards*, attorney-general of the state of *Ohio*, by direction of the general assembly of the state of *Ohio*, and gives the court to understand and be informed:

1. That the defendant, the *Pittsburg, Cincinnati, Chicago and St. Louis Railway Company*, is a consolidated railroad company, being a corporation engaged in operating a railroad in the state of *Ohio* and

1. The court held in this case that quo warranto would lie, and rendered judgment for the relator.

in other states, formed on the *28th* day of *August*, 1890, by the consolidation under and in accordance with the laws of *Ohio*, of the *Pittsburg, Cincinnati and St. Louis Railway Company*, hereinafter referred to, a railroad corporation then and prior thereto owning and operating a railroad within the state of *Ohio* and other states, and the *Chicago, St. Louis and Pittsburg Railroad Company*, and the *Cincinnati and Richmond Railroad Company*, and the *Jeffersonville, Madison and Indianapolis Railroad Company*.

2. That, in the year 1869, the said *Pittsburg, Cincinnati and St. Louis Railway Company*, one of the constituent companies of the defendant corporation, leased perpetually the line of railroad of the *Little Miami Railroad Company*, a corporation formed under the laws of *Ohio*, and then owning and operating a line of railroad from *Cincinnati, Ohio*, to *Columbus, Ohio*, together with all the rights, privileges and contracts belonging to said *Little Miami Railroad Company*, and at that time entered into the enjoyment thereof under said lease, and so continued up to the time of its merger by consolidation into the defendant corporation, when the defendant entered upon the enjoyment thereof and still continues so to enjoy the same.

3. That, on and prior to the *24th* day of *March*, 1863, the state of *Ohio* was the owner in fee and in full use and possession of that part of the *Miami and Erie* canal extending from the east side of *Broadway* street, in the city of *Cincinnati*, to the *Ohio* river, including the width thereof, as then owned and held by the state, the same being a part of the canal system and public works of the state of *Ohio*.

4. That, on said *24th* day of *March*, 1863, the general assembly of the state of *Ohio* passed the following act: (50 O. L., 44.) (*Here was set out the act.*)[1]

5. That, in accordance with the provisions of section three of the act last mentioned, the council of the city of *Cincinnati*, by a vote of not less than *two-thirds* of the whole number of members thereof, decided to use said part of said canal as authorized in the act, and made known its decision to the governor of the state, and thereupon, on the *28th* day of *April*, 1863, *David Tod*, then governor of *Ohio*, on behalf of the state, executed and delivered to the city of *Cincinnati* the following grant of the part of the canal described in the act, for the uses and purposes and upon the terms and conditions specified in said act: (*Here was set out the grant.*)[2]

6. That the city of *Cincinnati* duly accepted said grant, on the *19th* day of *February*, 1864, for the purpose of entering upon, improving and occupying the part of the canal described in said act as a public highway and for sewerage purposes, passed the following ordinance: (*Here was set out the ordinance.*)[3]

1. **The title of the act referred to** in the text was as follows: "An Act to authorize the city of Cincinnati to enter upon and occupy a part of the Miami and Erie canal as a public highway and general sewerage purposes." The act is set out in full in the reported case.

2. **The grant referred to in the text** was a " deed from the state of Ohio to the city of Cincinnati to a part of the Miami and Erie canal." The deed is set out in full in the reported case. It was signed and executed by the governor and secretary of the state, with the great seal of the state affixed.

3. **The title of the ordinance referred to** in the text was as follows: "Ordinance No. 321, to open, widen and establish

7. That the city of *Cincinnati*, having, in accordance with the act of *March 24*, 1863, submitted to the Board of Public Works of the State of *Ohio* its plan for the improvement of the part of the canal described in said act, and the same having been duly approved by said board, proceeded to and did enter upon that part of the *Miami and Erie* canal extending from the east side of *Broadway* to the *Ohio* river, under the said grant from the state, and proceeded to and did improve and occupy the same, in pursuance of the ordinance quoted, as a public highway and for sewerage purposes, in the manner and to the extent hereinafter described and not otherwise: Land lying along and adjacent to the canal was condemned by the city of *Cincinnati* sufficient to open *Eggleston* avenue the full width of *ninety* feet from the *Ohio* river to *Broadway*. Along *Eggleston* avenue and within the limits of the canal, the city, between the years 1869 and 1873 or 1874, constructed a large sewer from *Broadway* to the *Ohio* river, and over this sewer a covered raceway to conduct the water leased by the state for power purposes prior to the grant aforesaid. About this time the city filled the gullies and ditches of the canal and partially graded *Eggleston* avenue from *Fifth* street to *Broadway*.

For the improvement of *Eggleston* avenue the city expended in all the following sums: (*Here were enumerated the expenditures.*)[1]

The city has never permanently graded and paved said street for use as a public highway as are other improved streets of the city. Excepting the construction of the sewer and raceway aforesaid, no work whatever in the way of improving *Eggleston* avenue, between *Pearl* street and the *Ohio* river, has ever been done by the city.

8. That, on *November 16*, 1867, the city of *Cincinnati*, by resolution of its common council, granted to the said *Little Miami Railroad Company*, a corporation under the laws of *Ohio*, then owning and operating a line of railroad from *Cincinnati*, *Ohio*, to *Columbus*, *Ohio*, the right to lay down and use a railroad track on *Eggleston* avenue, extending from *Pearl* street north to *Broadway*, the said *Little Miami Railroad Company* being the lessor of the *Pittsburgh*, *Cincinnati and St. Louis Railway Company*, one of the constituent companies of the defendant consolidated corporation. In the year 1876, the said *Pittsburgh*, *Cincinnati and St. Louis Railway Company*, then the lessee of the *Little Miami Railroad Company*, built said railroad track along the said portion of *Eggleston* avenue, and it and the defendant company have ever since continued to use the same for railroad purposes, and have constructed for many property owners on and near *Eggleston* avenue connecting tracks leading from said line on *Eggleston* avenue into the private property of said persons, for use in the conduct of their business, and large outlays have been made, both by said railroad companies and by said persons, upon the faith of said grant by said city. Since the construction and use of said railroad track along *Eggleston* avenue, a large number of factories and warehouses have been located and built on and near the avenue because of the existence of the track, and the railroad facilities thereby afforded.

Eggleston avenue the full width of ninety (90) feet from the Ohio river to Broadway." The ordinance is set out in full in the reported case.

1. **The expenditures referred** to in the text were itemized, and amounted in all to $753,609.

9. That, prior to the building of the tracks mentioned in the last paragraph, namely, on the *first* day of *December*, 1871, the city of *Cincinnati* passed the following ordinance, vacating *Eggleston* avenue and *Kilgour* street, between *Front* and *Pearl* streets (said *Kilgour* street not being involved in this controversy), and granting the same to the *Newport and Cincinnati Bridge Company*, and the *Little Miami Railroad Company* and its lessees, for railroad, bridge and depot purposes, subject, however, to the rights of the state of *Ohio*, and upon certain conditions and under certain restrictions, which are set out in the ordinance: (*Here was set out the ordinance.*)[1]

10. That, immediately thereafter, the *Newport and Cincinnati Bridge Company* and the *Little Miami Railroad Company* and its lessees, filed with the city clerk of *Cincinnati* a written acceptance of the said ordinance vacating *Eggleston* avenue and *Kilgour* street between *Front* and *Pearl* streets, and, thereupon, the said companies entered into possession of that part of *Eggleston* avenue lying between *Front* and *Pearl* streets in the city of *Cincinnati*, and have ever since occupied and used the same for railroad, bridge and depot purposes, the part of said ground occupied and used by the *Little Miami Railroad Company* and its lessees and the nature of the occupation and use being described in the next succeeding paragraph.

11. Included in the part of *Eggleston* avenue between *Front* and *Pearl* streets vacated as aforesaid by the city of *Cincinnati*, was the following described real estate, which was formerly a part of the *Miami and Erie* canal, the use of which was granted to the city of *Cincinnati* for a public highway and for sewerage purposes by the act of *March 24*, 1863, as already set forth: (*Here follows in detail a description of the property.*)

12. That that part of *Eggleston* avenue between *Front* street and the *Ohio* river, including a part of the *Miami and Erie* canal, extending from *Front* street to the *Ohio* river, the use of which was granted by the state of *Ohio* by the act of *March 24*, 1863, to the city of *Cincinnati* for a public highway and for sewerage purposes, some years ago was taken possession of, and since then and for a long time, has been and is now occupied wholly by the yard tracks, side tracks and switches of the *Pittsburgh, Cincinnati and St. Louis Railway Company* and the defendant corporation, and has for a long time been and now is used exclusively by said railroad companies for railroad purposes, the city of *Cincinnati* having abandoned the use of said street as a public highway, although the large sewer conducted down *Eggleston* avenue still passes under this abandoned portion to the *Ohio* river, and, by reason of such use and occupation, it has become and is impossible to use said premises as and for a public highway.

13. The plaintiff avers and charges, that, subject to the rights, privileges and easements therein, which were granted to the city of *Cincinnati* by the state, under the act of *March 24*, 1863, excepting, however, such of the rights, privileges and easements thus granted as, by reason of the facts herein above stated, have since then been

1. **The title of the ordinance referred to** in the text was as follows: "Ordinance No. 629, to vacate Eggleston avenue and Kilgour street, between Front and Pearl streets." The ordinance is set out in full in the reported case.

released, abandoned or forfeited by said city, the state of *Ohio* has been, since the said *24th* day of *March*, 1*863*, and now is, the owner in fee and entitled to the full use and possession of that part of the *Miami and Erie* canal extending from the east side of *Broadway* in the city of *Cincinnati* to the *Ohio* river, including the width thereof, as owned and held by the state on said date.

14. Plaintiff further avers and charges, that the city of *Cincinnati* had no power or authority to grant to the *Little Miami Railroad Company* or its lessees, the right to lay and use a railroad track or tracks in *Eggleston* avenue as aforesaid, on canal property, belonging to the state, which the state had permitted the city of *Cincinnati* to enter upon, improve and occupy only as a public highway and for sewerage purposes; and that the construction and use of said railroad tracks by the *Pittsburgh, Cincinnati and St. Louis Railroad Company* and the defendant corporation as aforesaid, was and is inconsistent with the use granted to the city of *Cincinnati*, and in violation of the rights of the state and in contravention of law.

15. Plaintiff further avers and charges, that the vacation of *Eggleston* avenue between *Front* and *Pearl* streets as aforesaid, was an abandonment by said city of the same, and of the canal property of the state embraced therein for use as a public highway, and that the construction by the *Little Miami Railroad Company* and its lessee and the defendant of a permanent passenger depot and a permanent freight depot as aforesaid, on land belonging to the state already described, was and is an authorized and wrongful occupation and use of the property of the state which was granted to the city of *Cincinnati* for use only as a public highway and for sewerage purposes; and that such occupation and use of said canal land by the defendant was and is inconsistent with the use granted the city of *Cincinnati*, and was and is repugnant to and subversive of the rights of the state and of the public in said land, and in contravention of law.

16. Plaintiff further avers and charges, that the occupation and use of *Eggleston* avenue and the canal property of the state within its limits between *Front* street and the *Ohio* river, by the yard tracks, side tracks and switches of the defendant corporation, was and is an abandonment of the same by the city of *Cincinnati* as a public highway, and was and is inconsistent with the use granted and permitted to the city of *Cincinnati*, and was and is without authority and in contravention of law, and repugnant to and subversive of the rights of the public and the state in said land.

17. The plaintiff further avers and charges, that the defendant railway company, in locating, constructing and operating its railway tracks and switches as aforesaid in and along *Eggleston* avenue and the part of the *Miami and Erie* canal embraced therein between *Broadway* and *Pearl* streets; and in construction, occupying and using its permanent passenger depot and permanent freight depot as aforesaid, on the part of the *Miami and Erie* canal before described, embraced within the limits of *Eggleston* avenue between *Pearl* and *Front* streets, as originally established; and in locating, constructing and operating its yard tracks, side tracks and switches as aforesaid,

on, across and over that part of the *Miami and Erie* canal embraced within the limits of *Eggleston* avenue between *Front* street and the *Ohio* river, as originally established, is now and has been for some time past, usurping and unlawfully exercising and using rights, privileges and franchises, in contravention of law.

Prayer — The plaintiff prays the advice of the court in the premises, and that the defendant railroad company be compelled to answer by what warrant it claims to have, use and enjoy the rights, privileges and franchises aforesaid; and that it be ousted from exercising the same, and be compelled to remove its tracks and switches from the part of the *Miami and Erie* canal embraced within the limits of *Eggleston* avenue between *Broadway* and *Pearl* streets; and be compelled to remove its passenger depot and freight depot and railroad tracks from the part of the *Miami and Erie* canal, before described, embraced within the limits of *Eggleston* avenue between *Pearl* and *Front* streets as originally established; and that it be compelled to remove its side tracks, yard tracks and switches from that part of the *Miami and Erie* canal embraced within the limits of *Eggleston* avenue between *Front* street and the *Ohio* river as originally established; and the plaintiff further prays that such other relief be granted in the premises as to the court may seem just and proper.

John K. Richards, Attorney-General.

Joseph B. Foraker,
David K. Watson,
Of Counsel.

(3) Cross-petition of Creditor of Insolvent Corporation.

Form No. 6448.

(Precedent in Peter *v.* Farrel Foundry, etc., Co., 53 Ohio St. 534.)[1]

[The State of *Ohio*, *Lucas* County, ss. } In the Court *of Common Pleas.*

William Peter, *Sarah E. Peter*, *Horace S. Walbridge*, *S. Cornell Walbridge*, *Michael J. Cooney and Charles R. Faben, Jr.*, plaintiffs,
against
The Union Manufacturing Company, defendant.
} Answer and Cross-petition of the *Farrel Foundry and Machine Company.*

Now comes the defendant and cross-petitioner, the *Farrel Foundry and Machine Company*, by its attorney, *Jeremiah Mason*, and for its

1. **Cross-petition** is the proper remedy by a creditor of a corporation which is insolvent and its assets in the hands of a receiver who seeks the enforcement of the statutory liability of stockholders, notwithstanding said creditor has not reduced his claim to judgment. Peter *v.* Farrel Foundry, etc., Co., 53 Ohio St. 534.

An answer in the nature of a cross-petition which discloses the assets of the concern in addition to those disclosed by the petition, or shows a title in the party filing the cross-petition to a share in the distribution of the assets, was held in this case to be good as against a demurrer for failure to disclose a cause of action "in favor of the defendant

answer and cross-petition for the petition of the plaintiff herein, says:][1]

1. For first cause of action it says that it is a corporation, organized under the laws of the state of *Connecticut*, for the manufacture and sale of chilled rolls and other machinery, located and having its principal place of business in the town of *Ansonia*, in said state. Defendant, the *Union Manufacturing Company*, is a corporation, organized under the laws of the state of *Ohio* for the manufacture and sale of iron and wooden ware; and was until the date of the commencement of this action engaged in carrying on the business for which it was incorporated, as set forth in plaintiff's petition.

During the months of *October*, *November* and *December*, 1889, this cross-petitioner, at the request of said defendant, shipped from *Ansonia* to *Toledo*, and delivered to defendant, *fifty-six* chilled rolls, grooved. In consideration of such sale and delivery, said defendant at said dates promised to pay this cross-petitioner *sixteen* dollars for each of said rolls, in the aggregate *eight hundred and ninety-six* dollars, forthwith thereafter. Said defendant has not paid any part of said moneys, although requested by this cross-petitioner so to do.

Defendant is entitled to a credit of *two and twenty-three one-hundredths* dollars for an overcharge of freight upon a shipment of *eight* of said rolls made on the *28th* of *October*, 1889, and by said defendant paid to the carrier on the *9th* day of *November*, 1889. It is entitled to no other credit nor offset.

The respective dates at which said rolls were sold, shipped and delivered were as follows: (*Here was set out an itemized statement.*)

Said rolls were purchased by said defendant, to be by it used for the manufacture of the articles in which it dealt, and were by it applied to such purpose.

Wherefore said defendant is indebted to this cross-petitioner in the sum of *eight hundred and ninety-three and seventy-seven one hundredths* dollars, with interest thereon from the *fourteenth* day of *December*, 1889.

This cross-petitioner has never owned any of the stock of said defendant.

When said goods were by this cross-petitioner sold and delivered as aforesaid, said defendant was by cross-petitioner believed to be in good credit and perfectly solvent. But in fact said defendant then was and long theretofore had been and still is insolvent. It then owed, and still owes, more money than all of its assets were or are of value sufficient to pay. Nearly the entire indebtedness [a]foresaid was by defendant then owed, and is still owed to its stockholders. The amount by it owed to this cross-petitioner and other persons not stockholders was and is, in the aggregate, small. Said amount

and against the plaintiff between whom the several judgments might be had in an action." Peter *v.* Farrel Foundry, etc. Co., 53 Ohio St. 534.

Defendant may join in his cross-petition a cause of action for money payable to the insolvent corporation by a stockholder thereof on account of stock issued to him with a cause of action against all the stockholders of the concern, upon their statutory liability as such stockholders. Peter *v.* Farrel Foundry, etc., Co., 53 Ohio St. 534.

1. The words within [ ] do not appear in the reported case, but have been added to complete the form.

was and is much less than the value of the tangible assets then owned by said defendant corporation, now in the possession of *Alvin Peter* as its receiver in this action.

On the *twenty-second* day of *January*, 1890, the board of directors of said defendant was composed of *seven* of its stockholders, to wit: (*naming the stockholders*). No change has since been made in the composition of said board.

Said defendant corporation was organized in 1872, with an authorized capital stock of *fifty thousand* dollars. Said authorized capital stock has been by the stockholders of defendant successively increased: *April 12*, 1873, to *one hundred thousand* dollars; *September 19*, 1881, to *three hundred thousand* dollars; and *July 30*, 1886, to *one million* dollars, all of said stock being divided into shares of *one hundred* [dollars] each. Of said stock at least *seven hundred and twenty-four thousand five hundred* dollars have been by said corporation issued to its stockholders. A very small portion thereof is fully paid up stock. On the contrary, nearly the entire amount of said stock has been by defendant issued to its shareholders in exchange for moneys by said respective stockholders paid to defendant therefor, ranging respectively from *twenty* to *seventy-five* cents for each dollar of the nominal amount of said respective shares so issued, and for moneys by said respective stockholders paid to said defendant corporation much less in amount than the amount of the respective shares issued to them in consideration therefor.

Plaintiffs own jointly no stock of said defendant corporation. Plaintiffs individually own stock of the aggregate amount in their petition stated. It is not true that they individually own any large amount of paid up stock. Nearly the entire amount of stock by said individual plaintiffs held was by defendant issued to them respectively paid to defendant therefor, much less in amount than the amount of the respective shares so issued.

Plaintiff, *Sarah E. Peter*, is a relative of plaintiff, *William Peter*, and holds a certain amount of the last aforesaid described stock by said defendant corporation, issued to said *William Peter*, which stock was by him thereafter transferred to her without consideration, and is by her held in trust for his benefit.

Said defendant corporation, in the respective months of *April* and *August*, 1883, executed two trust deeds in the nature of mortgages, to plaintiff, *Horace S. Walbridge*, as trustee, conveying to him the real estate upon which the factories of said defendant are located, to wit: (*Here was set out a description of the property, and the substantial effect of the trust deeds, which were to secure the payment of certain bonds.*)

Said bonds were for the most part issued to stockholders and directors of said defendant corporation for *seventy-five* cents by them paid to said defendant for each dollar by said bonds promised to be paid, and for sums much less than the respective amounts by said bonds purporting to be due. Interest has been paid by said defendant to the *first* day of *October*, 1889, upon the full amount to that date purporting to be due upon the principal indebtedness described in said bonds, and in excess of the interest legally payable upon the moneys paid by the parties to whom said bonds were respectively

issued, and by said defendant received therefor. Said bonds are still in great measure held and owned by the parties to whom they were originally issued. Said trust deeds were duly recorded, and the indebtedness evidenced by said bonds is the bonded debt of said defendant mentioned in plaintiff's petition.

The unsecured debt owned by said defendant as aforesaid is at least *one hundred and sixty thousand* dollars. Of this amount *James Secor*, of *Toledo*, aforesaid, holds *two thousand* dollars, with interest from *July 3*, 1889, at *eight* per cent. per annum, evidenced by the promissory note of said corporation for that amount payable to his order.

Said defendant corporation has been at no time indebted to plaintiffs in any amount jointly. It was at the date of the commencement of this action, and is still, indebted to plaintiffs, *William Peter* and *Horace S. Walbridge*, respectively, in amounts which aggregate at least *fifty thousand* dollars.

This cross-petitioner has no knowledge of the property, stockholders or liabilities of said defendant which will enable cross-petitioner to make its statements relative thereto more specific than is herein set forth. But plaintiffs, comprising the majority of the board of directors of said defendant, and owning more than *one-third* of the stock by said corporation issued, were at the date of the commencement of this action and have at all times since been able to inform this court of the specific property, real and personal, both legal and equitable, of said defendant, and of all the books, vouchers and securities relating thereto, as well as to give a full, just and true account of the capital stock of defendant, the names and residences of the stockholders, the number of shares belonging to each, the amount paid in upon such shares respectively, and the amount still due thereon, and plaintiffs were and have been able to give to this court a specific statement of the aforesaid incumbrance upon the property of said defendant, and of each of its existing liabilities, specifying the name and residence of each creditor, and nature [of] each debt, and the true consideration received by the defendant therefor. Plaintiffs were at the date of the commencement of this action and at all times since have been able to perform their obligations to apply to this court for a dissolution of said defendant corporation and to make all the parties and prosecute every measure required for the winding up of the affairs of said defendant, and the disposal and distribution of its assets by chapter five of division seven of the first title of the Revised Statutes of Ohio. Plaintiffs have failed to request such dissolution, and furnish the court said information, and make any creditor or stockholder of defendant party to this proceeding other than plaintiffs themselves, and have procured the order of this court that said defendant convey its entire property, including choses in action, to *Alvin Peter* as its receiver, and have in behalf of said corporation placed *Alvin Peter* as such receiver in possession and control of the entire assets of said corporation, and have in every respect instituted and prosecuted this action with intent thereby to delay and hinder and defraud this cross-petitioner and every other creditor of said defendant other than plaintiffs, in

the collection of their respective indebtedness due from said defendant by appropriate process of law, and with intent, in view of the insolvency of the defendant, to prefer plaintiffs as creditors of said defendant in the disposal and distribution of the assets of said defendant, and the proceeds thereof by them proposed to be made in this action.

Said *Alvin Peter*, receiver, is the son of plaintiff, *William Peter*, who is the largest individual creditor and stockholder of said defendant, and since the date of the commencement of this action, said *Alvin Peter* has been in the possession of the entire property of said defendant, and has claimed the right to control its entire choses in action, asserting such possession and claim as being rightfully made as receiver by virtue of the order of the court in this action. And since the date of the commencement of this action said defendant has transacted no business, and has had no property not in the possession and control of the said *Alvin Peter* as receiver, and has neither money, credit nor materials with which to transact any business in the future.

The facts relative to the expediency of selling the entire assets and property of said defendant, other than the unpaid amounts due from its stockholders upon their capital stock, but including in said sale the good-will of its business, as an establishment in active operation, are as in plaintiff's petition set forth. But said sale should be made forthwith. The value of the good-will aforesaid has deteriorated, and must continue to deteriorate, if the business formerly carried on by said defendant corporation shall long continue to be prosecuted by this court through the intervention of any receiver or trustee.

2. For second cause of action this cross-petitioner repeats the statements of its first cause of action, as though the same were here again set forth, and says further, that the entire indebtedness of said defendant corporation to this cross-petitioner and all its other creditors exceeds the value of its entire assets, including therein the amount of the unpaid moneys due from its stockholders upon their stock aforesaid from said stockholders collectible.

3. For third cause of action this cross-petitioner repeats the statements of its first and second causes of action, as though the same were here again set forth, and says further, that in order to fully pay the indebtedness due to this cross-petitioner and all other creditors of said defendant corporation, it will be necessary that each of its stockholders contribute a further amount in proportion to the amount of the stock by him or her owned or held, but not exceeding the amount of said stock.

Wherefore this cross-petitioner, in behalf of itself and all other creditors of said corporation, prays that the court ascertain the entire indebtedness of said defendant corporation, the respective parties to whom the same is due, the respective amounts thereof due to each party respectively, and the respective consideration received by said defendant corporation therefor; and that each said respective creditor, by appropriate service of process or publication of notice, be made party to this action and proceeding; that the court ascer-

tain the names and residences of the past and present stockholders of said defendant, the number of shares issued or belonging to each, the amount paid to said defendant corporation for each said share, respectively, and the amount still due thereon; and that each said stockholder, by appropriate service of process or publication of notice, be made party to this action and proceeding; that the court ascertain the total amount of the assets and choses in action of said defendant now in the possession and control of *Alvin Peter* as receiver; and order all the same other than said moneys unpaid by said stockholders upon their capital stock to be sold as an entirety, including the good-will of defendant's former business; or in such other manner as shall insure the best price for said assets and good-will; that the court order that each stockholder liable for said unpaid amounts due upon his capital stock pay the amount so due to such receiver or officer as the court shall direct; and in default thereof that execution shall issue therefor; that the court ascertain the further amount due from each stockholder of defendant necessary for the payment to this cross-petitioner and every other creditor of defendant of the full amount of the indebtedness from defendant due, including the costs and expenses of this action and proceeding, with the reasonable counsel fees of the attorneys of this cross-petitioner and of such other creditors of defendant as shall in good faith endeavor to procure an equitable distribution of its assets and the moneys due from its stockholders for the benefit of all of its creditors; but not exceeding the amount of the stock by each respective stockholder owned or held; that each said stockholder be ordered to pay the further amount due from him or her as aforesaid to such receiver or other officer as the court shall appoint; and in default thereof that execution issue therefor; that if, in consequence of nonresidence or insolvency the amount due from any particular stockholder cannot be collected, then that each solvent stockholder within the jurisdiction of the court be ordered to pay as aforesaid all unpaid moneys due upon his stock and such further moneys, not exceeding the amount of his stock, as shall be necessary to pay the costs, expenses and counsel fees aforesaid and all creditors of defendant, with right thereafter to enforce contribution from any other stockholder in case as between said stockholders the party making such payment has paid more than his appropriate share; that all the moneys realized and collected as aforesaid be distributed first to the payment of the costs, expenses and counsel fees aforesaid; and next to the payment of the entire indebtedness of said defendant corporation; giving the preference, if necessary, to such creditors of defendant as shall in good faith co-operate with this cross-petitioner in its efforts to secure an equitable distribution of the moneys due from said defendant and its stockholders among all the creditors of defendant; and shall with this cross-petitioner become responsible for the costs, expenses and counsel fees aforesaid.

This cross-petition, in behalf of itself and all other creditors of said defendant, prays that this court grant to it and them all such other and further relief as it and they may legally and equitably claim.

But should this court refuse to permit this cross-petitioner to intervene in behalf of any other creditor of said defendant than itself, and should refuse to this cross-petitioner the relief herein before prayed, then in such event this cross-petitioner prays that the court render judgment in its favor, that it recover from the defendant, the *Union Manufacturing Company, eight hundred and ninety-three and seventy-seven one hundredths* dollars, with interest thereon from the *fourteenth* day of *December*, 1889; that execution issue therefor; that the order directing said defendant to convey its property to *Alvin Peter*, receiver, be rescinded and held for naught, and that this cross-petitioner have leave to cause said execution to be levied upon all property of said defendant now in the possession of *Alvin Peter* as such receiver.

[The *Farrel Foundry and Machine Company*,
By *Thomas Heller*, President.][1]

e. Answer or Plea.[2]

(1) Denying Abuse or Misuse of Franchise.

Form No. 6449.

(Precedent in State *v.* Greenville, Bldg., etc., Assoc., 29 Ohio St. 92.)

[(*Title of court and cause as in Form No. 6448.*) And now comes the defendant, *The Greenville Building and Savings Association*, by *Jeremiah Mason*, its attorney, and for answer to the petition of the *State of Ohio* on the relation of *John Little*, attorney-general, and says:][1]

1. That it is not true that it has unlawfully exceeded the powers and franchises conferred on it by law, nor is it true that it has assumed or claims any right or privileges not so conferred.

2. That it is not true that it permits any of its members to hold more than *twenty* (*20*) shares of its stock, nor that it claims any right so to do.

3. That it is not true that it has exercised, or that it claims to exercise, banking privileges, and it says that the loans made by it, and the bonds, etc., purchased, have been merely temporary investments of surplus money, and that it has long since ceased to make any such loans, purchases or discounts, or any such investments.

4. That it is not true that said defendant corporation has in the past, or does now, refuse or decline to loan its funds to its members; but, on the contrary, says that it is now and always has been ready to loan to its members, in accordance with the laws of the land and the rules and regulations adopted for its government by the members of said association.

1. The words in [ ] do not appear in the reported case, but have been added to complete the form.

2. **For formal parts** of answers and pleas, generally, consult the titles Answers in Code Pleading, vol. 1, p. 799; Answers in Equity, vol. 1, p. 854; Pleas.

Wherefore, defendant prays judgment; that said information be dismissed, and that it go hence, etc.

[*Jeremiah Mason*, Attorney for the Defendant.][1]

[(*Verification.*)][1]

1. The words in [ ] do not appear in the reported case, but have been added to complete the form. Consult the title VERIFICATIONS.

Another Precedent — *Pennsylvania.* — In Hestonville, etc., R. Co. *v.* Philadelphia, 89 Pa. St. 210, the answer of the railroad company to a bill seeking a forfeiture of its franchises, omitting the formal parts, was as follows:

"1. That they were created by an act of April 6th, 1859, P. L. 389, with the route therein described, with the power to lay out and construct a railway. By a supplement to said act, passed March 8th, 1860, P. L. 123, they were expressly authorized to lay out and construct their railway tracks, from the bridge at *Fairmount* to *Callowhill* street, and along *Callowhill street* to *Delaware* avenue, and to occupy such other street or streets as may be necessary to reach *Twenty-first* or *Twentieth* and *Callowhill* streets from said bridge.

2. That under these acts there was constructed a track from the bridge at *Fairmount* westwardly to *Hestonville*.

3. That by an act passed April 13th, 1858, P. L. 257, there was created the *Fairmount Passenger Railway Company*, with power to construct a passenger railway from the south side of *Fairmount* to *Callowhill* street; thence east on *Callowhill* to *Twenty-third*; thence south to *Vine*; thence east to *Second*; thence south to *Walnut* or *Dock*; thence west to *Third*; thence north to *Race*; thence west to *Twenty-second*; thence north to *Callowhill* street, with a double track on *Callowhill* street to *Fairmount*. Section 7 provided: 'That before the said company should use and occupy the said street the consent of the councils of the city of Philadelphia shall be first obtained.' That this consent was given.

4. That by the Act of April 16th, 1858, P. L. 320, there was created the *Fairmount and Arch Street City Passenger Railway Company*, with power to construct a passenger railway "commencing at Tenth and Arch and continuing westwardly along the same, with a double track to Twentieth and Twenty-first streets, respectively, with single track to Callowhill street, and thence westwardly with double track to bridge." Section 7 provided: "That before the said company shall use and occupy the said streets, the consent of the councils shall be first obtained." On *May 5th*, 1858 (Ordinances of 1858, 177), the councils disapproved of the act and refused consent. By a supplement to the aforesaid act, passed March 24th, 1859, P. L. 234, it was enacted that said company should have full authority to construct and lay a passenger railway on the route hereinbefore stated. Section 3 provided, that "after the special consent of the councils, said company may, in lieu of two tracks on that part of Callowhill street which is between Hamilton and Twenty-second, construct one of their tracks on Twenty-second from Callowhill to Hamilton, and thence west on Hamilton street to Callowhill street."

That consent was given by an ordinance passed April 23d, 1859 (Ordinances of 1859, 198). In accordance with the authority of said acts, railway tracks were laid on *Twenty-second* street from *Callowhill* to *Hamilton* and thence west on *Hamilton* street to *Callowhill* street.

5. *Callowhill* street, from the bridge at *Fairmount*, is between curbs twenty-nine feet in width, and the existence of more than a double track at that point would sacrifice the other uses of the highway. If, therefore, the defendants exercised their rights as a separate corporation to lay a double track on *Callowhill* street between these points, and the *Fairmount Passenger Railway Company* sought to exercise theirs, and the *Fairmount and Arch Street City Passenger Railway Company* sought to exercise theirs, the whole width of the street would be occupied without space between each set of tracks.

6. Such an exercise of separate corporate discretion and right would be impossible of execution, as cars could not pass each other, and therefore the several companies did by agreements arrange such running of their cars over the tracks actually laid by the *Fairmount Passenger Railway Company* and by the *Fairmount and Arch Street City Passenger Railway Company*, as secured to each their separate circuits,

(2) Denying Usurpation of Franchise.

Form No. 6450.

(Precedent in State *v.* Western Irrigating Canal Co., 40 Kan. 96.)[1]

the integrity of their several franchises and the accommodation of the passengers seeking the cars of either. The former company have laid a track from the bridge, along *Callowhill* street to *Twenty-third* street; and the latter company have laid a track from the bridge along *Callowhill* street to *Hamilton*, and thence eastwardly along *Hamilton* to *Twenty-second* street. These are the tracks now in existence and now used.

7. That by reason of an entire alteration of grades, caused by the construction of the double-decker bridge at *Fairmount* and of the necessities of public travel, they have become convinced that the franchise of a double track on *Callowhill* street must be maintained. Accordingly they have made arrangements to remove the tracks laid by the *Fairmount Passenger Railway* to the side of said *Callowhill* street and to lay another track beside it on their own behalf. The effect of this would be that the double tracks now existing on *Callowhill* street, from the bridge to *Hamilton* street would be continued eastward on the same alignment.

Respondents admit the truth of the first *five* paragraphs of the bill. Respondents deny that they entered into an obligation as averred in the *sixth* paragraph of said bill; but are advised that it is immaterial, inasmuch as the tenor of such an obligation would only be that respondents should comply with such ordinances as it was within the power of the city of *Philadelphia* to pass. Respondents admit the truth of the *seventh* paragraph of said bill, and that the averments in the *eighth* paragraph are true; but respondents are advised that said ordinance, so far as the same is now valid, applies exclusively to the original construction, and that in the case of entire compliance therewith, the purpose thereof is fully met; and respondents do say that their charter does not confer any power on the plaintiffs to regulate or control them on *Callowhill* street, east of the bridge at *Fairmount*. And respondents are advised that the assent of the General Assembly is sufficient and ample, and that no provision of their charter subjects them to a further assent by the councils of the city of *Philadelphia* to the use of *Callowhill* street. Respondents admit the truth of paragraph *nine*, but are advised that said ordinance is not passed pursuant to the conditions of the Act of April 11, 1868, as above cited; and that as its purpose was to secure the assent of the councils of the city to remove the cobblestones of the highways, it cannot apply to a body corporate, whose occupation and use of streets for the purposes of their chartered route had already been assented to. Respondents admit the truth of paragraph *ten*, and of paragraph *eleven*; but are advised that the same is immaterial as to the subject matters of this bill of complaint, inasmuch as these respondents, without such merger and consolidation, have the grant as aforesaid to lay the track on *Callowhill* street now proposed.

And respondents say, that if paragraph *twelve* in said bill means to aver the fact differently from that stated in the general paragraphs of this answer, then they deny the same to be so. That they have never surrendered any portion of their franchise to the *Commonwealth*; that as the chartered powers of defendants do not limit the construction of their road to any term, that completion thereof, or the change of the mode of running, is for their discretion, as the owners of the franchise, and even though this were not so, plaintiffs have no standing in this court to assert a loss of franchise by nonuser, this being wholly for the *Commonwealth*, at her own relation."

1. Judgment was rendered in this case in favor of the defendant for all costs, the court holding that an irrigation company, incorporated under the laws of *Kansas* to construct and operate a canal for irrigation, etc., can, with the consent of the stockholders, sell its property to another irrigation company, if it be done in good faith.

[In the *Supreme* Court of the State of *Kansas*.

The State of Kansas, on the relation of S. B. Bradford, Attorney-General, Plaintiff,
v.
The Western Irrigating Canal Co., Defendant.

Answer.

Now comes the defendant herein, and, answering the petition of plaintiff, says:][1]

That the *Supreme* Court of the State of *Kansas* ought not to take jurisdiction in this case, for the reason that no public question is involved therein; that this suit was instituted at the request and suggestion of the attorneys of one *A. T. Soule*, who is the principal owner of the *Eureka Union* and so called *Low-line* irrigating canals; that the canals of this defendant and of the said *A. T. Soule* come into competition with each other, and the said *A. T. Soule* is attempting to monopolize the entire irrigating business of *Ford* county, and as a part of his said design to monopolize the irrigating business as aforesaid, he is endeavoring by all means in his power to obstruct, hinder and delay this defendant in the construction of its canal; that in order to protect its rights, the defendant, prior to the institution of this suit, brought a suit in the *district* court of *Ford* county, against the *Low-line Canal Company*, one of the companies above named, which is now pending and undetermined; that it was upon the representation and statements of the said *Soule* and his attorneys that the attorney-general was induced to bring this suit, and the institution thereof is one of the means used by the said *A. T. Soule* to hinder, delay, annoy and oppress this defendant; and that the matters involved in this suit are solely matters of private interest between this defendant and the said *A. T. Soule*, and not of a public nature. Defendant therefore asks the *supreme* court to dismiss said suit.

Further answering, the defendant denies that it has assumed or pretended as of right to possess or use, pursuant to a purchase, the franchise of the *Enterprise Irrigating Company*; denies that it is now unlawfully exercising or in any manner using the powers, privileges or franchises of the said *Enterprise Irrigating Company*; denies that it has attempted, by purchase or otherwise, to succeed to the franchises authorized by law to be exercised by the said *Enterprise Irrigating Company*; denies that it is usurping, intruding into, or is unlawfully holding or exercising any franchise whatever.

And further answering, defendant says: It has no knowledge or information of the existence of a corporation named the *Enterprise Irrigating Company*, or that any such company ever existed in the state of *Kansas*, or at any other place.

[Wherefore, defendant prays judgment that the petition herein be dismissed, and for its costs.

Jeremiah Mason, Attorney for Defendant.

(*Verification.*)[2]][1]

1. The words in [ ] do not appear in the reported case, but have been added to complete the form.

2. Consult the title VERIFICATIONS.

Investment Company — The Return of Officers to Quo Warranto. — *Missouri.*—

In State *v.* Talbot, 123 Mo. 69, in which proceedings the state assailed a corporation by a quo warranto for illegal acts, the defendants, among other things, alleged in their return as follows: "Farther making return, the said defendants show that subsequently to the issuance of said certificate of incorporation to the *Guarantee Investment Company*, as aforesaid, and while the said corporation was carrying on in this state the business of selling, disposing of, and paying bonds issued on the instalment plan, the said corporation, together with all others of like incorporation under the laws of this state, was confirmed, ratified and recognized by the state of *Missouri* in its existence, franchise, capacity and powers as a corporation by reason and by means of an act of the general assembly entitled 'An Act to regulate bond investment companies and companies organized to place or sell bonds, certificates or debentures on the instalment or partial payment plan,' and approved April 21, 1893; that said statute became operative as a law on the *twenty-first* day of *June*, 1893, and that within *thirty* days thereafter, to wit, on the *nineteenth* day of *July*, 1893, the said *Guarantee Investment Company* complied with the terms and requirements of the said statute by depositing with the treasurer of the state of *Missouri* securities in the sum of *one hundred thousand* dollars, which were approved and accepted by the said treasurer as good and sufficient, and that the deposit still remains with said treasurer intact and unimpaired." To this return relator interposed a general demurrer, which demurrer was overruled, the court having found from the pleadings that the corporation was legally organized, and that there had been no charge of misuser of its franchises.

Mutual Protection Association — *Ohio.* — The plea of the defendant, in State *v.* Mutual Protection Assoc., 26 Ohio St. 21, to an information in the nature of a quo warranto, seeking the dissolution of a corporation for unlawfully assuming and usurping certain franchises and privileges, was substantially to the effect that it "admits that it is a corporation duly formed under the act of April 20, 1872, as set out in the information, and avers that it is exercising and assuming to exercise the faculties, liberties and franchises conferred by said act and none other.

It admits that it has established an office at *Norwalk, Ohio*; employed a president and secretary to conduct the business thereof; a medical board to pass finally upon the applications of persons desiring to become members of said association; medical examiners to examine applicants for membership in said association, and general and special agents to lay before the public and individuals the advantages of membership in said association, and to receive applications therefor, and such other officers and agents as are needed therefor; and avers that it has full authority for so doing under the statute under which it was incorporated. It disclaims being, or assuming to be, a life insurance company, or to carry on the business of life insurance, as charged in the information.

On the contrary, it avers that it is engaged exclusively in the business and carrying out the purpose contemplated and authorized by the statute under which it is formed. That it issues certificates of membership to the several persons becoming members of the association, stating therein the kind of benefit and protection the member is entitled to receive by virtue of his membership, and the obligation and promise of all other members to contribute ratably thereto. That this defendant simply acts as the agent of the members of the association to receive their contributions and appropriate and apply them to the objects of the association. That said contributions are not receivable or collectible until the conditions arise entitling a member or his legal representatives to have and receive the same; and that this defendant is paid therefor a small sum to defray the expenses of collecting and disbursing the said contributions for protection, relief and otherwise."

Judgment was rendered for the defendant on the theory that associations of persons incorporated under the act of April 20, 1872 (69 Ohio L. 82), "for the purpose of mutual protection and relief of its members, and for the payment of stipulated sums of money to the families or heirs of deceased members," are not subject to the laws of the state relating to life insurance companies.

Railroad Company — *New York.* — In People *v.* Ulster, etc., R. Co., 58 Hun (N. Y.) 266, to a complaint in an action to annul the charter of defendant, a corporation reorganized pursuant to New York Laws of 1874, chapter 430, on the ground that defendant had

failed to construct and operate any portion of its road, between Stamford and Oneonta, as required by law, defendants interposed the following defenses:

"1. A general denial to the effect that defendant "ever became bound or liable, or had lawful right or authority, or legal or pecuniary ability, to construct any part of said projected railroad between *Stamford* and *Oneonta*.

2. That the located line of said railroad beyond *Stamford*, through the town of *Harpersfield*, runs on the side of a mountain through a sterile, barren country, almost uninhabited, and there are not more than one or two houses on the line, and no roads leading thereto, etc., and that another railroad has been projected from *Stamford* to *Bloomville*, and thence to a point at or near *Oneonta* by a different route, and two other corporations are to build and operate the same, and which, when completed, can be operated in connection with that of defendant.

3. That the defendant has made annual reports of its property and earnings under the laws of the state upon the railroad as operated from *Rondout* to *Stamford*, and has been assessed thereon as well as upon its franchises and business, and has paid the taxes thus assessed, etc.

4. The action is barred by the statute of limitation.

5. That after this action was commenced, the legislature passed an act amending the Reorganization act of 1874, by adding a new section relieving a corporation thus organized from finishing a railroad not then completed, provided the board of railroad commissioners shall certify that the public interests do not require it, and that such certificate has since been made in relation to the completion of that portion of the road beyond *Stamford*." In this case the judgment of the lower court dismissing the complaint, with costs, was affirmed.

In Pennsylvania, to a suggestion in Com. *v.* Pittsburg, etc., R. Co., 58 Pa. St. 27, pleaded to the information substantially as follows:

"1. That they claim to be a body politic, etc., by virtue of letters patent issued *June 11th*, 1846, by the governor of *Pennsylvania*, in pursuance of an Act of Assembly of April 3d, 1837, and the several supplements thereto, viz.: The first approved the 18th day of April, 1843, embraced in an act entitled, etc.; which said last act was in part repealed by a resolution approved the 19th day of April, 1843, embraced in a resolution entitled, etc.; and which last mentioned resolution was repealed by the *6th* section of an act approved the 3d day of April, 1846, entitled, etc.; and further, by an additional supplement embraced in an act approved the 10th day of April, 1846, entitled, etc.; and further by an additional supplement approved the 17th day of April, 1846, embraced in an act entitled, etc.; and by this warrant the said defendants have used, and still use, the liberties, etc., of a body corporate and politic, under the name and style of *The Pittsburg and Connellsville Railroad Company*, as they well might and still may, etc.

2. That as to the said liberties, etc., to extend the said *Pittsburg and Connellsville* railroad beyond *Connellsville* to *Smithfield*, or any other point on the waters of the *Youghioghen*y, and within the limits of this *Commonwealth*, they have and claim to have and use the same under and by virtue of the power and discretion conferred upon them in and by the *7th* section of an Act of Assembly, approved April 18th, 1843, entitled, etc.

3. That as to the said franchises, etc., to extend the said *Pittsburg and Connellsville* railroad to any point they may select in *Somerset* or *Bedford* counties, so as to form a connection with the *Chambersburg and Allegheny* railroad, or any other railroad that may be constructed, they have. and claim to have and use the same under and by virtue of the powers conferred on them in and by the *6th* section of an Act of Assembly, approved the 18th day of April, 1853, entitled, etc." Under this plea the court held that the evidence as shown by the record of the state was sufficient to prevent the issuance of a quo warranto.

Street Railroad Company — *California*. — In People *v.* Stanford, 77 Cal. 360, a complaint brought by the people of the state on the relation of the attorney-general against certain persons for the purpose of having it determined that the company had no legal existence as a corporation to answer for each and all of the defendants generally and severally and specifically, denied that "the defendants, or any of them, claiming to be the said *Protrero and Bayview Railroad Company*, have for a long time, or do now, or at any time

(3) Setting Up Valid Consolidation Agreement.

Form No. 6451.[1]

(Precedent in Com. *v.* Atlantic, etc., R. Co., 53 Pa. St. 10.)[2]

[*The Commonwealth of Pennsylvania ex rel. the Attorney-General* against *The Atlantic and Great Western Railway Company.*

In the *Supreme* Court of the *Commonwealth* of *Pennsylvania*, *Middle* District.
December Term, 1866.
No. *102.*
Information for Quo Warranto.

And now, to wit, on the *nineteenth* day of *January*, 1866, comes the above named defendant, *The Atlantic and Great Western Railway*

have unlawfully claimed, or unlawfully exercised the franchises, powers or privileges in said city and county in this behalf in said complaint alleged, or any franchise, power or privilege." It was held on appeal in this case, that a demurrer to this answer was improperly sustained in the lower court, for the reason that a denial on the part of the individual defendants, that they are exercising the alleged corporate franchise, was a complete defense.

Religious Corporation — *Massachusetts.* — For an answer by a minority of members to a petition for dissolution, as well as an answer of trustees of a fund devoted to assisting a religious corporation, interposed to a petition for a dissolution of such corporation, see the answers substantially set out in Matter of New South Meeting-House, 13 Allen (Mass.) 497. *Compare* Warner *v.* Bowdoin Square Baptist Soc., 148 Mass. 400.

1. Replication to this plea on the part of the attorney-general was to the effect that "there is no record of the said supposed contract agreement and act of consolidation and merger in the first plea mentioned, remaining among the records of the commonwealth, in the office of the secretary of the commonwealth, at *Harrisburg*,' etc. To which replication a demurrer was properly overruled, with leave to the defendants to rejoin that such a record deed existed with a *prout patet recordum*. Com. *v.* Atlantic., etc., R. Co., 53 Pa. St. 10.

2. Another Precedent — *Illinois.* — In Ohio, etc., R. Co. *v.* People, 123 Ill. 467, the answer of the railroad company to the information in the nature of a quo warranto, substantially alleged as follows:

It denies that it was guilty of the several wrongs charged against it; it admits "that it was incorporated under the laws of *Illinois*, and that such incorporation was made by virtue and in pursuance of an act of the legislature of *Illinois*, entitled 'An Act to incorporate the Ohio and Mississippi Railway Company, and for other purposes,' approved February 5, 1861; that in the *first* section thereof *thirteen* persons were named incorporators of the company, and that a majority of the persons so named were nonresidents of the state of *Illinois*, and were citizens and residents of other states; that by virtue of the same section of that act respondent was invested with all the corporate franchises and rights which had theretofore been granted to and vested in the corporation known as the *Ohio and Mississippi Railroad Company*, incorporated by an act of the General Assembly of the State of Illinois, entitled 'An act to incorporate the *Ohio and Mississippi Railroad Company*, and for other purposes,' approved February 12, 1851; that it refers to both these acts and makes them parts of its answer, and insists that by virtue of these special acts, in pursuance of which it was incorporated, it became vested with the right to elect a majority of its directors, or all of them, from stockholders residing outside of the State of *Illinois*, and not citizens of *Illinois*; that in 1867, and before the adoption of the present constitution of this state, by virtue of the laws of the State of *Illinois*, and of similar laws in the States of *Indiana* and *Ohio*, respondent became consolidated with the *Ohio and Mississippi Railway Company*, and owning and operating a railroad leading from the *Mississippi* river at *East St. Louis*, *Illinois*, to *Cincinnati*, *Ohio*, all under one management and one board of directors, by which consolidation the property,

Company, by *Harvey W. Miller*, their attorney, and protesting that the information and suggestion filed in this case is altogether insufficient in law; and that the said *The Atlantic and Great Western Railway Company* need not, by the law of the land, make answer thereto; nevertheless, for a plea in this behalf the said *The Atlantic and Great Western Railway Company* say that the said *commonwealth* of *Pennsylvania* ought not to implead them, the said *The Atlantic and Great Western Railway Company*, by reason of the several matters and things in the said suggestion set forth, because they, the said *The Atlantic and Great Western Railway Company*, say:][1]

1. That the *Atlantic and Great Western Railway Company* claim to be a body politic and corporate by virtue of a contract, agreement[2] and act of consolidation and merger made *August 19th*, 1865, between the *Atlantic and Great Western Railway Company* in *New York*; the *Buffalo* extension of the *Atlantic and Great Western Railway Company* — corporations created and operated under the laws of *New York*; the *Atlantic and Great Western Railroad Company of Pennsylvania*, a corporation created under the laws of *Pennsylvania*; and the *Atlantic and Great Western Railroad Company*, a corporation created and operated under the laws of *Ohio*: *New York*, *Pennsylvania* and *Ohio* being ad-

stock and franchises of the old constituent corporations named became completely merged in respondent, its line of railroad being connected and continuous, and which consolidation was, in all respects, in conformity with the laws of the States of *Illinois*, *Indiana* and *Ohio*; that its principal business as a carrier is between *St. Louis*, *Missouri*, and *Cincinnati*, *Ohio*; that its capital stock is held and owned, excepting a few shares, by persons outside of *Illinois*, being largely held in foreign countries and in *New York*; that now, and for some time last past, but one of its stockholders is or has been a citizen and resident of the city of *Springfield*, *Illinois*, and that all its other directors are citizens and residents of other states (*Here follow their names and respective places of residence*); that the officers of the respondent have always been of the opinion, and have been so advised, that under its charter and consolidation, by authority of the laws of this State, with said railroad corporations in the States of *Indiana* and *Ohio*, the law of the State of *Illinois* requiring a majority of the directors to be citizens and residents of the said State of *Illinois* did not apply to respondent; that it has been supported in this opinion and belief by the fact that a majority of its directors have never resided in or been citizens of this State, which fact has been well known to the citizens and officers of this State, and to the relator in this proceeding, and still, until the filing of this proceeding, no objection has ever been made by either citizen, officer or relator, and no inquiry has been sustained thereby by any one; that respondent has always acted in this matter in good faith, and with a desire to comply with the laws of the State, as they were understood by its officers, and as they seemed to be understood by the officers of the State." A demurrer to this answer of this information was sustained in the lower court, which ruling upon appeal by respondent was reversed, the appellate court being of the opinion that the corporation did not fall within the constitutional provision mentioned.

1. The words in [ ] are not found in the reported case, but have been added to make the form complete.

2. **The agreement of consolidation** referred to in the plea commenced with this preamble: "Whereas, the line of railroad made and in process of construction by the aforesaid corporation and companies respectively so unite as to form a continuous line for the passage of cars from the city of *Buffalo* and *Salamanca* in said state of *New York* to the city of *Dayton* in the said state of *Ohio*, crossing the boundary lines of said several adjoining states of *New York*, *Pennsylvania* and *Ohio* at one and the same point;" the other material parts of the agreement being as set out in the plea above.

joining states, the laws whereof respectively authorize such consolidation, and the railroads of said companies forming a continuous line of railroad with each other and crossing the boundary line of *New York*, *Pennsylvania* and *Ohio* at the same point; the contract having been first duly submitted to and adopted by a vote of more than *two-thirds* of all the stockholders of each of said corporations; and that fact certified by the secretary of each of the same companies under the seals thereof, was on the *3d* day of *October*, A. D. 1865, filed with the secretary of state of *New York* and *Ohio* respectively, and with the secretary of the *Commonwealth* of *Pennsylvania*, as provided by law; which said contract, etc., with said certificates, the defendants now here in court produce.[1]

2. That the railroad of the *Atlantic and Great Western Railway Company* being connected with the railroad of the *Catawissa Railroad Company* by the intervening railroad of the *Philadelphia and Erie Railroad Company*, they claim to lease, etc., the said *Catawissa* railroad, and to have, etc., the corporate powers, etc., granted to the *Catawissa Railroad Company* under and by virtue of a contract and agreement made and entered into between the *Atlantic and Great Western Railway Company*, the *Western Central Railroad Company* and the *Catawissa Railroad Company*, dated the *1st* day of *November*, A. D. 1895, which contract the said defendants now here in court produce, etc.

[Wherefore, the said defendant, the said *The Atlantic and Great Western Railway Company*, pray judgment, and that the franchises, liberties and privileges enjoyed by them, the said *The Atlantic and Great Western Railway Company*, claimed as aforesaid, may be adjudged and allowed to them, and that they may be dismissed hence and discharged by the court from the premises so as aforesaid alleged against them.

Henry W. Miller, Attorney for
The Atlantic and Great Western Railway Company.][2]

f. Demurrer.[3]

(1) To Bill in Equity.

(*a*) *Charging Unlawful Preferences.*

DEMURRER TO BILL — CHARGING UNLAWFUL PREFERENCES.

Form No. 6452.[4]

1. **The instrument called a certificate of consolidation** of the Atlantic and Great Western Railway Company was held to be a lawful and valid instrument for the purposes therein expressed, and upon being filed in the office of the secretary of the commonwealth, constituted the defendants a legal corporation in the state of Pennsylvania.

2. The words in [ ] are not found in the reported case, but have been added to make the form complete.

3. **For the formal parts** of demurrers, generally, see the title Demurrers.

4. This demurrer is based on the facts in Pyles *v.* Riverside Furniture Co., 30 W. Va. 132. The bill in equity to which this demurrer was sustained is set out in full in the reported case.

The order sustaining the demurrer set out in the text was as follows, omitting the formal parts: "The demurrer heretofore interposed to complainant's bill, having been duly considered, it is

State of *West Virginia*, } ss.
County of *Ohio*. }

In the *Circuit Court*.

Jacob B. Pyles, plaintiff,
against
Riverside Furniture Company, *The Commercial Bank*, *and S. B. Hildreth and James Wheeler*, *Trustees*, *and others*, defendants.

The defendants, *The Commercial Bank* and *S. B. Hildreth* and *James Wheeler*, trustees, come by their attorneys and demur to the bill of plaintiff herein, as being insufficient in law in this,* that the *Riverside Furniture Company*, defendant herein, though insolvent, had a legal right to make an assignment with preferences, and there is nothing in the statutes of this state prohibiting an insolvent corporation, organized under the laws of this state, from making an assignment for the benefit of its creditors, and giving preference thereby to particular creditors.

Watson & Wilson,
Attorneys for *The Commercial Bank*,
and
S. B. Hildreth and *James Wheeler*,
Defendants.

(*b*) *Seeking to Forfeit Franchise of Plank Road Company.*

Form No. 6453.

(Precedent in Tripp *v.* Pontiac, etc., Plank Road Co., 66 Mich. 6.)[1]

[State of *Michigan*:
The *Circuit* Court for the County of *Oakland*. In Chancery.
Arthur R. Tripp, *Prosecuting Attorney*, complainant,
v.
The Pontiac & Lapeer Plank Road Company, defendant.]

The demurrer of the *Pontiac & Lapeer Plank Road Company*, defendant, to the bill of complaint of *Arthur R. Tripp*, Prosecuting Attorney, complainant:][2]

This defendant demurs to the said bill, and for cause of demurrer shows that the complainant has not in and by his said bill made or stated such a case as entitles him, in a court of equity, to any discovery or relief from or against this defendant touching the matters contained in the said bill, or any of such matters.

And, for a further cause of demurrer, this defendant shows that

adjudged, ordered and decreed that such demurrer be sustained; and the complainant, not desiring to amend his bill, it is further adjudged, ordered and decreed that the same be dismissed, and that the *Commercial Bank*, *S. P. Hildreth* and *James Wheeler*, the demurring defendants, recover of the complainant their costs herein expended."

1. **This demurrer was overruled** in the lower court, but on appeal this ruling was reversed and the appeal dismissed. Tripp *v.* Pontiac, etc., Plank Road Co., 66 Mich. 1.

2. The words in [ ] are not found in the reported case, but have been added to make the form complete.

the said *circuit* court in chancery is not the proper tribunal to hear, try, and determine the matters stated and charged in the complainant's bill, viz., that said defendant had not constructed its said road according to the charter, and statutes forming a part thereof, under which said road was constructed, as is alleged in said bill; but that the *Supreme* Court of the State of Michigan has jurisdiction, and is the proper tribunal, by information in the nature of a quo warranto, to hear, try, and determine the said matters.

And, for a further cause of demurrer, this defendant shows that said *circuit* court in chancery is not the proper tribunal to hear, try, and determine the matters stated in said bill as to whether or not the defendant had, after having constructed its road, suffered the same to get out of repair so as to be inconvenient and dangerous for the passage over it of teams and vehicles, or as to whether the defendant, for the space of *one* year or more last past, had ceased entirely to keep up its road, or any part thereof, and more than *one* year ago removed all of its gates from its said road, and abandoned the same without the consent of the Legislature of the State of *Michigan*, and has ever since that time continued to keep said gates so removed, and to abandon its said road without the consent of the said Legislature; but that, by the charter and statutes forming a part thereof named in said bill, fines and penalties are amply provided to protect the public of all their rights pertaining to the dangerous condition of said road or otherwise, and that such fines and penalties are to be recovered, and the right to take toll in certain cases forfeited, by such corporations in actions at law, and not by proceedings in chancery.

Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, this defendant demurs to the said bill, and to all the matters therein contained, and prays the judgment of this honorable court whether it shall be compelled to make any further or other answer to the said bill; and it prays to be dismissed, with its reasonable costs in this behalf sustained.

[By *Jeremiah Mason*,
Solicitor for Defendant.][1]

(2) To Petition.

DEMURRER TO PETITION FOR INJUNCTION AND WINDING UP.

Form No. 6454.

(Precedent in State *v.* Iowa Mut. Aid Assoc., 59 Iowa 129.)[2]

[In the *District* Court in and for *Wapello* County, *Iowa*.

State of Iowa, ex rel. W. V. Lucas, Auditor of the State of Iowa, plaintiff, against *Iowa Mutual Aid Association*, defendant. } *Blank* Term, 1881. Demurrer.

1. The words in [ ] do not appear in the reported case, but have been added to complete the form.

2. **This demurrer was properly sustained,** it appearing that the defendant could not have been in default as alleged when the action was commenced, it not having been organized until April, 1881, and could not therefore have been required to make an annual statement until January, 1882, whereas the action against it was begun in August, 1881.

The defendant demurs to the petition herein, and shows to the court the following grounds therefor:][1]

1. Because the allegations of the petition show that defendant was duly and legally incorporated under and by virtue of the provisions of the Code of 1873, particularly under section *1091*, and other sections in regard to corporations other than for pecuniary profit.

2. Because the allegations of the petition show that defendant is a *mutual aid association*, duly organized under the laws of *Iowa*, and that the so-called contracts of insurance in the plaintiff's petition mentioned, are the mutual obligations of the members of the association for the mutual benefit of such member[s].

3. Because the allegations of the petition show that defendant is not such an insurance company as is contemplated by sections *1161*, *1162* and *1163* of the Code of 1873, and that the provisions of chapter *5*, title *9* of the Code of 1873 do not apply to the defendant.

[*Jeremiah Mason*, Defendant's Attorney.][1]

(3) To Plea.

DEMURRER TO PLEA THAT CORPORATION HAD CEASED TO ACT.

Form No. 6455.[2]

(*Commencing as in Form No. 6452, and continuing to* *) that it does not show that defendant had wound up its business as a corporation, and had ceased to exist in fact at the time the alleged cause of action arose. (*Concluding as in Form No. 6452*).

g. Replication.[3]

1. The words in [ ] are not found in the reported case, but have been added to make the form complete.

2. **This demurrer** is based on facts in Miller *v.* Newberg Orrel Coal Co., 31 W. Va. 837, and was filed to a plea that the charter of the corporation had expired, and that it had ceased to exist in law at the time the alleged cause of action arose, and should have been sustained for the reason that the plea was bad in not also averring that the corporation had wound up its business and ceased to exist in fact as well as in law.

3. **The replication to a plea to an information** in the nature of a quo warranto in People *v.* Plymouth Plank Road Co., 31 Mich. 178, was as follows:

"I. And the said *Isaac Marston*, attorney-general, having heard the said plea of the said *The Plymouth Plank Road Company*, for the said people of the state of *Michigan*, saith: That the said people ought not to be barred from having their aforesaid information against the said *Plymouth Plank Road Company*, because he says that the said *Plymouth Plank Road Company*, after their incorporation, and after the erection of toll-gates upon their plank road, and the exaction of toll thereat, did willfully or negligently so manage their affairs that afterwards, to wit, on the *first* day of *January*, 1869, and from thence continually hitherto to this time, the said *Plymouth* plank road became and was broken, worn out, destroyed, its plank discarded, rotten and warped, and its road-bed full of holes, gullies, ruts and excavations throughout, over and upon its entire length of about 16 miles, and through the townships of *Greenfield*, *Redford*, *Livonia* and *Plymouth*, from its commencement at its intersection with the *Grand River* plank road, in said township of *Greenfield*, and extending through said townships of *Redford* and *Livonia*, to its termination in said township of *Plymouth*; and the bridge of said road, over the river *Rouge*, in said township of *Redford*, has been and remained during the winter in 1873 and 1874, entirely broken down and destroyed, for

REPLY TO PLEA TO INFORMATION IN THE NATURE OF QUO WARRANTO.

Form No. 6456.[1]

(*Title of court and cause as in Form No. 6433.*) Reply.

Plaintiff for reply to defendant's answer admits the corporate existence of the defendant and its corporate powers to sue and be sued, etc., to construct and maintain a canal, etc., and to exercise the power of eminent domain as granted by the act of general assembly of the state of *Ohio* passed *January 10*, 1827, and the act supplementary thereto, and as pleaded in the defendant's plea; but denies the right and power of the defendant to sell, lease or abandon any portion or portions of its canal under and by virtue of said statute

a period of *one* month, so that the said plank road was, during all the time aforesaid, to wit, since *January 1*, 1869, and still continues, utterly unsafe and dangerous to persons, horses and vehicles to pass over and upon; that these defects are not confined to any particular portion of said road, but extend its entire length; and there has not been during *five* years last past any two consecutive miles in the whole road which has not been and continued in the unsafe and dangerous condition above specified.

And so the attorney-general says that the board of directors of the said company have not at all times, nor at any time since the said *first* day of *January*, 1869, although toll-gates had been erected and toll exacted thereat upon the said plank road long before that time, kept the said plank road in good repair or in a safe condition to travel upon; nor has the said company so kept the same in good repair or in a safe condition to travel upon; and this he is ready to verify.

Wherefore he prays judgment, and that the said *Plymouth Plank Road Company* may be ousted and altogether excluded from its corporate rights, privileges and franchises.

II. And the said attorney-general further saith that the said people ought not to be barred from having their aforesaid information against the aforesaid *Plymouth Plank Road Company*, because, he says that the said *Plank Road Company*, after their incorporation, mentioned in their said plea, did not and has not so constructed its road 'as to have at least *sixteen* feet width of good smooth and permanent road, and so constructed as to permit carriages and other vehicles to meet and pass thereon,' for any two consecutive miles of said road, but on the contrary thereof the said plank road was constructed of a much less width than *sixteen* feet, and has so remained from the time of such construction until the present time, so that upon its entire length carriages or other vehicles cannot conveniently or easily pass each other; and the said road has so continued until this time, and this he is ready to verify. Wherefore he prays judgment, that the said *Plymouth Plank Road Company* may be ousted and altogether excluded from its corporate rights, privileges and franchises."

A demurrer to this complaint was properly overruled, although it was admitted that the pleader had not been as careful as he might perhaps have been in drawing the replication.

See also People *v.* Pontiac Bank, 12 Mich. 528, for another replication to a plea filed to an information in the nature of a quo warranto.

1. This reply is based on the facts of State *v.* Pennsylvania, etc., Canal Co., 23 Ohio St. 125. The defendant had pleaded an act of the legislature granting to it the franchises named in the information, and the court held that it was proper for the relator, in his replication, to aver the cause of forfeiture, and to pray for a judgment of dissolution as is set forth in the form.

Rejoinder to replication to plea to information for quo warranto against a railroad corporation is set out in Com. *v.* Pittsburg, etc., R. Co., 58 Pa. St. 32. Upon the final determination of the case judgment was rendered for the defendants.

of *March 20*, 1867, and avers that said act was in conflict with the provisions of the constitution of the state, and therefore void.

And the relator also avers that the defendant had failed to keep its canal in repair for a period of more than *twelve* months at one time, both before and after the passage of the act of *March 20*, 1867, in violation of the provisions and conditions of said act of *January 10*, 1827, and the act supplementary thereto, and that, by reason thereof, the defendant had ceased to be a corporation and had forfeited its charter.

And the relator further avers that the defendant has abandoned certain portions of its canal and leased other portions without legal authority to do so, and in violation of its charter, and thereby its charter had become forfeited to the State of *Ohio*.

Wherefore, *F. B. Pond*, as attorney-general aforesaid, asks judgment that the charter of the corporation be forfeited and the corporation be dissolved, etc.

F. B. Pond, Attorney-General, attorney for the plaintiff.

h. Judgment or Decree.[1]

1. Judgment dissolving consolidated corporation, as set out in Ketcham *v.* Madison, etc., R. Co., 20 Ind. 260, omitting formal parts, was as follows:

"1. That the said supposed contract, entered into between the Board of Directors of the *Peru and Indianapolis Railroad Company* and the Board of Directors of the *Madison and Indianapolis Railroad Company*, as set forth in the complaint herein, was and is void and of no effect.

2. That said supposed contract be and is by the court set aside and annulled to all intents and purposes.

3. That the said organization of the two companies called the *Madison, Indianapolis and Peru Railroad Company* was and is null and void, and is by the court here dissolved.

4. That the said *Peru and Indianapolis Railroad Company* and the *Madison and Indianapolis Railroad Company* be and they are each declared valid and existing independent corporations, notwithstanding said contract of consolidation.

5. It is further ordered, adjudged and decreed, that any outstanding obligations or liabilities of the consolidated organization which have been fairly and honestly incurred for the joint benefit of the two companies, parties to this suit, or for the sole benefit of either, shall be settled and paid by the said companies, respectively, in proportion to the real interest that each has, or may have, in such outstanding obligations or liabilities."

A judgment denying an injunction in a proceeding of this nature is set out in Steinberger *v.* Independent Loan, etc., Asso., 84 Md. 625, which, omitting formal parts, is as follows:

"That the plaintiffs are not entitled to the relief of a writ of injunction restraining and prohibiting the defendant, its officers and agents from further conducting its affairs and the appointment of a receiver to take charge of its affairs and a decree dissolving the defendant corporation, as prayed in the bill of complaint. It appearing, however, in the proceedings in Article XII of the by-laws of the defendant body corporate filed in the cause, that the plaintiffs, as free shareholders of said body corporate, have the right to withdraw therefrom; it is further adjudged, ordered and decreed, that the defendant pay to each of the plaintiffs his or her proportionate share of the assets of said body corporate, and that this cause be referred to an auditor of this court, with directions to state an account from the pleading and proof now in the cause, and such other proofs (if any) as the parties may produce before him, on giving the usual notice, showing the proportionate share of each of the plaintiffs in and to the assets of the defendant body corporate."

Decree dismissing information for writ of quo warranto in Murphy *v.* Farmers' Bank, 20 Pa. St. 420, is as follows:

"And now on *April 4*, 1853, this case having been fully heard, it is considered

Form No. 6457.

(Precedent in Frank *v.* Morrison, 58 Md. 425.)[1]

Citizens National Bank of Baltimore vs. *Chesapeake Mutual Loan and Building Association of Baltimore City, et al.* } In the *Circuit* Court of *Baltimore City*. *November* Term, 1874.

By and with the consent of all parties it is, this *first* day of *December*, 1874, adjudged, ordered and decreed, that *Robert D. Morrison*, *George J. Appold*, *Samuel Snowden* and *Joseph Friedenwald* be, and they are hereby appointed receivers, with the power and authority to wind up the affairs of the said *Franklin Land and Loan Company*, of *Baltimore City*, in order to make an equitable distribution of the assets of said company amongst its creditors and shareholders.

And it is further ordered, that the said receivers give notice to all persons having claims against the said *Franklin Land and Loan Company*, of *Baltimore City*, to file their claims, properly authenticated, with the Clerk of this Court on or before the *sixth* day of *February*, 1875, in two daily newspapers in the City of *Baltimore*, once a week, for *three* successive weeks, before the *second* day of *January next.*

And it is further ordered, that *Robert D. Morrison*, Esquire, and *George J. Appold*, Esquire, the temporary receivers, shall yield up and deliver to the said receivers all the books, papers, property, assets and effects, of the said corporation defendant, in their possession, on being reimbursed and indemified for all the moneys expended, and pecuniary responsibilities incurred by them as such receivers.

And it is further ordered, that the same receivers shall, (subject to

and adjudged, that the relator, *Michael Murphy*, has shown no right or title to maintain the information in the name of the *Commonwealth*; and that the same be and hereby is quashed and wholly taken for naught; and that the relator pay to the defendants their lawful costs in this behalf expended."

1. Decree appointing receiver to wind up a corporation is set out in Hayes *v.* Brotzman, 46 Md. 519, which, omitting the formal parts, is as follows:

"The bill and answer in the above cause having been read and considered, and the same submitted for decree, it is thereupon, on this the *18th* day of *August*, A.D. 1875, by the *Circuit* Court of *Baltimore City*, adjudged, ordered and decreed, that *J. Thomas Scharf* be and he is hereby appointed receiver of the *South Ann Street Perpetual Savings Association* of *Baltimore City*, and that the said association turn over to the said receiver all its books, papers, promissory notes, writing obligations, choses in action, claims, demands, property and assets, and that the said receiver shall proceed to wind up the affairs of the said association — the ulterior object of this decree being that the property and assets of the said defendant shall be equitably distributed among the creditors of the said defendant. And it is further ordered, that *J. Thomas Scharf*, the receiver aforesaid, give notice to all creditors of the said defendant to file their claims in this cause, and upon the proof of the same that the said creditors be allowed their distributive portion of the assets of the said defendant. And it is further ordered, that the said *J. Thomas Scharf*, receiver as aforesaid, shall prosecute and defend all suits at law that may now be pending, or may be hereafter instituted, in which the said defendant may be a party. And it is further ordered, that the said *J. Thomas Scharf*, the receiver aforesaid, before he enters upon the discharge of the duties of the said receiver, shall give the usual bond in the penalty of *five thousand* dollars, for the faithful performance of his duties as said receiver."

the order of this Court,) nave the power to sell the property of said corporation defendant, and make all collections of outstanding indebtedness, and shall have the power to institute all such proceedings at law and in equity, as may be necessary for the purpose of enforcing the rights of said defendant corporation, subject to the direction of this court.

And it is further ordered, that before the said *Robert D. Morrison*, *George J. Appold*, *Samuel Snowden*, and *Joseph Friedenwald* proceed to act as receivers by virtue of this decree, they shall each give bond to the state of *Maryland* in the penalty of *one hundred thousand* dollars, with surety or sureties to be approved by this Court, and conditioned for the faithful performance of the trust reposed in him by this decree, or which may be reposed in him by any future decree or order in the premises.

Campbell W. Pinkney.

Form No. 6458.[1]

[At a *Trial* Term of the *Superior* Court of *Buffalo*, held at the *City and County Hall*, in the City of *Buffalo*, *New York*, on the *fourteenth* day of *April*, 1890.][2]

Present, Hon. *Edward W. Hatch*, Judge presiding.

1. This judgment is copied from the record in People *v.* Buffalo Stone, etc., Co., 131 N. Y. 140.

Order Appointing Receiver, etc.—*Michigan.* — In Turnbull *v.* Prentiss Lumber Co., 55 Mich. 387, in a creditor's suit to wind up an insolvent corporation, the following order was made:

"The motion for the appointment of a receiver in this cause having come on to be heard, and solicitors for the respective parties having been heard thereon, now, on motion of *Turnbull & Dafoe*, solicitors for the complainant, it is ordered by the court that *Charles B. Greely* be, and he is hereby, appointed receiver of all the property, equitable interests, things in action and effects of said *Prentiss Lumber Company*, a corporation, one of the above named defendants, belonging or in any way appertaining to said defendant (said corporation) at the time of the commencement of this suit, to wit, on the *2d* day of *February*, A. D. 1884 (except such as are exempt by law under the statutes of this state, if any), and vested with all the rights and powers of a receiver in chancery, upon the filing with the register of this court a bond for the faithful performance of his duties as such in the penal sum of *five thousand* dollars, and the approval by this court. And it is further ordered that said *Prentiss Lumber Company* and its proper officers assign, transfer and deliver over to said receiver, on oath, under direction of the court or the judge thereof, all and singular the property, real and personal, of or belonging to said corporation, said defendant and the said *Prentiss Lumber Company*, its officers and agents, forthwith surrender and deliver to said receiver all the assets, materials, tools, machinery, fixtures, effects, and property of every description, nature or kind of or belonging to said *Prentiss Lumber Company*; and also all money, drafts and bills of exchange, checks or other evidence of indebtedness due and owing to said *Prentiss Lumber Company*, as well all books of account, books of record of said corporation, accounts, deeds, bonds, mortgages, certificates of stock, vouchers and papers of every nature and description belonging to said corporation, and that said receiver, or either or any of the parties to this cause, have leave to apply to the court from time to time for such further order or direction as may be necessary."

2. The superior court of Buffalo has been abolished, and the jurisdiction formerly possessed by it vested in the supreme court. N. Y. Const. (1895), art. 6, § 5.

The People of the State of New York
against
The Buffalo Stone and Cement Company.
} Judgment.

This cause having been duly reached on the calendar in its regular order at a *Trial* Term of this court, before the Hon. *Edward W. Hatch*, one of the judges thereof, on the *twenty-first* day of *January*, 1890, and a jury trial of this action having been waived in open court by the counsel of the respective parties therein; and the case having been tried before court, and the decision of said judge having been filed with the clerk of this court on the *fourteenth* day of *April*, 1890, in which he decides judgment among other things that the plaintiff is entitled to judgment, dissolving the defendant corporation with costs; and the costs of the plaintiff having been adjusted at *one hundred and sixteen* dollars and *sixty-one* cents ($116.61).

Now on motion of *Strong & Brendel*, of counsel for plaintiff, it is adjudged that the charter of the defendant the *Buffalo Stone and Cement Company* be, and the same hereby is, dissolved, and the rights, privileges and franchises of said defendant are hereby declared forfeited.

It is further adjudged, that a receiver of the property and effects of the defendant be appointed with all the power and authority conferred by law, and subject to all the duties and liabilities imposed upon receivers in such cases.

It is further adjudged, that the defendant, its trustees, directors, managers and other officers be forever restrained from collecting and receiving any debt or demand, and from paying out or in any way transferring or delivering to any person, any money, stock, property, or effects of the said corporation and from exercising any of the corporate rights, franchises or privileges of the corporation.

It is further adjudged, that the plaintiff recover of the defendant the sum of $116.61, adjusted as costs in this action.

Judgment signed this *fourteenth* day of *April*, 1890.

Moses Shire, Clerk.

Form No. 6459.[1]

At a *Special* Term of the *Supreme* Court of the State of *New York*, held at the *County Court-house*, in the City of *New York*, on the *thirty-first* day of *January*, 1889.

Present, Hon. *George C. Barrett*, Justice.

The People of the State of New York
against
The North River Sugar Refining Company.
} Judgment.

The summons and complaint in this action having been duly served on the defendant, and said defendant having served its answer herein, and the issues in said action having been tried at a *Trial* Term of this court at the *court-house* in the city of *New York*, on the *fourteenth* day of *November*, 1888, before Mr. Justice *Barrett* and a jury, and at the

1. **This judgment is copied from the record** in People *v.* North River Sugar Refining Company, 121 N. Y. 582.

close of the evidence the said plaintiffs having moved the court to direct a verdict for the plaintiffs, and the said defendant having moved the court to direct a verdict for the defendant, and the said court having denied said motion of the defendant and granted said motion of the plaintiffs, and the jury under the direction of the court having rendered a verdict in favor of the plaintiffs, and a motion for judgment now coming on to be heard;

Now, upon reading and filing said summons and complaint, the answer and the verdict aforesaid, and on motion of *Charles F. Tabor*, attorney-general, after hearing Mr. ———, counsel for the defendant,

It is adjudged and decreed that the defendant has offended against the provisions of the act under which it was created and has violated provisions of law whereby it has forfeited its charter and become liable to be dissolved by abuse of its power.

And it is further adjudged and decreed that the said defendant, *The North River Sugar Refining Company*, be and the same is hereby dissolved, and its corporate rights, privileges and franchises forfeited to the people of the state of *New York*.

And it is further adjudged and decreed that the said defendant, *The North River Sugar Refining Company*, its trustees, directors, managers and other officers, attorneys and agents, be, and each of them hereby is, forever restrained and enjoined from exercising any of the corporate franchises, powers, rights or privileges of the defendant, and from collecting or receiving any debts or demands belonging to or held by the defendant, and from paying out or in any manner interfering with, transferring or delivering to any person, any of the deposits, moneys, securities, property or effects of the said defendant or held by it.

It is further adjudged and decreed that *Henry Winthrop Gray*, Esq., of the city of *New York*, be and he is hereby appointed receiver of all the property, real and personal, things in action and effects, of the said corporation, *The North River Sugar Refining Company*, held by and vested in it or in or to which it may be in anywise interested or entitled with the usual powers and duties enjoyed and exercised by receivers according to the practice of this court and of the statutes in such cases made and provided.

It is also adjudged and decreed that, before entering upon the duties of his trust, such receiver execute and file with the clerk of *New York* county a bond, with at least two sufficient sureties to the people of the state of *New York*, in the penal sum of *one hundred thousand* dollars, conditioned for the faithful discharge by said receiver of the duties of his trust; such bond to be approved as to its sufficiency, form and manner of execution by a justice of the *Supreme* court. Upon the filing of such bond thus approved, the said receiver is authorized and directed to take possession of and sequestrate the property, things in action and effects, real and personal, of the defendant herein, and to take and hold all property held by or in possession of said defendant corporation and to secure and reduce to possession all property to which said corporation may be entitled; that an account of the assets and property and debts and liabilities of said defendant be taken, and that the property of such defendant be distributed

among its stockholders or persons lawfully entitled thereto, and fair and honest creditors in the order and proportions prescribed by law in case of the voluntary dissolution of a corporation.

It is further adjudged and decreed that such further application may be made to this court under the provisions of this decree or order as the receiver may be advised is proper and necessary for his instruction in the management and conduct of his trust.

It is further adjudged and decreed that no application shall be made to any court against the receiver relative to or in any way connected with the duties of said receiver, or the funds or assets of the defendant above mentioned, or their transfer, sale or delivery, unless at least five days' notice of such application be first given to said receiver and to the attorney-general of the state of *New York* and the defendant's attorney.

It is further adjudged and decreed that said receiver proceed according to law to convert into money all the property and assets held or owned by said defendant or to which said defendant may be in anywise entitled, and forthwith upon receiving such money he shall deposit the same in the *United States Trust Company* of the city of *New York* to the credit of said receiver, to be held by him subject to the further order of the court, and said money so deposited as aforesaid with said *Trust Company* shall not be delivered over by it, unless the check, draft or demand therefor be accompanied with a certified copy of an order of this court directing such payment; such order to be made only on notice to the attorney-general and the defendant's attorney.

And it is further adjudged that the plaintiffs, the people of the state of *New York*, recover of the defendant, *The North River Sugar Refining Company*, the sum of *ninety-three* dollars and *fourteen* cents costs and disbursements of this action, which said sum the said receiver is hereby directed to pay to the attorney-general.

Edward F. Reilly, Clerk.

2. Proceedings for Voluntary Dissolution.[1]

1. **Voluntary dissolution** of a corporation may be accomplished as provided by statute. Consult the following statutory provisions:

Alabama. — Civ. Code (1886), § 1683 *et seq.*

Arizona. — Rev. Stat. (1887), § 239.

Arkansas. — Sand. & H. Dig. (1894), § 1429 *et seq.*

California. — Code Civ. Proc. (1897), § 1227 *et seq.*

Colorado. — Mills' Anno. Stat. (1891), § 497, § 619 *et seq.*, § 640; Laws (1891), p. 95.

Connecticut. — Gen. Stat. (1888), § 1942 *et seq.*; Laws (1893), p. 224.

Delaware. — 17 Laws, c. 147 (Rev. Stat. (1893), c. 70).

Florida. — Rev. Stat. (1892), § 2154 *et seq.*

Georgia. — 2 Code (1895), § 1879 *et seq.*

Idaho. — Rev. Stat. (1887), § 5186 *et seq.*

Illinois. — Starr & C. Anno. Stat. (1896), p. 1028, par. 50 *et seq.*

Iowa. — Code (1897), § 1617.

Kansas. — 1 Gen. Stat. (1897), p. 700, § 45 *et seq.*

Kentucky. — Stat. (1894), § 561.

Maryland. — Pub. Gen. Laws (1888), p. 388, § 265.

Massachusetts. — Pub. Stat. (1882), p. 569, § 40 *et seq.*

Michigan. — How. Anno. Stat. (1882), § 8174 *et seq.*

Minnesota. — Stat. (1894), § 3430.

Missouri. — Rev. Stat. (1889), § 2513 *et seq.*

Montana. — Code Civ. Proc. (1895), § 2190 *et seq.*

Nevada. — Gen. Stat. (1885), § 822 *et seq.*

a. Petition.[1]

Form No. 6460.[2]

Court *of Common Pleas*, for the *City and* County of *New York*.

In the matter of the application of the trustees of the corporation called *Importers and Grocers' Exchange of New York* for a Voluntary Dissolution. } Petition.

To the Court *of Common Pleas* for the *City and* County of *New York*:

The petition of *Henry F. Hitch*, *Ira Bursley*, *Moses G. Wanzor*, *Thomas T. Barr*, *Levis W. Minford*, *James C. Russell*, *Henry Hentz*, *Osgood Welsh*, *Benjamin C. Arnold*, as trustees of the *Importers and Grocers' Exchange of New York*, respectfully shows:

First. That the said *Importers and Grocers' Exchange of New York* is a corporation created by and under the laws of the state of *New York*, having been incorporated under the provisions of the act entitled "An Act to provide for the incorporation of Exchanges or Boards of Trade," passed May 3, 1877, and its principal office is located at No. *107 Water* street, in the city of *New York*, in the county of *New York*.

Second. That your petitioners are a majority of all the trustees having the management of the concerns of said corporation, and hold and own most of the capital stock thereof. That the said *Henry F. Hitch* is president and *Samuel C. Burdick* is treasurer of the *Exchange*. That the full board of said trustees consists of *fifteen* members. That the names and residences of all such trustees who do not unite

New Hampshire. — Pub. Stat. (1891), c. 147, § 10.

New Mexico. — Comp. L. (1884), § 211.

New York. — Birds. Rev. Stat. (1896), p. 678, § 97 *et seq*.

North Carolina. — Code (1883), § 694.

North Dakota. — Rev. Codes (1895), § 2912.

Ohio. — Bates' Anno. Stat. (1897), § 5651 *et seq*.

Oklahoma. — Stat. (1893), § 968 *et seq*.

Oregon. — Hill's Anno. Laws (1892), § 3235.

Pennsylvania. — Bright. Pur. Dig. (1894), p. 426, § 115 *et seq*.

South Dakota. — Dak. Comp. Laws (1887), § 2938 *et seq*.

Utah. — Rev. Stat. (1898), § 3661 *et seq*.

Vermont. — Stat. (1894), § 3735, *et seq*.

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 4275.

West Virginia. — Code (1891), p. 510, § 56.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 1788, *et seq*.

See also list of statutes cited *supra*, note 1, p. 527.

1. **For formal parts** of petitions of this character consult the title PETITIONS.

2. **This petition is copied from the record** in Matter of Importers, etc., Exch., 132 N. Y. 212, which was in special proceeding to dissolve a corporation under the New York Code of Civil Procedure, §§ 2419–32. The court of appeals affirmed an order of the general term of the supreme court reversing an order of the court of common pleas of New York city denying the application, holding that a corporation organized under the act of 1887 (N. Y. Laws (1887), c. 228), providing for the organization of exchanges or boards of trade, may be dissolved by the court upon the petition and consent of a large majority of its trustees and members, when it appears that the corporation is doing no business because of the diverse interests of its members, notwithstanding the fact that the corporation is solvent and a minority of the trustees and members oppose the dissolution.

in this petition are as follows (*names and residences of trustees*).[1]

Third. That the nature of the business and the objects for which said corporation was formed are (*nature and objects of corporation*).[2]

Fourth. That the said *Exchange* has already outlived its usefulness; that as early in its existence as the year 1885, and after *two* years of business, a petition was presented to the trustees by the members of said *Exchange* asking them to wind up the corporation and procure its dissolution for the reason that it was of no real benefit to its members. That such petition was signed by *one hundred and ninety* out of a total membership of about *two hundred and twenty*. That at that time the trustees deemed it best to continue business for some time longer, in the hope that by amendment of rules and regulations then suggested by nonpetitioning members the *Exchange* might still be made to serve the purpose of its creation; but it has been found that, aside from making an unreliable daily quotation of the price of tea, and giving the number of tons of the receipts and stock of tea and sugar, it furnishes no information of any value. The daily circular was omitted for *eighteen* months and has only recently been revived by a few personally interested.

That the *Exchange* room is not attended from day to day by more than two or three members. That a young man is kept in attendance, who, at the instance of a few men engaged in the tea trade, writes up a few figures on the blackboard and sends out a daily circular of prices based thereon. This was also omitted for *eighteen* months, but has been revived as above stated. That the trust fund of the *Exchange* has continued to increase from annual interest but no new membership tickets are sold. That the price or value of seats or privileges of the floor has receded from *seven hundred and fifty* dollars to *two hundred* dollars each. That aside from a very few, no interest is manifested by members in the affairs of the *Exchange*. That the meeting or *Exchange* room has been removed from time to time to smaller quarters until at present one small room at No. *107 Water* street, located on the *third* floor of the building, divided by a panel partition is found to be more than ample accommodation for the few who ever go there, and the rental of said room is the sum of *three hundred* dollars per annum.

1. The names and residences of the trustees not uniting in the petition were as follows: "*Charles G. Boardman*, residing at *102 East Fifty-seventh* street, *New York City*; *Henry E. Hawley*, residing at *16 West Thirty-third* street, *New York City*; *Fred. A. Mead, Jr.*, residing at *1 West Fifty-sixth* street; *Charles W. Beebe*, residence not known, but doing business at *130 Water* street, *New York City*; *Joachim J. Francke*, residing in *Havana, Cuba*, and *Everett Frazar*, residing at *New Brighton, Staten Island*."

2. The nature of the business and objects for which the corporation was formed, as referred to in the text, were "To foster trade and commerce in groceries and *East Indian* and *South American* products; to protect such trade from unjust or unlawful exactions; to reform abuses in such trade; to diffuse accurate information and to produce uniformity and certainty in the customs and usages of the trade in said merchandise; to settle differences between the members of said corporation arising out of the trade in said merchandise and to promote a more friendly intercourse between merchants engaged in said trade; and generally to increase the facilities for conducting the trade in groceries and *East Indian* and *South American* products."

That the members of said *Exchange* number about *two hundred and fifteen*, and the sale of membership tickets or certificates from time to time has accumulated a trust fund now amounting to upwards of *sixty thousand* dollars, in the distribution of which all members and stockholders are interested.

That the great majority of all the members are still desirous of having the corporation dissolved, and to further their wishes, your petitioners, being a majority of the trustees, favoring such action, and believing it beneficial to the interest of the stockholders and members, therefore file this their petition accordingly, to procure a voluntary dissolution of said corporation and the suitable distribution of its trust fund to those entitled thereto.

Fifth. That the schedule hereto annexed states, so far as your petitioners know, or have the means of knowing (*substance of schedule*).[1]

Sixth. There is no stock remaining unissued or unpaid.

Seventh. That no other application has been made for the order herewith applied for.

Wherefore, your petitioners pray for a final order dissolving said corporation and appointing a receiver of its property, to wind up its affairs and distribute its assets to those entitled thereto and for such other relief as may be just.

Dated *New York, May 2*, 1887.

(*Signatures of Petitioners.*)

Hascall, Clarke & Vander Poel,
Attorneys for Petitioners, *71 Broadway, N. Y. City.*

(*Schedule annexed.*)

(*Verification.*)[2]

Form No. 6461.[3]

In the *Superior* Court of the *City and* County of *San Francisco*, State of *California*.

1. **Schedule referred to in the text** made statements showing the following:

"1st. A full and true account of all the creditors of the corporation, and of all unsatisfied engagements entered into by and subsisting against the corporation.

2d. A statement of the name and place of residence of each creditor, and of each person with whom such an engagement was made, and to whom it is to be performed, if known; or, if either is not known, a statement of that fact.

3d. A statement of the sum owing to each creditor, or other person specified in the last subdivision, and the nature of each debt, demand or other engagement.

4th. A statement of the true cause and consideration of the indebtedness to each creditor.

5th. A full, just and true inventory of all the property of the corporation, and of all the books, vouchers and securities relating thereto.

6th. A statement of each incumbrance upon the property of the corporation by mortgage, judgment, pledge or otherwise.

7th. A full, just and true account of the capital stock of the corporation, specifying the name of each stockholder; his residence, if it is known, or if it is not known, stating that fact; the number of shares belonging to him; the amount paid in upon his share; and the amount still due thereupon. Also, the names and residence of all members, if known; or if it is not known, stating that fact."

2. Consult the title VERIFICATIONS.

3. *California.* — Code Civ. Proc., §§ 1228–1230. See also list of statutes cited *supra*, note 1, p. 735.

In the matter of the application of the *Stabot Carriage Company*, a corporation, for Voluntary Dissolution. } Petition for Dissolution.

To the Honorable *Superior* Court of the *City and* County of *San Francisco*, in the State of *California*.

The petition of the *Stabot Carriage Company*, corporation aforesaid, represents and states:

I. (*Like first paragraph in Form No. 6460.*)

II. That at a meeting of the stockholders and members of the said corporation, the said *Stabot Carriage Company*, called for that purpose, the dissolution of the corporation was resolved upon by a *two-thirds* vote of the stockholders of said corporation.

III. That all claims and demands against the said corporation, the said *Stabot Carriage Company*, have been satisfied and discharged.

IV. That the total number of shares of the capital stock of said corporation is *five thousand* (*5,000*). That *four thousand five hundred and fifty* shares of the said capital stock of said corporation was duly represented at said meeting called as aforesaid, at the office of said company, in said city and county, for the purpose of the dissolution of said corporation, on the *first* day of *May*, 1897, and that the vote of all the stockholders at said meeting was as follows: *Four thousand five hundred and fifty* shares represented by stockholders as aforesaid, were for dissolution.

V. That the board of directors or trustees of said corporation consist of *five*, all stockholders thereof, and residents of said city and county of *San Francisco*, and their names are as follows: *L. P. Stanford*, *Marcus Heit*, *Fisher Marsh*, *D. B. Field* and *J. M. Putner*, and that said persons so named as trustees aforesaid, have had the sole management of the affairs of said corporation for *one* year next preceding this application, and are now such managers.

Wherefore, your petitioners pray that your honor will order this petition to be filed with the clerk of this court, and that the clerk give notice of the nature of this application, not less than *thirty* nor more than *fifty* days, and of the time and place of hearing the same, by publication in some newspaper published in the *city and* county of *San Francisco*. That after the time of publication has expired your honor may, upon *five* days' notice to any persons who have filed objections within the time prescribed by section 1231 of the Code of Civil Procedure, or without notice if no objections have been filed, proceed to hear and determine this application, and after hearing, adjudge and declare said corporation dissolved in accordance with the law in such cases made and provided.

(*Signatures of the majority of the board of trustees, directors, or officers having the management of the affairs of corporation.*)

(*Verification.*)[1]

b. Order to Show Cause.

Form No. 6462.[2]

1. Consult the title VERIFICATIONS.

2. *New York.* — Birds. Rev. Stat. (1896), p. 678, § 97 *et seq.* See also list of statutes cited *supra*, note 1, p. 735.

For the formal parts of orders to show cause, generally, consult the title ORDERS AND RULES TO SHOW CAUSE.

(*Title of court as in Form No. 6427.*)
(*Title of cause as in Form No. 6460.*)

On reading and filing the petition of *Henry F. Hitch* and (*naming other trustees*), of the *Importers and Grocers' Exchange of New York*, a corporation created under the laws of the state of *New York*, whose principal office and place of business is located at *107 Water* street in the city of *New York*, in the county of *New York*, state of *New York*, and also the schedule to said petition annexed, which said petition and schedule were duly verified by the petitioners on the *second* day of *May*, 1887, and Messrs. *Hascall, Clarke and Vander Poel*, attorneys for petitioners, having appeared herein on motion of said counsel, it is

Ordered, That all persons interested in the said corporation, the said *Importers and Grocers' Exchange of New York*, be and appear before this court at the *county court-house* in the city of *New York*, in the said county of *New York*, on the *fifth* day of *March*, 1887, to show cause why the said corporation, the said *Importers and Grocers' Exchange of New York*, should not be dissolved.

And it is further ordered that a copy of this order be published at least once in each week of *three* weeks preceding the said *fifth* day of *March*, 1887, in the *New York Journal and Advertiser* and the *New York Times*, newspapers published in the city of *New York*, in the county of *New York*, in the state of *New York*, wherein this order is entered.

Edward W. Hatch, Justice *Supreme* Court.

c. Order Fixing Time and Place of Hearing Petition.

Form No. 6463.[1]

(*Title of court and cause as in Form No. 6461.*) Order for notice of Application for Voluntary Dissolution.

On reading the petition for voluntary dissolution, heretofore filed in this court, of the *Stabot Carriage Company*, a corporation, which said petition prayed among other things for the fixing of a time and place by this court for the hearing of said petition and for a direction to the clerk of the *Superior* Court ordering him to publish a notice thereof and of the nature of said application, and *Oliver Ellsworth*, attorney for said corporation, the *Stabot Carriage Company*, having appeared in behalf of the petitioners, it is now ordered that the said petition be filed with the clerk of the *Superior* Court of the city and county of *San Francisco*, and that on *Friday*, the *twelfth* day of *November*, 1897, at *ten* o'clock in the *fore*noon of that day, or as soon thereafter as counsel can be heard, at the court-room of this court in the *new City Hall* in the *city and* county of *San Francisco*, state of *California*, the said petition shall be heard, and that the said clerk of the said *Superior* Court of the *city and* county of *San Francisco* be and he is hereby ordered to publish a notice of said petition and of the general

1. *California* Code Civ. Proc., § 1230. See also list of statutes cited *supra*, note 1, p. 735. **For the formal parts** of orders, generally, consult the title ORDERS.

nature of said application not less than *thirty* nor more than *fifty* days preceding the said *twelfth* day of *November*, 1897, in the *San Francisco Examiner*, a daily newspaper published daily in the said *city and* county of *San Francisco*.

Charles W. Slack, Judge.

Dated at *San Francisco*, the *fifteenth* day of *September*, 1897.

d. Clerk's Notice of Time and Place of Hearing Petition.

Form No. 6464.[1]

(*Title of court and cause as in Form No. 6461.*) } Notice of Application for Voluntary Dissolution.

Please take notice that the said corporation, the *Stabot Carriage Company*, formed under and by virtue of the laws of the state of *California*, did on the *first* day of *September*, 1897, persent to the Honorable *Superior* Court of the *city and* county of *San Francisco* its petition wherein it prayed for a voluntary dissolution and that the said *Superior* Court of the *city and* county of *San Francisco* has fixed *Friday*, the *twelfth* day of *November*, 1897, at *ten* o'clock in the *fore*noon, or as soon thereafter as counsel can be heard, and the court-room of the said *Superior* Court in the *new City Hall* in the *city and* county of *San Francisco* as the time and place when and where the said application will be heard. In witness whereof, I have hereunto set my hand and affixed my seal of the said *Superior* Court this *eleventh* day of *November*, 1897.

(SEAL) *Calvin Clark*, Clerk.

Oliver Ellsworth, Attorney for Petitioners.

e. Objections by Creditor.

Form No. 6465.[2]

(*Title of court and cause as in Form No. 6461.*) } Objections to Application for Voluntary Dissolution.

Now comes *Philip Albrecht*, a creditor of the said corporation, the said *Stabot Carriage Company*, and files his objection to the application of the said company heretofore filed herein asking for a voluntary dissolution, because he says that all the claims and demands against the said corporation, the said *Stabot Carriage Company*, have not been satisfied and discharged, and particularly a claim of him the said creditor, the said *Philip Albrecht*, against the said corporation for the purchase price of certain goods sold and delivered by him the said *Philip Albrecht* to the said corporation, which has not been satisfied and discharged, which said claim is for certain goods, to wit, *five thousand* wheels of the value of *five thousand* dollars, which said sum the said corporation agreed to pay the said *Albrecht* as purchase

1. *California.* — Code Civ. Proc., § 1230. See also list of statutes cited *supra*, note 1, p. 735.

For the formal parts of notices, generally, consult the title NOTICES.

2. *California.* — Code Civ. Proc., § 1231. See also list of statutes cited *supra*, note 1, p. 735.

price of said wheels and which said sum is now due and unpaid. Wherefore the said *Philip Albrecht* respectfully prays that the said application for a voluntary dissolution of the said corporation may be by the court denied.

Philip Albrecht,
By his attorney, *Daniel Webster*.

Dated at *San Francisco*, the *fourth* day of *October*, 1897.
(*Verification.*)[1]

f. Petition of Minority Stockholders and Creditors to Dismiss Application.

Form No. 6466.[2]

Supreme Court — *Cortland* County.

In the matter of the application for the Voluntary Dissolution of *The Hitchcock Manufacturing Co.*

To the *Supreme* Court of the State of *New York*:

The petition of *William Martin* and *Duane E. Call*, *The Second National Bank of Cortland*, *German American Bank of Buffalo*, *New York*, and *C. Coles Dusenbury*, *William C. Bond* and *Louis Dusenbury*, respectfully shows and alleges that said *Hitchcock Manufacturing Company* is a domestic corporation, created and organized under the laws of the state of *New York*, and doing business therein other than an insurance and moneyed corporation. That the name of said corporation is as aforesaid, *Hitchcock Manufacturing Company*, and that said corporation had prior to the *thirteenth* day of *July*, 1895, been located and doing business as such in the village of *Cortland*, county of *Cortland* and state of *New York*.

That on the *thirteenth* day of *July*, 1895, upon the petition of *Caleb B. Hitchcock*, *Carroll C. Hitchcock* and *Fred S. Bennett*, all of the directors of said *Hitchcock Manufacturing Company*, verified on the *twelfth* day of *July*, 1895, and upon the schedule and affidavit attached thereto verified on the same day, and upon notice to the attorney-general, an order to show cause why said corporation, the *Hitchcock Manufacturing Company*, should not be dissolved, returnable at *Norwich* on the *tenth* day of *December*, 1895, was made by Hon. *Gerrit A. Forbes*, justice of the *Supreme* Court, and entered in *Cortland* county clerk's office in *Cortland*, *New York*, on the *fifteenth* day of *July*, 1895.

That on said *thirteenth* day of *July*, 1895, upon the same petition, affidavit, schedule and notice, an order was also made by Hon. *Gerrit A. Forbes*, justice of the *Supreme* Court, restraining and enjoining the

1. Consult the title VERIFICATIONS.

2. **This petition is copied from the record** in Matter of Hitchcock Mfg. Co., 1 N. Y. App. Div. 164. For the formal parts of petitions of this character, generally, see the title PETITIONS.

Petition for voluntary dissolution will be entertained on due notice, even though a bank is in the possession of the superintendent of banking. Matter of Murray Hill Bank, 9 N. Y. App. Div. 546.

Petition must show that the dissolution will benefit the stockholders. Matter of Pyrolusite Manganese Co., 29 Hun (N. Y.) 429.

The statute must be fully complied with in all the particulars of various defects pointed out. Matter of Dubois, 15 How. Pr. (N. Y. Supreme Ct.) 7.

Hitchcock Manufacturing Company from exercising its corporate functions, and restraining and enjoining the creditors of said *Hitchcock Manufacturing Company* from bringing any action against said *Hitchcock Manufacturing Company* or taking any further proceedings in any action theretofore begun, and appointing *James Devine* of *Syracuse*, *New York*, and *Caleb B. Hitchcock* of *Cortland*, *New York*, temporary receivers of all the property, goods, chattels and effects of said corporation, which said order was also entered in *Cortland* county clerk's office on the *fifteenth* day of *July*, 1895.

That said temporary receivers immediately thereafter qualified as such, and entered upon the discharge of their duties, and are now acting as such temporary receivers of said *Hitchcock Manufacturing Company*.

That on the *third* day of *July*, 1895, an action was begun in the *Supreme* Court by service of a summons and complaint upon said *Hitchcock Manufacturing Company* by your petitioners *William Martin* and *Duane E. Call*, upon *four* promissory notes made by said *Hitchcock Manufacturing Company*, in all to the amount of *eight hundred and eighty-five* dollars and *fifty-six* cents. That your petitioners *William Martin* and *Duane E. Call* were copartners, doing business as such, under the firm name and style of *Martin & Call*, and having their office and principal place of business as such copartners in the village of *Cortland*, county of *Cortland* and State of *New York*.

That your petitioner *The Second National Bank of Cortland* is a domestic corporation, to wit: "A national bank, duly chartered and organized according to law, and under and by virtue of the laws of the United States, and under and by virtue of an act of congress approved February 25, 1865, and an act of congress approved June 3, 1864, under the name and style of *The Second National Bank of Cortland*," and that said petitioner is doing business as such bank under said name at *Cortland* village, *New York*.

That on the *twelfth* day of *July*, 1895, an action was begun in the *Supreme* Court by service of summons and complaint upon said *Hitchcock Manufacturing Company* by said *The Second National Bank of Cortland*, upon several promissory notes of the said *Hitchcock Manufacturing Company*, amounting in all to *seven thousand two hundred and twenty-nine* dollars and *ninety-six* cents.

That your petitioner the *German American Bank of Buffalo*, *New York* is a domestic corporation, to wit: "A state bank duly chartered and organized according to law, and under and by virtue of the laws of the state of *New York*, under the name and style of *The German American Bank of Buffalo*, *New York*," and that said petitioners are doing business as such bank, under said name, at the city of *Buffalo*, county of *Erie*, *New York*. That on the *twelfth* day of *June*, 1895, two actions were begun in the *Supreme* Court by service of summons and complaint upon said *Hitchcock Manufacturing Company* by said *German American Bank of Buffalo*, *New York*, upon *two* promissory notes, amounting in all to *six hundred* dollars. That on or about the *first* day of *July*, 1895, a stipulation was given said *Hitchcock Manufacturing Company*, the defendant in said actions, extending their time to answer *twenty* days.

That your petitioners, *C. Coles Dusenbury*, *William M. Bond* and *Louis Dusenbury* are copartners, doing business as such under the firm name and style of *Dusenbury & Bond*, at No. *83 Leonard* street in the city of *New York*. That on the *third* day of *July*, 1895, an action was begun in the *Supreme* Court by service of summons and complaint upon said *Hitchcock Manufacturing Company* by said petitioners, *C. Coles Dusenbury*, *William M. Bond* and *Louis Dusenbury*, upon an account for goods, wares and merchandise sold and delivered to said *Hitchcock Manufacturing Company* and upon several promissory notes made by said *Hitchcock Manufacturing Company*, amounting in all to *seven hundred and sixty-two* dollars and *sixteen* cents.

Your petitioners further allege that no other steps or proceedings have been taken in any of said actions other than as aforesaid and that there is justly due and owing from said *Hitchcock Manufacturing Company* to each of said petitioners the several amounts hereinbefore set forth, and that there are no counter-claims or offsets to them, and that said *Hitchcock Manufacturing Company* has no defense to either of said actions.

Wherefore, your petitioners ask and pray for a rule or order of this court vacating and setting aside the order made herein on the *thirteenth* day of *July*, 1895, and entered in *Cortland* county clerk's office on the *fifteenth* day of *July*, 1895, appointing *James Devine* and *Caleb B. Hitchcock* temporary receivers of said *Hitchcock Manufacturing Company*, and enjoining and restraining the creditors of said *Hitchcock Manufacturing Company* from beginning any action against said company or taking any further proceedings in actions theretofore begun, and for such other or further order or relief as shall be just, with costs of this motion.

Dated *Cortland*, *New York*, the *eighth* day of *November*, 1895.

Wm. Martin,
German American Bank of Buffalo,
per *James Dougherty*.
Dusenbury & Bond,
per *James Dougherty*.
Hector Cowan,
President *Second National Bank*.

(*Verification.*)[1]

g. Decree.[2]

Form No. 6467.[3]

In the matter of the application of the *Hisdale Dry Goods Company* for the Dissolution of its Charter. } In the Court *of Common Pleas*, No. *1*, of the County of *Allegheny*, of the *December* Term, 1897. No. *102*.

And now, to wit, on this *eighth* day of *December*, A. D. 1897, it appearing that, according to the order of this court, notice of the

1. Consult the title VERIFICATIONS.
2. **For the formal parts** of decrees, generally, consult the title DECREES.
3. *Pennsylvania.*— Bright. Pur. Dig. (1894), p. 426, § 115, *et seq.* See also list of statutes cited *supra*, note 1, p. 735.

application by petition of the *Hisdale Dry Goods Company* for dissolution, and that said application would be granted on the *fifth* day of *November*, 1897, unless exceptions thereto should be filed on or before that day, was published once a week for three weeks, according to law, and the rules of court, as appears by affidavits filed and the certificates of the auditor-general, state treasurer, and the attorney-general having been filed in this case, showing that all taxes due the *commonwealth* of *Pennsylvania* have been paid into the state treasury by said corporation, it is now ordered and decreed that the accounts of the directors of said corporation, filed with the petition aforesaid, be approved and confirmed absolutely, and that said corporation be and it is hereby dissolved, and all and singular its powers, franchises, privileges and faculties are hereby extinguished and determined forever. Provided, that this decree shall not go into effect until a certified copy thereof be filed and recorded in the office of the secretary of *commonwealth*.

3. Proceedings After Dissolution.

a. By or on Behalf of Corporation.[1]

(1) By Receiver.

COMPLAINT OF RECEIVER TO OBTAIN PROPERTY OF INSOLVENT CORPORATION.

Form No. 6468.[2]

Supreme Court — *Washington* County.

Frederick I. Baker, as receiver of the Fort Ann Woolen Company, plaintiff,
against
Louis Emerson and James A. Emerson, defendants.

The above named plaintiff, suing as receiver of the *Fort Ann Woolen Company*, by leave of the court respectfully shows, upon information and belief,

I. That on or about the *twelfth* day of *September*, 1893, in an action

1. **Proceedings by and against corporations**, generally, see *supra*, note 1, p. 527.

2. **This complaint is copied from the record** in the case of Baker *v.* Emerson, 4 N. Y. App. Div. 348. The proceeding was by a receiver to obtain property of an insolvent corporation. The appellate division reversed the judgment of the supreme court in favor of the defendant, dismissing plaintiff's complaint, the court holding that it was shown that the corporation was insolvent and could not pay its debts in due course of its business, and that the defendants had received an advantage and that the company had meant that they should receive an advantage, which constituted an intent to make an undue preference by the corporation in favor of a creditor.

For formal parts of complaints, generally, consult the title Complaints, vol. 4, p. 1019.

of sequestration pending in the *Supreme* Court of the state of *New York*, wherein the *Merchants' National Bank of Whitehall* was the plaintiff, and the above named the *Fort Ann Woolen Company*, a domestic corporation of the state of *New York*, was the defendant, this plaintiff was, in and by final judgment, duly made and entered in the said action, appointed a permanent receiver of the said the *Fort Ann Woolen Company*, and thereupon duly qualified and entered upon the discharge of his duties as such receiver.

II. That, on or about the *twenty-ninth* day of *May*, 1893, and for some time prior thereto, the above named the *Fort Ann Woolen Company* was insolvent, and unable to meet its liabilities as the same became due and payable; that at the date aforesaid the assets of said company according to prices at sales thereof did not exceed in value and amount the sum of *seventeen thousand* dollars, or thereabouts, while the liabilities of the said company then amounted to the sum of *fifty thousand* dollars and upwards.

III. That at the date last above mentioned and for several years prior thereto, the said company was engaged in the manufacture of *woolen goods*, its general office and place of business being located at *Fort Ann*, *Washington* county, *New York*, and that among the customers of said company was the firm of *Hull & Co.*, of *Poughkeepsie*, *New York*, of which firm the defendants are said to be partners.

That during the months of *April* and *May*, 1893, said company sold and delivered to said firm of *Hull & Co.*, at *Poughkeepsie*, *New York*, goods amounting to *eight thousand nine hundred and seventy-seven* dollars and *seventy-one* cents, or thereabouts, and that on the *twenty-ninth* day of *May*, 1893, the said firm of *Hull & Co.* was indebted to said *Fort Ann Woolen Company*, upon account thereof, in the sum of *four thousand nine hundred and fifty-seven* dollars and *seventy-one* cents, or thereabouts.

IV. That at the date last above mentioned and prior thereto various creditors of said *Fort Ann Woolen Company*, comprising banks and individuals, held and owned promissory notes of said company amounting in the aggregate to *fifty thousand* dollars or thereabouts, and upon said last mentioned date certain of said promissory notes amounting in the aggregate to *twelve thousand* dollars and upwards, past due, unpaid and lying under protest, were held and owned by the *First National Bank of Glens Falls*, the *Central National Bank of Troy*, and other creditors.

V. That on or about the date last above mentioned, *John M. Barnett* was the president and treasurer of said *Woolen Company* and *Volney A. Richmond* was its secretary. That at or prior to the said date, said banks above mentioned declined and refused to renew said notes, or extend the time for the payment thereof, and threatened legal proceedings against said company, unless the same were promptly paid. That said firm of *Hull & Co.* and these defendants were informed thereof and had notice and knowledge of the financial condition of said company at said date. That on the *second* day of *June*, 1893; attachments were issued against said company, and on the *fifth* day of *June*, 1893, the same were levied and said company suspended business.

VI. That the defendants *Louis Emerson* and *James Emerson* are now,

and were during several years last past, copartners doing business under their firm name of *Emerson & Co.*, private bankers at *Warrensburgh*, *Warren county*, *New York*. That on or about the *second* day of *February*, 1893, the defendants discounted for said *Fort Ann Woolen Company* its promissory note, dated that day, for the sum of *three thousand* dollars, payable *four* months from date; that said note matured on the *fifth* day of *June*, 1893.

VII. That on or about said *twenty-ninth* day of *May*, 1893, said *John M. Barnett* and *Volney A. Richmond*, the president and secretary of said *Fort Ann Woolen Company*, for and in behalf of said corporation, made the draft or bill of exchange of said company in writing, dated on that day, directed to the said firm of *Hull & Co.*, requiring them to pay to the order of the defendants *three thousand and seventy-five* dollars on the *first* day of *November*, 1893, and delivered the same to defendants and thereupon credit said firm of *Hull & Co.*, upon account of goods theretofore sold and delivered as hereinbefore mentioned, with the sum of *three thousand and seventy-five* dollars; that the interest upon said draft or bill of exchange, from the date it was drawn until the date of maturity, *November 1*, thereafter, amounted to *seventy-five* dollars. That, thereupon, said draft or bill of exchange was duly presented to said *Hull & Co.* for acceptance, and was accepted, and said *Fort Ann Woolen Company* debited the amount thereof to said *Hull & Co.* upon their account with said *Fort Ann Woolen Co.*, for goods sold and delivered as hereinbefore set forth.

VIII. That said draft or bill of exchange, or the proceeds thereof, was received and accepted by the said defendants in payment and satisfaction of said promissory note of *three thousand* dollars, maturing on the *fifth* day of *June* thereafter, and thereupon said note was canceled; that said draft or bill of exchange was paid at maturity by said firm of *Hull & Co.*

IX. That the above mentioned transactions of the *twenty-ninth* day of *May*, 1893, or thereabouts, were had, and that said draft or bill of exchange was made and accepted, and the same, or the proceeds thereof, transferred to said defendants, and said note paid in contemplation of the insolvency of said *Fort Ann Woolen Company*, and in violation of the statute in such case made and provided; and that the transactions above mentioned and described constituted an unlawful transfer or assignment, in contemplation of the insolvency of said corporation, to the defendants, and that such transfer or assignment was void.

X. That prior to this action plaintiff, as receiver aforesaid, demanded payment from the defendants of said sum of *three thousand* dollars, and that the same be refunded and restored to the plaintiff as assets of said corporation for the benefit of its creditors, but that the defendants have neglected to comply with such demand.

Wherefore plaintiff demands judgment against the defendants for the sum of *three thousand* dollars, besides interest thereon from the *twenty-ninth* day of *May*, 1893, besides the costs of this action; and for such other or different relief as may be right.

Potter & Lillie, Plaintiff's Attorneys.

(2) For Mandamus.[1]

Form No. 6469.[2]

To the Honorable the Judges of the *Supreme* Court of the *Commonwealth* of *Pennsylvania*, *Middle* District:

The *Commonwealth* of *Pennsylvania* on relation of *The Alliance Petroleum and Coal Company*, a corporation, respectfully represents:

That on the *twenty-eighth* day of *February*, 1865, *J. J. Allen* and four others associated themselves to form a corporation under the act of *July 18*, 1863, for incorporating *mechanical manufacturing*, *mining and quarrying companies*, and by their agreement it was provided that their principal office should be in *Philadelphia*; that having complied with the provisions of the law, the governor incorporated them by letters patent on the *twenty-third* day of *March*, 1865, by the name of *The Alliance Petroleum and Coal Company*; that on the *twenty-seventh* day of *February*, 1866, they applied to the Court *of Common Pleas* of *Philadelphia* to be dissolved, and that court decreed, on the *ninth* day of *April*, 1866, that the corporation "be hereby dissolved." That the said *Alliance Petroleum and Coal Company* further set forth that they had transmitted to *Eli Slifer*, secretary of the *commonwealth*, a certified copy of said decree with the request that it be filed in his office according to the provisions of the act of assembly, and that he refused to permit the same to be filed.

The petitioner showing the premises, and that he is without further adequate and specific remedy at law, therefore prays that an alternative writ of mandamus may be issued directed to the said *Eli Slifer*, the said secretary of the said *commonwealth*, requiring him the said secretary to receive and file the decree above set forth or that a rule on the said secretary may be granted requiring him to show cause why the mandamus should not be issued against him for the purposes aforesaid, and your petitioner will ever pray, etc.

Daniel Webster, Attorney-General,
Attorney for Petitioner.

(*Verification.*)[3]

(3) To Revive Suit against Debtor.[4]

Form No. 6470.[5]

1. For forms relating to mandamus proceedings, generally, consult the title Mandamus.

2. **This petition was based on the facts** in Com. *v.* Slifer, 53 Pa. St. 71. Peremptory mandamus was awarded directed to the secretary of the commonwealth. **For the formal parts** of petitions of this character consult the title Petitions.

3. Consult the title Verifications.

4. For Forms relating to reviving of suits, generally, consult the title Revivor and Abatement.

5. **This petition is based on the facts** in McCoy *v.* Farmer, 65 Mo. 244, in which case it was held that the supreme court would not review the action of the trial court in overruling a motion to dismiss on the ground that the charter of the plaintiff corporation had expired and in permitting a substitution of parties and a revival of the suit, unless these were assigned as errors in a motion for a new trial and that the debts due a moneyed corporation had not become extinct upon its dissolution.

John P. McCoy and (*names of others*), plaintiffs,
against
William Farmer and (*names of others*),
defendants.

In the *Circuit* Court of *Cass* County, State of *Missouri*. To the *May* Term, 1874.

Plaintiffs state that hitherto, to wit, on the *first* day of *May*, 1871, suit was commenced in this *Circuit* Court by the *Independence Fire and Marine Mutual Insurance Company*, a corporation organized under the laws of the state of *Missouri*, on a note executed to it by the defendants due *four* months after date, and dated *January 1*, 1861, for *ninety-six* dollars and *seventy-three* cents. That defendants appeared to the action and filed their answer, subsequently to which time, *November*, 1873, the charter of the said company, by the terms of the act creating it, expired, at which time the present plaintiffs were elected directors of said corporation at the last meeting held for that purpose by the said company, and that no other directors were elected at any time subsequently.

Wherefore, plaintiffs pray that they, being the last board of directors, should be permitted to prosecute the same as trustees for the benefit of all persons interested.

Oliver Ellsworth,
Attorney for Plaintiffs.

(*Verification.*)[1]

(4) For Writ of Prohibition.[2]

Form No. 6471.[3]

In the *Supreme* Court of the State of *California*.

Theodore Havemeyer and (*naming the others*), petitioners,
against
The Superior Court for the City and County of San Francisco, Department No. 6, William T. Wallace, Judge.

Petition for Writ of Prohibition.

To the Honorable the Judges of the *Supreme* Court of the state of *California*:

1. Your petitioners respectfully represent, that in the month of *November*, 1888, the people of the state of *California*, on the relation of the *attorney-general*, commenced an action in the *Superior* Court of the *city and* county of *San Francisco* against the *American Sugar Refinery Company*, a corporation organized under the laws of the state of *California*. That the object of such action was to have declared forfeited the charter of said company. That said cor-

1. Consult the title Verifications.

2. For forms relating to writ of prohibition, generally, consult the title Prohibition, Writ of.

3. **This petition for a writ of prohibition** was based on the facts in Havemeyer *v.* Superior Ct., 84 Cal. 327, in which case an absolute and peremptory writ of prohibition was issued, the court holding that when a trading corporation ceased to exist, its property should be used to pay its debts and that only a creditor or stockholder can ask for the appointment of a receiver to take charge of the corporate property.

poration appeared and answered to the complaint, and after trial had, the judgment of said *Superior* Court was pronounced declaring the forfeiture and imposing upon the corporation defendant a fine of *five thousand* dollars, and costs of suit. That said judgment was rendered on the *eighth* day of *January*, 1890, and on the same day, at the instance of the attorneys representing the state, a rule was issued and served requiring the said corporation and its attorneys to show cause, on the *tenth* day of *January*, why a receiver should not be appointed to take charge of the estate and effects of the said defendant corporation, and to distribute the same according to law, or to preserve the same pending an appeal herein, if such appeal be taken herein, on the ground that said defendant corporation has been dissolved and has forfeited its corporate rights. That on said *eighth* day of *January*, the corporation duly appeared and the hearing was continued until the *twentieth* day of *January* of the same year. That in the meantime, on the *eighteenth* day of *January*, 1890, the corporation duly served and filed its notice of appeal to this court from the judgment against it, and at the same time filed in due form a bond in the penal sum of *twelve thousand* dollars to stay proceedings on said judgment. That the motion for a receiver came on to be heard, and the judge of the said *Superior* Court held the matter under advisement until the *seventeenth* day of *February*, 1890, on which day he made an order appointing a receiver, in which, among other things, the receiver was directed to take charge of all the property, real, personal and mixed, of the said defendant, to hold the same, and to dispose of it under the direction of the court, upon the filing of a bond, which was to be approved by the said judge. That, later in the same day, the said receiver presented his bond for approval, and it was duly approved.

2. That ever since the *twenty-first* day of *March*, 1889, your petitioners have been the owners in fee simple in their own right of the several tracts and parcels of land in *San Francisco* (*Here was set forth specific description of the land and buildings*); that ever since said date they have been carrying on in said buildings the business of refining sugars for sale in the markets of *California* and elsewhere; and they, also, have offices, furniture, books, and other personal property used by them in and about said business; that they do not use, hold or possess said property, or any part thereof, in trust, for the use or benefit of the *American Sugar Refinery Company*, the defendant in the action referred to, or any of its directors, trustees, creditors or stockholders, but solely for themselves, and for their own exclusive use and benefit, and have ever since said *thirty-first* day of *March*, 1889, been in the quiet and peaceable possession of the same, claiming title thereto and the exclusive ownership thereof; that since *September*, 1889, *Henry C. Mott* has been the general agent and attorney in fact of the petitioners, in actual charge and custody of all of said property, and duly authorized to conduct said business.

3. That the said receiver appointed by the said *Superior* Court made various attempts to take possession of the property and premises of your petitioners, but that he has in fact failed to so obtain possession, and never did have, and has not now, possession

of the property, or any part thereof, heretofore belonging to the *American Sugar Refinery Company*, and which is now claimed by the petitioners to belong to them. But that the said receiver, notwithstanding these repeated failures to obtain possession of the said property, and your petitioners' constant refusal of and resistance to his demands, is threatening to cause the arrest of such employees of your petitioners as have charge of the premises, that is to say, the *agent* and the *superintendent of the works*, for contempt of the said *Superior* Court in resisting his demand. That great damage would result from the possession of said property by the receiver and the consequent stoppage of the works.

4. Your petitioners further represent that they have through their agent, *Henry C. Mott*, presented the foregoing facts to the *Superior* Court, and called its attention to the excess of jurisdiction by it committed in making said order, and in directing the said receiver to enter upon and take possession and control of their said property, and that they have requested said court to modify its said order so as to direct him to bring a proper action for the recovery of said property instead of taking possession without action, which request said *Superior* Court has denied.

5. Your petitioners further represent that the said order, so far as it authorizes the receiver to take the property now in their possession and claimed by them, exceeds the power and jurisdiction of the said *Superior* Court and is in violation of their rights; that they are not parties to said action of the people against said *American Sugar Refinery Company*, nor did they make any appearance or participate in any respect in said action.

6. Your petitioners further represent that after said judgment against the said *American Sugar Refinery Company* was entered, said company, on the *eighteenth* day of *January*, 1890, took and perfected an appeal therefrom to this court and duly filed an undertaking sufficient to stay execution thereof.

7. Your petitioners further represent, that they have no plain, speedy or adequate remedy against the said proceedings of the said *Superior* Court in ordinary course of law.

Wherefore plaintiffs ask that a writ of prohibition herein may be issued to said *Superior* Court in the *city and* county of *San Francisco*, department No. *6*, and the judge thereof, commanding and directing said court, and said judge, and also its said receiver, *Patrick Reddy*, to desist and refrain from further proceedings upon the order aforesaid appointing its said receiver, and from exercising any of the powers in said order granted with regard to any property in the possession of said *Havemeyer & Elder* through their agents or employees, and especially with said *sugar refinery*, and from interfering with or disturbing the possession and control of the said *Havemeyer & Elder* of the said *sugar refinery*, or any other property by them possessed and claimed in their own right.

(*Signatures of Petitioners.*)

Oliver Ellsworth Attorney for Petitioners.

(*Verification.*)[1]

1. Consult the title VERIFICATIONS.

(5) Answer[1] Alleging Dissolution.

SUPPLEMENTAL ANSWER OF DEBTOR ALLEGING EXPIRATION OF CORPORATION.

Form No. 6472.

(Precedent in Conwell *v.* Pattison, 28 Ind. 511.)[2]

[State of *Indiana*, } In the *Marion Common Pleas* Court, *February*
Marion County. } Term, 1867.

Abraham B. Conwell, President of the Bank of Connersville,
v.
T. T. N. Pattison.
} Supplemental Answer.

Now comes the defendant, and by leave of court files his supplemental answer to the complaint of plaintiff herein, and for answer thereto says][3] that said *Bank of Connersville* was organized under the general Banking law of the state of *Indiana*, approved May 28th, 1852; that said bank, about the *1st* of *January*, 1855, failed to redeem its notes in circulation, and went into liquidation, and that in *May*, 1855, the bonds and securities deposited with the Auditor of State were sold by said Auditor, under the law, in *New York*, to redeem the circulation of said bank, and said bank wholly ceased to do a banking business, and failed and refused to comply with the requirements of the act of the general assembly of the State of *Indiana*, approved March 3d, 1855, and thereby forfeited its corporate power to do a general banking business, and that the time fixed by law for such banks to wind up their business expired on the *1st* of *March*, 1857, at

1. **For formal parts** of answers, generally, consult the title Answers in Code Pleading.

2. **Expiration of Charter.** — Although the *Indiana* statute allowed a corporation to continue for three years after the expiration of its charter in order to collect debts due it, where no receiver had been appointed and no extension of time for collecting such debts had been obtained, they are, at the expiration of said three years, totally extinguished. Conwell *v.* Pattison, 28 Ind. 509. In this action, plaintiff, as president of a bank, brought suit against the defendant as indorser of two bills of exchange. Demurrer to the complaint was overruled and defendant filed his answer consisting of three paragraphs. The court held that the fourth paragraph of the answer was well pleaded and contained a valid defense, and therefore judgment for the defendant was proper.

An answer in a suit on a promissory note executed to a corporation, brought by the payee setting up that the corporation had been dissolved and ceased to exist since the execution of the note, may be pleaded in abatement but not in bar. Hartsville University *v.* Hamilton, 34 Ind. 506. In that case defendant's answer contained three paragraphs, which are set out in full in the reported case, all of which were held to be defective on demurrer for the reasons stated in the opinion. The first paragraph of the answer was good, with the exception that it should have stated that the corporation came to an end by some legal process. The third paragraph was defective for failure to properly set up false representations. False representations upon which fraud can be predicated must show existing facts or facts alleged to have existed at the times, and not the promises to be performed in the future. The answer might be readily corrected in accordance with the decision and used as a good pleading.

3. The words in [ ] are not found in the reported case, but have been added to make the form complete.

which time said bank ceased to exist for any purpose whatever, and had no legal capacity thenceforward to sue or be sued, or to transact any business whatever, having forfeited its charter and all powers under it.

And the defendant says that *Abraham B. Conwell*, as president of said bank, has no legal capacity whatever to maintain this suit, in behalf of, or for the use of said bank, for the reason that, at the time of the commencement of said suit, said bank had no legal existence. Wherefore, they claim judgment for costs.

[*Jeremiah Mason*, Defendant's Attorney.

(*Verification.*)[1]] [2]

b. Against Corporation.[3]

(1) Complaint.[4]

BY LESSOR AGAINST DISSOLVED INSOLVENT CORPORATION.

Form No. 6473.[5]

State of *Minnesota*, } *District* Court,
Hennepin County. } *Fourth* Judicial District.

Robert C. Kalkhoff and [*John Doe*], plaintiffs,
against
B. F. Nelson, as receiver of Thomas H. Bishop & Co., defendant.

The plaintiffs above named complain of the defendant above named and say:

1. That the *James H. Bishop & Company* was on the *first* day of *May*, 1891, and ever since has been a corporation organized under the laws of this state.

2. That on that day it and the plaintiff duly made and delivered each to the other a lease of the premises described in the complaint in this action, then and now owned by the plaintiff, whereby they leased the premises to the corporation for the term of *ten* years, for the reserved rent of *six thousand* dollars for each year, payable *five hundred* dollars *monthly in advance*, on the *first* day of each and every month, which rent the corporation covenanted so to pay to them, and to surrender up the premises at the end of the term in good repair. That said corporation went into possession of the premises under the lease, and paid the monthly instalments of rent up to and including the *first* day of *January*, 1894, but the *five hundred* dollars

1. Consult the title VERIFICATIONS.

2. The words in [ ] are not found in the reported case, but have been added to make the form complete.

3. **Proceedings by and against corporations**, generally, see *supra*, note 1, p. 527.

4. **For formal parts** of complaints, generally, consult the title COMPLAINTS, vol. 4, p. 1019.

5. **Liability for Rent.** — By the dissolution the corporation became unable to pay the sums due on a lease extending beyond its dissolution, and by such breach a cause of action immediately accrued to the lessors for the recovery of all damages, present and prospective. Kalkhoff *v.* Nelson, 60 Minn. 284.

rent due and payable on the *first* day of *February*, 1894, has never been paid. That on the *seventh* day of *February*, 1894, upon the petition of stockholders, the corporation, which was then insolvent, was dissolved by the *District* Court of *Hennepin* county, and the respondent appointed receiver, pursuant to the provisions of Gen. Stat. (1878), c. 34, tit. 8 (Gen. Stat. 1894), §§ 3391–3436.

3. That the receiver occupied the premises from said date until the *fifth* day of *June*, 1894, for the purpose of taking possession and disposing of the merchandise of the corporation in the building thereon, when he vacated the premises, and attempted to surrender them to the plaintiffs, who refused to accept the attempted surrender, and they notified the receiver that they would not do so, but that if he insisted on abandoning the said premises they would rent them for the best prices obtainable, at the risk of the lessee; and that if such prices would not equal what they were entitled to from him as receiver of the said company they would charge the same to him as receiver of the said company. That the plaintiffs were in fact unable to rent the said premises, and they thereafter demanded from the said receiver the damages sustained by reason of the breach of the covenant of the lessee to pay rent at the stipulated rate for the full term of the lease; for damages for the breach of the covenant to keep the premises in repair; and for the sum of *five hundred* dollars, being rent due for *February*, 1894. But said receiver and defendant herein then refused and still refuses to allow said claims.

Wherefore plaintiff asks judgment against the defendant:

(1) For damages sustained by reason of the breach of the covenant of the lessee to pay rent at the stipulated rate for the full term of the lease;

(2) For damages for a breach of the covenant to keep the premises in repair;

(3) For *five hundred* dollars rent due on the *first* day of *February*, 1894, and for their costs.

Oliver Ellsworth, Plaintiff's Attorney.

(*Verification.*)[1]

(2) Petition[2] of Creditors.[3]

(*a*) *To Declare Trust on Corporate Property.*

Form No. 6474.[4]

State of *Kansas*, }
Wyandotte County. }

In the *District* Court in and for the county and state aforesaid:

1. Consult the title Verifications.

2. **For the formal parts** of petitions or complaints, generally, consult the title Complaints, vol. 4, p. 1019.

3. **Creditors' suits,** for forms relating to, generally, consult the title Creditors' Suits, *post*, p. 874.

4. **This petition is based on the facts** in Chicago, etc., Bridge Co. *v.* Fowler, 55 Kan. 17, in which case the court held that the plaintiff was entitled to the relief prayed for.

The Chicago and Atchison Bridge Company, plaintiff,
against
The Anglo-American Packing and Provision Company, *George Fowler*, *Alexander Muir and Arthur Booth*, defendants. } Petition.

The plaintiff states that, on the *twenty-fifth* day of *June*, 1885, it obtained a judgment against the defendant, the *Anglo-American Packing and Provision Company*, in the *United States Circuit* Court, for *three thousand four hundred and four* dollars and *seventy-four* cents; that an execution was issued upon the judgment and placed in the hands of the *United States marshal*, who, on the *sixth* day of *December*, 1887, levied upon certain real estate in *Wyandotte* county as the property of the said *Anglo-American Company*. (*Here follows a description of said property.*) That said *Anglo-American Packing and Provision Company* was organized on the *nineteenth* day of *November*, 1878, with a capital stock of *one hundred and fifty thousand* dollars, of which *George Fowler* was appointed the general manager, which position he continued to occupy until shortly before the rendition of the judgment in favor of plaintiff herein on the *twenty-fifth* day of *June*, 1885, and that, as such manager, he had knowledge of the indebtedness of the *Anglo-American Company* to the plaintiff herein, and was fully aware that the latter had not been paid. That, on the *thirtieth* day of *May*, 1885, the said *Anglo-American Packing and Provision Company*, by its officers, made a deed of conveyance pretending to convey all of the real estate in question, and above referred to, to *George Fowler*, for a pretended consideration of *five hundred and eighty thousand* dollars; that the conveyance was made for the purpose of defrauding the creditors of the said *Anglo-American Company*, and especially the plaintiff herein. That there was no consideration for the said transfer, and that the pretended indebtedness of the *Anglo-American Company* to the said *Fowler*, claimed to be a consideration, was fraudulent and fictitious. That, at the time of the transfer, the *Anglo-American Company* had no other property or assets, except that included in the transfer, and that the said *George Fowler*, defendant herein, accepted the conveyance for the purpose of carrying out the fraudulent intent and purpose of placing the property beyond the reach of the plaintiff and other creditors. That, shortly after the deed above referred was made, the said *George Fowler* conveyed the property in question to *Alexander Muir* and *Arthur Booth*, defendants herein, which conveyance was placed on record without any consideration whatever passing from the said *Muir* and *Booth* to either *Fowler* or the said *Anglo-American Company*. That the plaintiff herein did not discover the above fraudulent transaction until within *twelve* months before the bringing of this action. That the said *Anglo-American Company* is insolvent, and that, since the transfer of its property and assets, as is above set forth, it has ceased to do business, and has practically abandoned its corporate rights and privileges. That said judgment now amounts to, including interest and costs, the sum of *three thousand seven hundred and sixty-eight* dollars and *sixty-four* cents.

Wherefore plaintiff prays judgment that the property should be

adjudged to be that of the *Anglo-American Packing and Provision Company*, and that *George Fowler*, defendant herein, be held to have received and held the property in trust for the benefit of the creditors of the said *Anglo-American Company*, and that the same shall be subject to the payment of said judgment.

And plaintiff further prays that, in case the property cannot be subjected to the payment of said judgment, the said *George Fowler* shall be required to account for the full value of the property up to the amount necessary to pay the judgment, and that the plaintiff herein have judgment against him for the sum of *three thousand seven hundred and sixty-eight* dollars and *sixty-four* cents, and for its costs.

Oliver Ellsworth, Attorney for Plaintiff.

(*Verification.*)[1]

(*b*) *To have Sole Remaining Officer Act as Trustee for Creditors.*

Form No. 6475.[2]

John C. Moore and (*naming others*), plaintiffs, against *George W. Whitcomb*, defendant. } In the *Circuit* Court of *Mississippi* County, State of *Missouri*. To the *October* Term, 1870.

The plaintiffs state that, by an act of the legislature of the state of Missouri, approved February 19, 1866, entitled "An Act to provide for the sale of certain railroads and property by the governor, to foreclose the State's lien thereon, and to secure the early completion of the Southwest Branch Pacific, the Platte Country, the St. Louis & Iron Mountain, and the Cairo & Fulton railroads of Missouri," the charter of said corporation was repealed, and the government of the state of *Missouri*, by which the same was granted, reclaimed, seized and took possession of the franchises of said corporation, and together with the road, rolling stock and other property of said corporation, on the *first* day of *October*, 1866, sold said franchises, whereby said corporation, on the day and year aforesaid, became and is dissolved.

Plaintiffs further state that said corporation failed to complete its railroad; that the same is in an unfinished condition and abandoned; that the same has become dilapidated and gone to waste, and that the corporation has not kept up or maintained its corporate existence, or had or held a legal election for officers thereof since the election held in 1861; and that the present defendant is the only surviving of the officers of said dissolved corporation qualified under the constitution and laws of this state to act as a trustee of the property thereof.

Wherefore plaintiffs pray that the defendant may be directed to act as a trustee of the property of said company for all persons interested in the distribution of the assets of said company.

Oliver Ellsworth, Attorney for Plaintiffs.

1. Consult the title VERIFICATIONS.

2. **This petition is based on the facts** in Moore *v.* Whitcomb, 48 Mo. 543. Consult the statute relating to trustees of dissolved corporations, Mo. Rev. Stat. (1889), § 2513.

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By W. R. Buckminster.

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CROSS-REFERENCES.

For Forms of Bonds and Undertakings for Costs on Appeal, see the title BONDS AND UNDERTAKINGS ON APPEAL AND ERROR, vol. 3, p. 833.

For Forms of Bonds for Costs upon Removal of Actions from One Court to Another, see the title REMOVAL OF CAUSES.

For Forms of Executions for Costs, see the title EXECUTIONS.

For Forms of Orders allowing Amendment upon Payment of Costs, see the title AMENDMENTS, vol. 1, pp. 751, 752.

For Forms of Stipulations for Costs in Admiralty, see the title ADMIRALTY, vol. 1, pp. 463–465.

See also the GENERAL INDEX to this work.

For matters of Substantive Law connected with the subject of Costs, see the title COSTS, 4 AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW (2d ed.), p. 313.

For matters of Pleading and Practice connected with the subject of Costs, see the titles COSTS, 5 ENCYCLOPÆDIA OF PLEADING AND PRACTICE, p. 100; *ADDITIONAL ALLOWANCE*, 1 ENCYCLOPÆDIA OF PLEADING AND PRACTICE, p. 211.

I. SECURITY FOR COSTS.

1. The Affidavit.[1]

a. In Support of Motion.

(1) IN GENERAL.

(*a*) *Plaintiff a Nonresident.*

aa. GENERALLY.

1. For forms of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

Form No. 6476.[1]

Supreme Court, *City and* County of *New York.*

John Doe, plaintiff,
against
Richard Roe, defendant.

City and County of *New York*, ss.

Joseph Story, being duly sworn, deposes and says:

I. That he is the attorney[2] for the defendant in the above entitled action.

II. That said action was begun on the *fourth* day of *May*, 1897, by the service of a summons and complaint on the defendant herein. †

1. This affidavit is drawn under N. Y. Code Civ. Proc., § 3268 (Birds. Rev. Stat. (1896), p. 717, § 63), but with change of caption will answer for the following states, to wit:

Alabama. — Civ. Code (1886), § 2858.

Arkansas. — Sand. & H. Dig. (1894), § 781.

Arizona. — Rev. Stat. (1887), § 906.

California. — Code Civ. Proc. (1897), § 1036.

Colorado. — Mills' Anno. Stat. (1891), § 675.

Idaho. — Rev. Stat. (1887), § 4915.

Illinois. — Starr & C. Anno. Stat. (1896), p. 1064, par. 1.

Indiana. — Horner's Stat. (1896), § 589.

Kentucky. — Bullitt's Civ. Code (1895), § 616.

Maryland. — Pub. Gen. Laws (1888), art. 24, § 9.

Minnesota. — Stat. (1894), § 5518.

Missouri. — Rev. Stat. (1889), § 2915.

Montana. — Code Civ. Proc. (1895), § 1871.

Nebraska. — Comp. Stat. (1897), § 6208.

Nevada. — Gen. Stat. (1885), § 3510.

New Jersey. — Gen. Stat. (1895), p. 2593, par. 348.

New Mexico. — Comp. Laws (1884), § 1843.

North Dakota. — Rev. Codes (1895), § 5597.

Ohio. — Bates' Anno. Stat. (1897), § 6701.

Oklahoma. — Stat. (1893), § 4833.

Oregon. — Hill's Anno. Laws (1892), § 2062.

Rhode Island. — Gen. Laws (1896), c. 247, § 3.

South Carolina. — Rules of Practice for Circuit Courts, Rule X.

South Dakota. — Dak. Comp. Laws (1887), § 5207.

Tennessee. — Code (1896), §§ 4926, 4927.

Texas. — Rev. Stat. (1895), art. 1440.

Utah. — Rev. Stat. (1898), §§ 3354, 3355.

Washington. — 2 Hill's Anno. Stat. (1891), § 844.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 2943.

Wyoming. — Rev. Stat. (1887), § 2688.

In all states except *New York* it is advisable to add a clause to the affidavit which shall state that the defendant has a good defense to the action, specify it, and suggest that it is probable that a judgment for costs will be recorded against the plaintiff in favor of the defendant. This should certainly be done whenever the appeal is to the discretion of the court.

Security is also required in the following states before the clerk will issue process in favor of a nonresident, to wit:

Connecticut. — Gen. Stat. (1888), § 896.

District of Columbia — Comp. Stat. (1894), p. 310, § 12, p. 446, § 30.

Kansas. — Gen. Stat. (1889), § 4682.

Maine. — Rev. Stat. (1883), c. 81, § 6.

Massachusetts. — Pub. Stat. (1882), c. 161, § 24.

Michigan. — How. Anno. Stat. (1882), § 7296.

Mississippi. — Anno. Code (1892), § 861.

New Hampshire. — Pub. Stat. (1891), c. 218, § 8.

North Carolina. — Code Civ. Proc. (1891), § 209.

Pennsylvania. — Bright. Pur. Dig. (1894), p. 1131, § 53.

Vermont. — Stat. (1894), §§ 920–925, 1066. These sections apply to residents as well as nonresidents.

2. Who may Make. — The affidavit may be made by any one familiar with the facts. 2 Wait's Prac. 573.

That no answer has been served and that the time to answer has not yet expired.*

III. That the plaintiff is not,[1] and at the time of the beginning of this action was not, a resident of the state of *New York*, but resides, and then resided, in the state of *New Jersey*.

IV. That no previous application for an order requiring the plaintiff to file security for the costs, or for an order to show cause why he should not be compelled to file such security, has been made in this action.

V. That the reason why an order to show cause why the plaintiff should not be compelled to file security for the costs, and why the defendant should not have such other further relief as may be necessary, is sought, is because (*Here state the reason why the motion cannot be regularly noticed for the motion day.*)[2]

Joseph Story.

Sworn to before me this *tenth* day of *May*, 1897.

Abraham Kent,
Notary Public, *New York* County.

Form No. 6477.[3]

In the *District* Court in and for *Polk* County, *Iowa*.

John Doe, plaintiff,
against
Richard Roe, defendant.

State of *Iowa*, }
Polk County. } ss.

I, *Richard Roe*, being first duly sworn, say that I am the defendant in this action; that I have a good defense to the whole of this action

1. Section 3268 of the New York Code (Birds. Rev. Stat. (1896), p. 717, § 63) requires merely that the plaintiff should have been a nonresident at the commencement of the action. Ambler *v.* Ambler, 8 Abb. Pr. (N. Y. Supreme Ct.) 340. But it is usual to add a statement as to present residence.

Security for costs on the ground of nonresidence is not required unless all the plaintiffs are nonresidents. N. Y. Code Civ. Proc., § 3270 (Birds. Rev. Stat. (1896), p. 718, § 65); Sims *v.* Bonner, 60 N. Y. Super. Ct. 63.

In an action brought by a nominal party for the use of another the affidavit supporting a motion for security must deny the solvency of the *cestui qui use* and his residence within the jurisdiction. O'Connell *v.* Rea, 51 Ill. 306.

2. If an absolute order is sought by notice for the regular motion day, an order to show cause becomes unnecessary and paragraphs IV and V may be omitted. As an *ex parte* application for an order to show cause, paragraph IV is required by Hun's Ct. Rules (1896), No. 25, and paragraph V by Hun's Ct. Rules (1896), No. 37. These paragraphs of the form are drafted to meet the *New York* rules of court. They are not necessary except in states where the court rules specially require such clauses in affidavits for *ex parte* motions and applications for orders to show cause.

3. *Iowa*. — Code (1897), § 3847. The affidavit need not set out the facts constituting the defense, but only that the party filing it has a good defense. D. M. V. Live Stock Ins. Co. *v.* Henderson, 38 Iowa 446.

Delaware. — The provisions of the *Delaware* statute are substantially the same, save that the affidavit must state that the defense is to the whole action, and must state the nature and character of the defense. Del. Rev. Stat. (1893), p. 791, § 8.

(*or to a certain part of the action, stating what part*), and that the plaintiff is a nonresident of this state.

Richard Roe.

Subscribed and sworn to before me this *first* day of *July*, 1896.

Abraham Kent,
Notary Public, *Polk* County.

Form No. 6478.[1]

State of *Mississippi*, } In *Chancery* Court,
De Soto County. } *October* Term, A. D. 1897.

John Doe
against } No. *212*.
Richard Roe.

Personally appeared before me, the undersigned, a justice of the peace of said county, *John Hancock*, clerk of the *Chancery* Court of the county aforesaid, who, on oath, says:* That the complainant in the above styled case is a nonresident of the state of *Mississippi*, and has not, as he believes, sufficient property in said state out of which the costs can be made if adjudged against him.

John Hancock, Clerk.

Sworn to and subscribed before me this the *sixth* day of *October*, A. D. 1897. *Abraham Kent*, J. P.

bb. Where Plaintiff Removes After Commencement of Suit.

Form No. 6479.[2]

(*Commencing as in Form No. 6476, and continuing down to* *.)

III. That since the beginning of this action and about the month of *March last*, the plaintiff in this action removed[3] from this state to the state of *New Jersey*, with the intention of there permanently residing. That he has ceased to be a resident of this state and that he is not within the jurisdiction of this court, but resides at *Newark* in the state of *New Jersey*.

IV. (*Concluding as in Form No. 6476.*)

cc. Foreign Corporation.

Form No. 6480.[4]

(*Commencing as in Form No. 6476, and continuing down to* *.)

1. *Mississippi.* — Anno. Code (1892), § 862.

2. *New York.* — Code Civ. Proc., § 3269 (Birds. Rev. Stat. (1896), p. 718, § 64).

Similar provisions exist in nearly all the states. See the list of statutes cited *supra*, note 1, p. 760, and also the statutes following, to wit:

Alabama. — Civ. Code (1886), § 2861.

Illinois. — Starr & C. Anno. Stat. (1896), p. 1067, par. 4.

Iowa. — Code (1897), § 3849.

Massachusetts. — Pub. Stat. (1882), c. 167, § 30.

Missouri. — Rev. Stat. (1889), § 2916.

3. Actual, not intended removal is meant. Morton *v.* Domestic Tel. Co., 1 Abb. N. Cas. (N. Y. Supreme Ct.) 290.

4. See statutes cited *supra*, note 1, p. 760.

III. That the plaintiff herein is a foreign corporation incorporated under the laws of the state of *New Jersey*.

IV. (*Concluding as in Form No. 6476.*)

(*b*) *Plaintiff an Administrator.*

Form No. 6481.[1]

Supreme Court, *City and* County of *New York*.

John Doe, as administrator of the estate of Richard Styles, deceased, plaintiff, against *Richard Roe*, defendant.

City and County of *New York*, ss.

Joseph Story, being duly sworn, says:

I. That he is the attorney for the defendant in this action.

II. That the plaintiff is the duly appointed administrator of the goods, chattels and choses in action of *Richard Styles*, deceased, being appointed by the *surrogate* of *Albany* county on the *third* day of *January*, 1894.

III. (*Here state the cause of action and the present condition of the same.*)

IV. (*Here state costs already accrued and likely to accrue.*)

V. Upon information and belief that plaintiff's intestate left no estate and that said letters of administration were taken out only to prosecute a claim for damages in causing his death.

VI. That the complaint herein, a copy of which is hereto annexed and made a part of this affidavit, is made only on information and belief, of which information the sources are not given.

VII. Upon information and belief that intestate's death was caused by his own negligence and that the sources of information and belief are the affidavits of *Samuel Short*, verified on the *third* day of *April*, 1894, and of *William West*, verified on the *fifth* day of *April*, 1894, which affidavits are herewith submitted.[2]

1. *New York.* — Code Civ. Proc., § 3271 (Birds. Rev. Stat. (1896), p. 718, § 66).

The order for security for costs against an executor must be upon notice or by order to show cause. An *ex parte* order if granted will be vacated. Swift *v.* Wheeler, 46 Hun (N. Y.) 580. The same rule applies to an order against plaintiff as receiver. Ridgway *v.* Symons, 25 Civ. Proc. Rep. (N. Y. Supreme Ct.) 23.

2. Paragraphs V, VI and VII are adapted from the facts in Caccavo *v.* Rome, etc. R. Co., 59 N. Y. Super. Ct. 129, in which it was held a proper case was made out for the exercise of the court's discretion.

But personal irresponsibility and insolvency of estate alone are not sufficient statements. The merits of the action as shown in the complaint are always to be considered in like manner as if the plaintiff had applied to sue *in forma pauperis*, and if a *prima facie* cause of action appears in the complaint the court will refuse security. Rutherford *v.* Madrid, 77 Hun (N. Y.) 545. And a sworn complaint presenting *prima facie* a good cause of action is reason for refusing application for security. Schmidt *v.* Eiseman, 6 Misc. Rep. (N. Y. Brooklyn City Ct.) 264; Fessenden *v.* Blanchard, 14 Civ. Proc. Rep. (N. Y. Supreme Ct.) 277, 48 Hun (N. Y.) 350.

A statement that the estate has no assets except the claim in litigation is not a cause requiring security. Ryan *v.* Potter, 2 McCarty (N. Y.) 33.

VIII. Upon information and belief that defendant, in case he is successful in this action, will not be able to collect out of decedent's estate the costs herein. That the sources of deponent's information and belief are (*naming them*).

IX. That said deponent is informed and verily belives that this action is not commenced in good faith by said plaintiff, but is in bad faith and improperly begun and continued.[1]

X. That said deponent is informed and verily believes the plaintiff is irresponsible and insolvent, and that if successful in this action deponent will not be able to collect from the plaintiff the costs herein, and that the sources of his information and belief are (*naming them*).

(*Signature and jurat as in Form No. 6476.*)

(*c*) *Plaintiff a Trustee of an Express Trust.*

Form No. 6482.[2]

Supreme Court, *City and* County of *New York.*

John Doe, as trustee for Jacob Wirth and Alfred Case, plaintiff,
against
Richard Roe, defendant.

City and County of *New York*, ss.

Joseph Story, being duly sworn, deposes and says:

I. That he is the attorney for the defendant in this action.

II. That prior to the commencement of this action, one *Lewis Case*, who is not now within the state, claimed to have a cause of action to recover damages against the defendant for a tort alleged

1. Where security is required under section 3271 of the New York Code of Civil Procedure it will be granted only in the discretion of the court. Under the old code, in Wilbur *v.* White, 56 How. Pr. (N. Y. Supreme Ct.) 321, where the allegation in the affidavit was "that there are not funds belonging to the bankrupt's estate represented by him sufficient to pay said costs if defendant succeeded in the action," it was held that the allegation was not sufficient without a further allegation of bad faith or mismanagement in the prosecution of the action. Under the new code, however, in Tolman *v.* Syracuse, etc., R. Co., 92 N. Y. 353, it was held that the court had power in its discretion to require security from an administratrix although the affidavit contained no allegation of mismanagement or bad faith. But if the allegation is not made, other reasons must be shown for the exercise of the discretion of the court. The court will not act merely because the estate is insolvent. Fagan *v.* Strong, 19 Civ. Proc. Rep. (N. Y. Supreme Ct.) 88. So in Hale *v.* Mason, 86 Hun (N. Y.) 500, it was held that in an action brought by a receiver, administrator, etc., the plaintiff will not be required to give security for costs unless it is shown, "in addition to the fact of insolvency," that the action was brought in bad faith or heedlessly or that the plaintiff will not probably succeed.

2. This form is drawn under N. Y. Code Civ. Proc, § 3271 (Birds. Rev. Stat. (1896), p. 718), § 66, and is based on the facts in Fish *v.* Wing, 1 Civ. Proc. Rep. (N. Y. Supreme Ct.) 231, in which case it was held that a plaintiff suing as a trustee of an express trust will be required to file security for costs when one of the beneficiaries is a non-resident of the state, and the other is an infant whose guardian *ad litem* has not filed such security, and that the former rule under section 317 of the Code of Procedure, requiring proof of bad management or bad faith before such trustee will be required to file security, has not been retained in the present revision. See also Swift *v.* Collins, 1 Den. (N. Y.) 659.

(*Here specify*). That the said *Lewis Case*, still prior to the commencement of this action, transferred and assigned said cause of action to *John Doe*, the plaintiff herein, in trust, however, to collect it and to pay over the sum collected to one *Jacob Wirth*, a nonresident, and to *Alfred Case*, the minor son of said *Lewis Case*, in certain specified proportions.

III. That by virtue of said assignment said *John Doe* brings this action as express trustee for the persons above mentioned.

IV. Upon information and belief that the plaintiff is insolvent and that if the defendant shall succeed in this action he will be unable to secure payment of his costs from said plaintiff.

V. That the source of deponent's information as to those portions of this affidavit which are stated to be made on information and belief is investigation which deponent has personally made in execution of his duties as attorney for the defendant in this cause.

(*Signature and jurat as in Form No. 6476.*)

(*d*) *Plaintiff Unable to Pay Costs.*

Form No. 6483.

(Precedent in Hamilton *v.* Dunn, 22 Ill. 259.)[1]

[In the *Cook County Circuit* Court.[2]

James Hamilton }
ats. }
Patrick Dunn. }

State of *Illinois*, }
County of *Cook*. } ss.][3]

James Hamilton personally appears, and being first duly sworn

1. *Illinois.* — Starr & C. Anno. Stat. (1896), p. 1067, par. 4. The affidavit in this case, however, was defeated by the counter affidavit to be found *infra*, Form No. 6488, the court saying, "The rule upon the plaintiff to show cause why he should not give security for costs was properly discharged by the court on the counter affidavit of the plaintiff; that should have as much weight with the court as the defendant's affidavit. Such motions in such cases are not regarded in a very favorable light by courts, the object being most generally procrastination and delay. Slight evidence has been usually held sufficient to discharge such rule."

Where security for costs is sought because the plaintiff would be unable to pay them if awarded against him, the rule should not be granted unless it appears that there is probability that costs will be so awarded against the plaintiff. Where the plaintiffs were suing to recover a valuable tract of land with rents and profits, which was claimed by them as heirs, and where it appeared from the report of the referee that the estate was amply sufficient to meet all charges, it was held error for the circuit court to dismiss the case on motion for want of security for costs and upon proof merely that the plaintiffs possessed no other property subject to execution. The proof should have been made that the plaintiffs were likely to become ultimately liable for costs. Whitsett *v.* Blumenthal, 63 Mo. 479. See Knight *v.* Fisher, 15 Colo. 177, holding that the affidavit must present a case which appeals to the discretion of the court, and Starr & C. Anno. Stat. Ill. (1896), p. 1067, par. 4; Mo. Rev. Stat. (1889), § 2916.

2. The proceedings in this case were actually had in the Cook county court of common pleas.

3. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

deposes and says that he is the defendant in the above entitled suit; that he is well acquainted with, and has, for some months past, well known the said *Patrick Dunn*, the plaintiff in said suit, personally and by reputation. That the said *Patrick Dunn*, according to his own statements and admissions made to this affiant on or about the *first* day of *December last past*, was, and according to the best of his, this affiant's, knowledge, information and belief, still is, utterly insolvent, and has no goods, estate or effects liable to execution, wherefrom such costs or any part thereof, as the said *Patrick Dunn* may be decreed or adjudged to pay in the above entitled cause, can be made, levied or satisfied. This affiant further says that he has, or he is informed by his counsel and verily believes, a good, full and sufficient defense to the above entitled suit on the merits thereof, and that his proceedings in this behalf are not in any manner interposed or intended to delay or retard the trial of the same. This affiant therefore prays that a rule may be entered in the above entitled cause, requiring the said *Patrick Dunn*, within such time as the court, in its discretion, shall see fit, to file good and sufficient security for such costs as may accrue therein, and in default thereof, that said suit may be dismissed, according to the form, force and effect of the statute in such case made and provided.

[(*Signature and jurat as in Form No. 6476.*)][1]

Form No. 6484.[2]

(*Commencing as in Form No. 6478, and continuing down to* *.) That he has good reason to believe, and does believe, that the complainant in the above styled case, though a resident of said state, cannot be made to pay the costs of the said suit in case the same shall be adjudged against him.

(*Signature and jurat as in Form No. 6478.*)

(2) Where there has been Delay in Applying for Security.

Form No. 6485.[3]

(*Title of court and cause, and venue as in Form No. 6476.*)

Richard Roe, being duly sworn, deposes and says:

I. That he is the defendant in this action.

II. That he is not personally acquainted with the plaintiff and had

1. The matter to be supplied within [ ] will not be found in the reported case.

2. *Mississippi.* — Anno. Code (1892), § 862.

3. Security for costs under section 3268 of the New York Code (Birds. Rev. Stat. (1896), p. 717, § 63) can be required only if there is due diligence in application therefor. Such application should be made before answer, and any subsequent delay must be excused by facts stated in the affidavit. Stevenson *v.* New York, etc., R. Co., 49 Hun (N. Y.) 169; Teal *v.* Yost, 16 Civ. Proc. Rep. (N. Y. Super. Ct.) 367; Schwartz *v.* Scott, 25 Civ. Proc. Rep. (N. Y. Supreme Ct.) 53.

Indiana. — A rule of court provides that "motions to require security for costs must be made at the first calling of the docket, unless the affidavit upon which the motion is based shows that the plaintiff's nonresidence was not known to the defendant or his attorney, and that it is made as soon as the fact of such nonresidence comes to his knowledge. When the motion is sus-

no knowledge or belief that said plaintiff was a nonresident until the *seventeenth* day of *May*, 1897, when the fact that at the commencement of this action said plaintiff was and now is a nonresident was discovered (or *became known*) to the defendant.

III. That (*Here state how the fact became known to him, so confirming his previous lack of knowledge.*)

(*Signature and jurat as in Form No. 6476.*)

(3) For Additional Security.

Form No. 6486.[1]

(*Commencing as in Form No. 6476, and continuing down to* †) that (*Here state what has happened in the case and itemize as far as possible the expenses which have been and will be incurred*), and that said costs and disbursements will greatly exceed the sum of *two hundred and fifty* dollars.

III. That the plaintiff is and always has been a nonresident of the state of *New York*, residing, as deponent is informed and believes, in *Jersey City, New Jersey*.

IV. That on the *fourth* day of *May*, 1897, complying with the demands of the defendant's attorney (*or an order of the court specifying it*), the plaintiff's attorney filed an undertaking for the defendant's costs in the sum of *two hundred and fifty* dollars. That after the costs in the action had greatly increased and threatened still further greatly to increase, deponent often requested said attorney for the plaintiff to file additional security for costs in this action, but this, said attorney has neglected and refused to do.

tained, the plaintiff will be required to file the undertaking for costs on the following day." Pancoast *v.* Travelers' Ins. Co., 79 Ind. 174.

1. Additional security for costs may be required "at any time after the allowance of an undertaking for costs" upon proof "that the sum specified in the undertaking is insufficient." N. Y. Code Civ. Proc., § 3276 (Birds. Rev. Stat. (1896), p. 719, § 71). The language of the code, however, does not give the right to require additional security where the plaintiff has paid money into court instead of filing an undertaking. Newhall *v.* Appleton, 57 N. Y. Super. Ct. 154.

Additional security for costs is provided for also by the express words of the statutes in the following states:

Alabama. — Civ. Code (1886), § 2858; Peavey *v.* Burkett, 35 Ala. 141.

Arkansas. — Sand. & H. Dig. (1894), § 785.

California. — Code Civ. Proc. (1897), § 1036.

Delaware. — Rev. Stat. (1893), p. 792.

Idaho. — Rev. Stat. (1887), § 4915.

Illinois. — Starr & C. Anno. Stat. (1896), p. 1067, par. 4. The court cannot require additional security unless some change in the circumstances of the plaintiff or his security is shown. Ball *v.* Bruce, 27 Ill. 332.

Iowa. — Code (1897), § 3850.

Kansas. — Gen. Stat. (1889), § 4685.

Kentucky. — Bullitt's Civ. Code (1895), § 620.

Michigan. — How. Anno. Stat. (1882), § 7299.

Minnesota. — Stat. (1894), § 5518.

Missouri. — Rev. Stat. (1889), § 2915.

Montana. — Code Civ. Proc. (1895), § 1871.

Nebraska. — Comp. Stat. (1897), § 6211.

Nevada. — Gen. Stat. (1885), § 3510.

North Dakota. — Rev. Codes (1895), § 5601.

Ohio. — Bates' Anno. Stat. (1897), § 5343.

Tennessee. — Code (1896), § 4927.

Washington. — 2 Hill's Anno. Stat. (1891), § 844.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 2947.

Wyoming. — Rev. Stat. (1887), § 2690.

V. That (*Here state the present condition of the action.*)

VI. That no previous application for an order requiring plaintiff to file additional security has been made in this action.

(*Signature and jurat as in Form No. 6476.*)

b. In Opposition to Motion.

(1) By an Administrator.

Form No. 6487.[1]

(*Title of court and cause as in Form No. 6481.*)

Jeremiah Mason, being duly sworn, deposes and says:

I. That he is the attorney for the plaintiff in this action.

II. That on the *fourth* day of *May*, 1897, the plaintiff began this action by the service of a summons and verified complaint, a copy of which is hereto annexed and made a part of this affidavit.

III. That said action is brought for the benefit of *John Killman* and *James Killman*, the next of kin to the decedent, who reside in the state of *Maine*.

IV. That said next of kin are infants of the respective ages of *eight* and *fourteen* years. That the decedent, their father, left no estate except a few articles of personal apparel and furniture of small value.

V. That said infants are utterly unable to pay into court *two hundred and fifty* dollars or to give security for the costs of this action, and that if required so to do they would be unable to comply, and the action would be discontinued.

(*Signature and jurat as in Form No. 6476.*)

(2) By a Poor Plaintiff.

Form No. 6488.

(Precedent in Hamilton *v.* Dunn, 22 Ill. 259.)[2]

[In the *Cook County Circuit* Court.[3]

Patrick Dunn
against
James Hamilton.

State of *Illinois*,
County of *Cook*. } ss.][4]

1. The averments in this affidavit are taken from the opposing affidavit in Fessenden *v.* Blanchard, 14 Civ. Proc. Rep. (N. Y. Supreme Ct.) 279, where the motion for security was denied. In Lyons *v.* Cahill, 12 Civ. Proc. Rep. (N. Y. Super. Ct.) 72, the motion for security was also denied upon the affidavit made by the administratrix, which alleged that she had applied to the surrogate of New York county for letters of administration and in her petition had alleged that the personal estate of the decedent was less than twenty-five dollars, and that she had been thereupon duly appointed administratrix, and gave bond, etc. The affidavit in this latter case set out the facts which gave rise to the cause of action with great fullness.

2. This affidavit was sufficient to defeat the defendant's affidavit in support of the motion set out *supra*, Form No. 6483.

3. See *supra*, note 2, p. 765.

4. See *supra*, note 3, p. 765,

Patrick Dunn of said county, being duly sworn, deposes and says, that he is a mason by trade, and that *James Hamilton*, the defendant in this suit, is justly indebted to this deponent in a large sum of money, to wit: the sum of about *two hundred* dollars, for work, labor and services done and performed by this deponent for said *Hamilton*, and that said suit herein was commenced against said *Hamilton* to recover said sum of money; that this deponent is not insolvent, although a poor man, and that if said *Hamilton* would pay this deponent what is justly his due, he could pay all the debts he owes in the world. This deponent further says, that he does not know what the costs of the court in this case may be, but that if they do not amount to a large sum of money, he will be able to pay them without difficulty, especially if said *Hamilton* pays him what is now justly his due. This deponent further saith, that he is now and has been for about a year a resident of the city of *Chicago*, and that he has no other residence whatever. And further this deponent saith not.

[(*Signature and jurat as in Form No. 6476.*)][1]

2. The Motion.[2]

a. Notice of Motion.

Form No. 6489.

(*Title of court and cause as in Form No. 6476.*)

Please take notice that upon the affidavit of *Richard Roe*, verified the *fifteenth* day of *February*, 1897, a copy of which is hereunto annexed, and upon the defendant's notice of appearance which is herewith served upon you, the undersigned will apply to this court, at a *special* term thereof to be held at the *County Hourt-house* in the city of *New York* on the *twenty-fourth* day of *February*, 1897, at *ten* o'clock in the *fore*noon, or as soon thereafter as counsel can be heard, for an order that the plaintiff pay into this court the sum of *two hundred and fifty* dollars, said sum to be applied to the payment of any costs which may be awarded against him in this action, or if he so elects that he file with the clerk of this court an undertaking as prescribed in and by section 3273 of the Code of Civil Procedure, and that he serve written notice thereof upon the defendant's attorney, and that all other proceedings on the part of the plaintiff be stayed until such payment or filing of notice thereof, and if the undertaking be given, until the allowance of such undertaking; and further that the time for the defendant to answer be extended until *twenty* days after notice of such payment into court, or after the allowance of such undertaking; and for such further relief as may be just, together with the costs of this motion.

February 15, 1897.

Joseph Story,
Attorney for Defendant,
111 Broadway, New York City.

To *Jeremiah Mason*, Esq.,
Attorney for Plaintiff.

1. See *supra*, note 1, p. 766.

2. For forms of motion, generally, consult the title MOTIONS.

b. Order to Show Cause.

Form No. 6490.

At a *Special* Term of the *Supreme* Court, held in and for the County of *Suffolk*, at the *County Court-house* in *Riverhead*, in said County, on the *fourth* day of *October*, 1896.

Present: Hon. *John Marshall*, Justice.

John Doe, plaintiff,
against
Richard Roe, defendant.

Upon reading and filing the affidavit of *Joseph Story*, verified the *third* day of *October*, 1897, it is ordered that the defendant show cause before me (or *at a special term of this court to be held*) at the *County Court-house* in *Riverhead* on the *seventh* day of *October*, 1897, at *ten* o'clock in the *fore*noon, or as soon thereafter as counsel can be heard, why he should not be required to give security for costs according to the statute, and why, if he fails to give such security, his proceedings should not be stayed, and why the plaintiff should not have such other or further relief as may seem just, with the costs of this motion.

Enter: *J. M.*, J. *S.* C.

c. Motion.

Form No. 6491.[1]

In the *District* Court in and for *Polk* County, *Iowa*.

John Doe, plaintiff,
against
Richard Roe, defendant. } Motion for Security for Costs.

The defendant moves the court to require the plaintiff herein to give security for the costs of the above entitled action, upon the grounds set out in the annexed affidavit.[2]

Joseph Story, Attorney for Defendant.

Form No. 6492.[3]

State of *Rhode Island and Providence Plantations.*

Providence, Sc. *Common Pleas* Division of *Supreme* Court.

John Doe
against
Richard Roe. } No. *212.*

The defendant in the above entitled case hereby moves that the plaintiff be required to furnish surety for costs.

By his Attorney, *Joseph Story.*

Form No. 6493.[4]

The State of *Texas*, } Suit pending in the *District* Court of *Freestone*
County of *Freestone.* } County, *October* Term, A. D. 1897.

1. *Iowa.* — Code (1897), § 3847.
2. For the form of affidavit see *supra*, Form No. 6477.
3. *Rhode Island.* — Gen. Laws (1896), c. 247, § 3.
4. *Texas.* — Rev. Stat. (1895), art. 1440.

John Doe, plaintiff,
against
Richard Roe, defendant. } No. *212*.

And now comes *John Hancock*, clerk of the *District* Court in and for *Freestone* county, *Texas*, and moves the court to require the plaintiff herein to give a good and sufficient bond in the above styled and numbered cause.

John Hancock, Clerk.

Form No. 6494.[1]

John Doe
against
Richard Roe.

Now comes the defendant, by *Joseph Story*, his attorney, this *twenty-first* day of *April*, A. D. 1897, and suggests to the honorable court that the plaintiff herein is a nonresident of the state of *Virginia*, and requires and moves that this suit be dismissed unless within *sixty* days from the entry of this suggestion the plaintiff shall be proved to be a resident of this state or shall file security for costs according to the statute.

Joseph Story.

3. The Order.[2]

a. Generally.

Form No. 6495.

(*Title of court and cause as in Form No. 6490.*)

Upon reading and filing the affidavit of *Joseph Story*, verified the *third* day of *April*, 1897, and the order to show cause granted herein on the *fifth* day of *April*, 1897, and after hearing *Joseph Story*, of counsel for the defendant, and *Jeremiah Mason*, of counsel for the plaintiff (or *and after reading and filing affidavit* or *admission of due service of a copy of the order to show cause above mentioned and no one appearing in opposition*); Ordered,

I. That within *twenty* days the plaintiff deposit with the clerk of this court the sum of *two hundred and fifty* dollars, said sum to be applied to the payment of any costs which may be awarded to the defendant in this action, or if he so elects that he file an undertaking, as is prescribed by section 3273 of the Code of Civil Procedure, with *one* sufficient surety for the payment of any costs which may be so awarded, and further that the plaintiff serve notice upon the defendant's attorney of such payment into court, or the filing of such undertaking, also within said *twenty* days.

II. That until such payment into court and notice thereof, or until the allowance of such undertaking, all proceedings on the part of the plaintiff, except to review or to vacate this order, be stayed.

III. That the time of the defendant to answer be extended to

1. *Virginia.* — Code (1887), § 3539. *West Virginia.* — Code (1891), c. 138, § 2.

2. For forms of orders, generally, consult the title ORDERS.

twenty days after the notice of such payment or the allowance of such undertaking.[1]

IV. That the plaintiff pay to the defendant *ten* dollars costs of this motion.

Enter,: *J. M.*, J. *S.* C.

b. For Stay of Proceedings Unless Security is Filed.

Form No. 6496.

(Precedent in National Exch. Bank *v.* Silliman, 4 Abb. N. Cas. (N. Y. Supreme Ct.) 227.)

[(*Title of court and cause as in Form No. 6490.*)][2]

On reading and filing the motion papers in the cause, consisting on the part of the defendants of the printed case in this action, on which the appeal was argued in the court of appeals, the affidavits of *Robert F. Silliman* made on the *2d* day of *May*, 1876, and on the *18th* day of *August*, 1876, copies of two affidavits annexed to last mentioned affidavits, called schedule *A*, and made by *Henry W. Mosher* and *John S. Fake*, affidavits made by *F. J. Parmenter* on *2d* day of *May* and *19th* day of *August*, 1876, a certified copy of the certificate of association of the *Exchange Bank of Lansingburgh*, and the notices of motion; and on the part of the plaintiff affidavits made by *Alfred W. Murray* and *Levi Smith*, by which among other things it appears that the above named plaintiff when this action was commenced was a corporation under the name of the *National Exchange Bank of Lansingburgh*, and that the same was afterwards duly dissolved and this action continued by the plaintiff in the name of the original plaintiff. And after hearing Mr. *F. J. Parmenter* of counsel for the defendants, and Mr. *E. L. Fursman* and Mr. *Esek Cowen* of counsel for the plaintiff, and after due deliberation had; Ordered that all further proceedings in this action on the part of the plaintiff be and the same are hereby stayed unless the plaintiff shall within *twenty* days after the service of a copy of this order on the attorneys of record for the plaintiff, give and file an undertaking or bond with at least *two* sufficient sureties, conditioned for the payment to the defendants herein of all costs and disbursements which shall be recovered and allowed to them in this action, which said sureties, if accepted to, shall justify in the same manner as prescribed in cases of arrest and bail, under chapter 1, of title 7 of the Code of Procedure. Upon the giving of such security for costs, this action may continue in the name of the above entitled plaintiff.

[Enter: *J. W.*, J. *S.* C.]

1. A stay of proceedings in an order to furnish security for costs does not extend the defendant's time to answer. Sniffen *v.* Peck, 6 Civ. Proc. Rep. (N. Y. City Ct.) 188; White *v.* Smith, 16 Abb. Pr. (N. Y. Supreme Ct.) 109, note; Hamilton *v.* Dunn, 22 Ill. 259. But such extension of time may be granted by an *ex parte* order and by the same order which requires the filing of security. No affidavit of merits is required. Worthington *v.* Warner, 19 Abb. N. Cas. (N. Y. City Ct.) 266.

2. The matter to be supplied within [ ] will not be found in the reported case.

c. To File Security or Show Cause.

Form No. 6497.[1]

Supreme Court, *City and* County of *New York.*

John Doe, plaintiff,
against
Richard Roe, defendant.

Upon reading the annexed affidavit of *Joseph Story*, verified the *fourteenth* day of *May*, 1897, and upon motion of *Joseph Story*, attorney for the defendant, it is ordered that the plaintiff, within *ten* days from the service of a copy of this order, deposit with the clerk of this court *two hundred and fifty* dollars, or file an undertaking with *one* surety in the sum of *two hundred and fifty* dollars as security for costs to the defendant, and serve notice thereof on said attorney for the defendant within the same period, or that he show cause before me at the *County Court-house* in *New York City* on the *eighteenth* day of *May*, 1897, at *ten* o'clock in the *fore*noon, why he should not do so; and until such time, or until such payment into court and notice thereof, or until the allowance of such undertaking, that all the plaintiff's proceedings herein, except to review or vacate this order, be stayed.

May 14, 1897. *John Marshall*, J. *S.* C.

4. The Bond, Undertaking, or Recognizance.[2]

a. In Civil Cases.

(1) Generally.

(a) *In Courts of Record.*

Form No. 6498.

(Sand. & H. Dig. Ark. (1894), § 781.)[3]

1. **The present New York practice** is to move by notice of motion requiring security, or by short order to show cause why security should not be required. But under sections 3268 and 3269 of the Code (Birds. Rev. Stat. (1896), p. 717, §§ 63, 64), the notice of the motion or an order to show cause is not necessary, and an *ex parte* absolute order to file security is proper, although it is preferable to follow the present practice as above stated. Churchman *v.* Merritt, 50 Hun (N. Y.) 270; Schwartz *v.* Scott, 25 N. Y. Civ. Proc. Rep. (N. Y. Supreme Ct.) 53; Mitchell *v.* Dick, 8 Misc. Rep. (N. Y. Super. Ct.) 98. But where security is sought for costs already accrued in the action, as well as for those which shall hereafter accrue, the language of the code does not authorize an *ex parte* absolute order, and in such case it is absolutely necessary to bring on the motion by notice or order to show cause. Wood *v.* Blodgett, 15 Civ. Proc. Rep. (N. Y. Supreme Ct.) 114.

2. **Indorsement on Writ.** — In the following states the surety's obligation is complete by indorsement on the writ:

Maine. — Rev. Stat. (1883), c. 81, § 6.

Massachusetts. — Pub. Stat. (1882), c. 161, § 24.

Michigan. — How. Anno. Stat. (1882), § 7296.

New Hampshire. — Pub. Stat. (1891), c. 218, § 8.

South Dakota. — Dak. Comp. Laws (1887), § 5207.

3. In Munzesheimer *v.* Byrne, 56 Ark. 117, the bond, while not following

Pulaski Circuit Court.

John Doe
against
Richard Roe.
} Bond for Costs.

We undertake that the plaintiff, *John Doe*, shall pay to the defendant, *Richard Roe*, and to the officers of the court, all costs that may accrue to them in this action, either in the *Pulaski Circuit* Court or any other court to which it may be carried.

Samuel Short.
William West.

Approved:
Richard Styles, Clerk.

Form No. 6499.[1]

In the *Superior* Court of the *City and* County of *San Francisco*, State of *California.*

John Doe, plaintiff,
against
Richard Roe, defendant.
} Undertaking for Costs.

Whereas, on the *fourteenth* day of *January*, 1897, an order was made in the above entitled action requiring the plaintiff above named to file security for all costs and charges that may be awarded against him the said plaintiff by judgment or in the progress of the action, not exceeding the sum of *three hundred* dollars. Now therefore we, *Samuel Short* and *William West*, both of the said *city and* county of *San Francisco*, jointly and severally do undertake that we will pay such costs and charges as may be awarded against the plaintiff by judgment or in the progress of this action, not exceeding the sum of *three hundred* dollars.

In testimony whereof we have hereunto set our hands this *fifteenth* day of *January*, A. D. 1897.

Samuel Short.
William West.

(*Justification of sureties.*)[2]

Form No. 6500.

(Conn. Gen. Stat. (1888), § 896.)

You, *John Doe*, as principal, and *Samuel Short*, as surety, acknowl-

the statute, was said to be good as a common-law bond. It was in the words following, to wit:

"*Eagle Phenix Manufacturing Co.*, Plaintiff,
v.
Munzesheimer & Klein, Defendants.
}

We undertake that the plaintiff, *The Eagle Phenix Manufacturing Company*, shall pay to the defendants, *Munzesheimer & Klein*, or either of them, all damages which they may sustain by reason of this attachment, if the order therefor is wrongfully obtained, and the costs of this action.

Eagle Phenix Mfg. Co.
By *Samuel P. Mendeg*, Agt.
L. A. Byrne.
E. F. Friedell."

1. *California.* — Code Civ. Proc. (1897), § 1036. See also the following statutes, to wit:
Idaho. — Rev. Stat. (1887), § 4915.
Montana. — Code Civ. Proc. (1895), § 1871.
Nevada. — Gen. Stat. (1885), § 3510.
Utah. — Rev. Stat. (1898), § 3354.
Washington. — Ballinger's Anno. Codes & Stat. (1897), § 5186.

2. See the title JUSTIFICATION OF SURETIES.

edge yourselves as jointly and severally bound (or *You Samuel Short acknowledge yourself bound*) to *Richard Roe*, in a recognizance of *one hundred* dollars, that the said *John Doe* shall prosecute the action which he has now commenced against the said *Richard Roe* at the *Superior* Court to be holden at *Hartford* in and for the county of *Hartford* on the *second Tuesday* of *October*, A. D. 1897, to full effect, and that he shall pay any costs for which judgment shall be rendered against him thereon.

Taken and acknowledged at *Hartford*, on the *eighth* day of *September*, A. D. 1897, before me.

John Jay,
Justice of the Peace.

Form No. 6501.

(Mills' Anno. Stat. Colo. (1891), § 674.)

John Doe
against
Richard Roe. } *District* Court.

I do hereby enter myself security for costs in this case, and acknowledge myself bound to pay, or cause to be paid, all costs which may accrue in this action, either to the opposite party or to any of the officers of this court pursuant to the laws of this state.

Dated this *sixteenth* day of *April*, 1897.

Richard Styles.

Approved:
Abraham Kent, Clerk.

Form No. 6502.[1]

In the *Supreme* Court of the *District of Columbia*, the *seventh* day of *October*, 1897.

John Doe, plaintiff,
against
Richard Roe, defendant. } No. *212.* At law.

The plaintiff, and *Samuel Short*, his surety, appear, and, submitting to the jurisdiction of the court, hereby undertake for themselves and each of them, their and each of their heirs, executors, and administrators, to make good all costs and charges that the defendant may be put to in case the plaintiff is nonsuited, or judgment be given against him; and they further agree that such judgment against the plaintiff may be rendered against all the parties whose names are hereto affixed.

John Doe.
Samuel Short.

Form No. 6503.

(Starr & C. Anno. Stat. Ill. (1896), p. 1064, par. 1.)

John Doe
vs.
Richard Roe. } In the *Cook* County *Circuit* Court.[2]

1. *District of Columbia.*— Comp. Stat. (1894), p. 446, § 30.

2. **Need not State Term.**— The security need not state the term in which the

I, *Richard Styles*, do enter myself security for all costs which may accrue in the above cause.

Dated this *sixteenth* day of *April*, 1897.

Richard Styles.[1]

Approved:

Abraham Kent, Clerk of said Court.[2]

Form No. 6504.[3]

Know all men by these presents, that we, *John Doe*, principal, and *Samuel Short* and *William West*, sureties, are held and firmly bound unto *Richard Roe* in the sum of *five hundred* dollars, lawful money of the United States, well and truly to be paid to the said *Richard Roe*, his heirs, executors and assigns.

The condition of the above obligation is such, that whereas, on the *third* day of *October*, A. D. 1897, the said *John Doe* commenced an action in the *District* Court against the said *Richard Roe*, and whereas the said plaintiff is a nonresident of the state of *Iowa*, and the defendant having filed his affidavit in said action stating that he has a good defense thereto:

Now if the said *John Doe* shall well and truly pay the costs which may accrue in said action, in said court or in any other court to which the same may be carried, either to the said defendant or the officers of the court, then this obligation to be void, otherwise to remain in full force and virtue.

John Doe, Principal.
Samuel Short, Surety.
William West, Surety.

(*Justification of sureties.*)[4]
Approved: *John Hancock*,
Clerk *Polk* County *District* Court.

Form No. 6505.[5]

In the *District* Court, *Laramie* County, *Kansas.*

John Doe, plaintiff, } Bond for Costs.
against }
Richard Roe, defendant. }

Whereas, *John Doe*, as plaintiff, is about to commence, in the *Dis-*

action was brought, so long as there is no difficulty in identifying the cause in which it is filed. The recital even of the wrong term does not necessarily vitiate the security. Himes *v.* Blakesley, 21 Ill. 509.

1. **Undertaking valid:** Where christian name of surety abbreviated, King *v.* Thompson, 4 Ill. 184; where signed in copartnership name, Linn *v.* Buckingham, 2 Ill. 452; where the form was written on the back of the declaration and bore no title of the court; where entitled "Same *v.* Same," written below the præcipe for summons, and signed in partnership name, Kettelle *v.* Wardell, 2 Ill. 593. But where the undertaking was entitled "The Same *vs.* The Same," and was upon a separate sheet, with nothing to refer it to the properly entitled cause, it was held insufficient. Warnock *v.* Russell, 2 Ill. 383.

2. **Approval.**— The undertaking must be approved by the clerk. Starr & C. Anno. Stat. Ill. (1896), p. 1066, par. 2.

3. *Iowa.* — Code (1897), § 3847. See also Neb. Comp. Stat. (1897), § 6208.

4. See the title JUSTIFICATION OF SURETIES.

5. *Kansas.* — Gen. Stat. (1889), § 4682. Under the provisions of this statute

trict Court of *Laramie* county, *Kansas*, a civil action against *Richard Roe*, as defendant, entitled as above: Now, therefore, we *John Doe*,[1] as principal, and *Samuel Short* and *William West*, as sureties, do hereby undertake and bind ourselves unto the said defendant in said action, and to each and every other person who may have a right to such costs or to any part thereof, that the said plaintiff will pay all costs that may accrue in said action in case he shall be adjudged to pay them; and in case the same cannot be collected from the defendant if judgment be obtained against him, or any or either of them, that the said plaintiff will pay the costs made by said plaintiff; and we hereby acknowledge ourselves indebted to whomsoever it may concern to the amount of said costs, which it is above agreed the said plaintiff shall pay. To the faithful performance of the foregoing obligation we bind ourselves and our representatives firmly by these presents.

Witness our hands this *fourth* day of *October*, A. D. 1897.

John Doe.
Samuel Short.
William West.

The above bond is hereby approved by me this *fourth* day of *October*, A. D. 1897. *John Hancock*, Clerk of the *District* Court.

(*Justification of sureties.*)[2]

Form No. 6506.

(Bullitt's Civ. Code Ky. (1895), p. 692.)[3]

John Doe, plaintiff, against *Richard Roe*, defendant. } Bond for Costs.

We undertake that the plaintiff, *John Doe*, shall pay to the defendant, *Richard Roe*, and to the officers of the court, all costs that may accrue to them in this action either in the *Bourbon Circuit* Court or in any other court to which it may be carried.

every plaintiff must file such a bond or deposit with the clerk such sum or sums as in the opinion of the clerk will cover the costs.

Precedent. — In Ryan *v.* Williams, 29 Kan. 492, the bond was as follows:

"*Henry T. Green, as Administrator of the Estate of Theodore Jones, Deceased*, Plaintiff, v. *James E. Williams, as Administrator of the Estate of Jacob McMurtry, Deceased*, Defendant.

I, *Matthew Ryan*, a resident of *Leavenworth* county, in *Kansas*, hereby bind and obligate myself that the plaintiff above named shall pay all costs that may accrue in the above entitled action, in case he shall be adjudged to pay the same; and I further bind and obligate myself that he will pay all costs made by him in said action, in case judgment be obtained against the defendant herein, and the same cannot be collected from the defendant, as ordered by the court herein.

Given under my hand at *Leavenworth city, Kansas*, this *twelfth* day of *February*, 1879.

Matthew Ryan."

It was held that this bond bound the obligor to pay only such judgment as might be rendered for costs against Green as administrator, and did not bind him to pay any judgment for costs that might be rendered against any other or subsequent administrator.

1. The plaintiff himself need not execute the bond. Kan. Gen. Stat. (1889), § 4682.

2. See the title JUSTIFICATION OF SURETIES.

3. *Kentucky.* — Bullitt's Civ. Code (1895), §§ 29, 616, 621.

Witness our hands this *thirteenth* day of *May*, 1897.

John Doe.[1]
Samuel Short.

(*Justification of sureties.*)[2]

Form No. 6507.[3]

State of *Minnesota*, } ss. *District* Court,
County of *Ramsey*. } *Second* Judicial District.

John Doe, plaintiff,
against
Richard Roe, defendant.

Know all men by these presents, that we, *Samuel Short* and *William West*, of the city of *St. Paul*, in said county and state, are held and firmly bound unto the clerk of this court in the sum of *seventy-five* dollars, lawful money of the United States, to be paid to the said clerk, for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators firmly by these presents.

Sealed with our seals, and dated the *fourth* day of *October*, A. D. 1897.

The condition of the above obligation is such, that if the plaintiff in this action shall well and truly pay, or cause to be paid, to the said clerk, for the benefit of the party who may become entitled thereto, all disbursements and costs that may be adjudged against said plaintiff in this action, then this obligation shall be void, otherwise of force.

Samuel Short. (SEAL)
William West. (SEAL)

Signed, sealed and delivered in presence of *Leonard A. Ford.*
Charles Mainjoy.

State of *Minnesota*, } ss.
County of *Ramsey*. }

On this *fourth* day of *October*, A. D. 1897, before me personally appeared *Samuel Short* and *William West*, to me known to be the same persons described in and who executed the foregoing bond, and each for himself acknowledged the same to be his own free act and deed.[4]

Abraham Kent, Justice of the Peace.

(*Justification of sureties.*)[5]

Form No. 6508.[6]

State of *Mississippi*, *De Soto* County.

We, *John Doe*, complainant, as principal, and *Samuel Short* and

1. The plaintiff's signature to the bond is not necessary. Bullitt's Civ. Code Ky. (1895), p. 692.

2. See the title JUSTIFICATION OF SURETIES, and Bullitt's Civ. Code Ky. (1895), §§ 683, 684.

3. *Minnesota.* — Stat. (1894), § 5518. As to the use of an undertaking in place of the bond, see Stat. (1894), § 7989.

4. **Acknowledgment.** — A bond is not ordinarily acknowledged, but it is sometimes required to be acknowledged by rule of court or even by statute, as in New York Code Civ. Proc., § 810. But it seems that a judge may excuse compliance with a rule requiring a bond to be acknowledged by sureties. Gale *v.* Seifert, 39 Minn. 171.

5. See the title JUSTIFICATION OF SURETIES.

6. *Mississippi.* — Anno. Code (1892), §§ 861, 863.

After Suit Commenced. — Where the

William West, sureties, agree to pay, as may be required by law, all costs that may accrue in an action for (*Here describe the action*) to be filed in the *Chancery* Court of the county of *De Soto* in said state, by said complainant against *Richard Roe*.

Signed with our hands and delivered this the *fourth* day of *October*, A. D. 1897.

John Doe.
Samuel Short.
William West.

I approve the above security this the *fourth* day of *October*, A. D. 1897. *John Hancock*, Chancery Clerk.

Form No. 6509.

(Mo. Rev. Stat. (1889), p. 2240, No. 50.)[1]

John Smith, plaintiff, against *John Jones*, defendant. } In the *circuit* court of *Barton* county, *November* term, 1890.

I, *Jasper James*, a resident of the state of *Missouri*, do hereby acknowledge myself bound to pay all the costs which may accrue in the above entitled cause.

Witness my signature, this *fourth* day of *October*, 1897.

Jasper James.

Form No. 6510.[2]

Supreme Court, *City and* County of *New York*.

John Doe, plaintiff, against *Richard Roe*, defendant. } Security for Costs. — Nonresident Plaintiff.

Whereas, *John Doe*, the above named plaintiff, has commenced an action in the above named court against *Richard Roe*, the above named defendant,

Now, therefore, we, *Samuel Short* of No. *23 W. 23d* street, in *New*

security for costs is required after suit commenced under Miss. Anno. Code (1892), § 862, the following form may be used:

"State of *Mississippi*, *De Soto* County. } In *Chancery* Court.

John Doe, plaintiff, against *Richard Roe*, defendant. }

The plaintiff in the above styled case having been duly required by said court to give security for costs, we, *John Doe*, as principal, and *Samuel Short* and *William West*, sureties, agree to pay, as may be required by law, all costs accrued or to accrue in said suit.

Signed" (*concluding as in Form No. 6508*).

1. *Missouri*. — Rev. Stat. (1889), § 2915.

After Suit Begun. — Security after suit begun is provided for in Mo. Rev. Stat. (1889), § 2916. The form of the undertaking is given in Mo. Rev. Stat. (1889), p. 2240, No. 51, as follows:

"I, *Jasper James*, a resident of the state of *Missouri*, do hereby acknowledge myself bound to pay all the costs which have accrued, or may accrue, in the above entitled cause," the caption and conclusion being the same as those in the text.

2. *New York*. — Code Civ. Proc., § 3273 (Birds. Rev. Stat. (1896), p. 717, § 63). See also the following statutes:

Alabama. — Civ. Code (1886), §§ 2858, 2863.

Indiana. — Horner's Stat. (1896), § 589.

York City, and *Richard Shannon* of No. *172a Clifton* place, in the city of *Brooklyn*, do hereby, pursuant to the statute in such case made and provided, jointly and severally undertake that we will pay, upon demand,[1] to the defendant all costs which may be awarded to him in said action, not exceeding the sum of *two hundred and fifty* dollars.

Dated *May 10*, 1897.

Samuel Short.
Richard Shannon.

(*Acknowledgment.*)[2]
(*Justification of sureties.*)[3]

I hereby approve the foregoing undertaking both as to form and manner of execution and as to the sureties therein mentioned.[4]

John Marshall, J. *S.* C.

Form No. 6511.[5]

Nash County — In the *Superior* Court.

John Doe, plaintiff, against *Richard Roe*, defendant. } Undertaking for Costs.

We, *John Doe*, the plaintiff, and *Samuel Short* and *William West*, our executors and administrators, are bound to the defendant, *Richard Roe*, in the above entitled action in the sum of *two hundred* dollars. This obligation to be void upon the condition that the said plaintiff, *John Doe*, shall pay to the defendant all such costs as the defendant may recover of the plaintiff in said action. Otherwise to remain in full force and effect.

Witness our hands this *fourth* day of *October*, 1891.

John Doe.
Samuel Short.
William West.

1. The bond should be conditioned for payment on demand of the obligors and not on demand of the plaintiff. Montague *v.* Bassett, 18 Abb. Pr. (N. Y. Supreme Ct.) 13.

2. See *supra*, note 4, p. 778.

3. See the title JUSTIFICATION OF SURETIES.

4. This approval is required by N. Y. Code Civ. Proc., § 3275 (Birds. Rev. Stat. (1886), p. 719, § 70).

5. *North Carolina.* — Code (1883), § 209. A money deposit in lieu of an undertaking is authorized by this section.

Precedent. — In Holly *v.* Perry, 94 N. Car. 31. the instrument was written on the back of the summons, and was as follows:

"We acknowledge ourselves bound unto the defendant in this action in the sum of *two hundred* dollars; to be void, however, if the plaintiff shall pay to the defendant all such costs as the defendant may recover of the plaintiff in this action.

Witness our hands and seals this —— day of ——, A.D. 18*8*–.

——— (SEAL)
——— (SEAL)
J. B. Martin. (SEAL)"

The superior court having held this writing not a substantial or any compliance with the statute cited above, the plaintiff excepted, whereupon the supreme court held that while the bond was certainly informal and in some respects not very definite and certain, yet taken in connection with the summons, its purpose as indicated by its terms, and applying it as contemplated by the statute, it ought to be treated as in effect a sufficient undertaking.

Form No. 6512.

(S. Car. Circuit Ct. Rules (1894), No. X.)[1]

State of *South Carolina*,
York County.

John Doe
vs.
Richard Roe.
Complaint for ———.

I acknowledge myself liable for the costs of this case, and consent that if the plaintiff fail to recover, the defendant may have execution for his costs against me.

Given under my hand this *twenty-fourth* day of *April*, A. D. 1897.

Samuel Short.

Witness:
Richard Styles,
C. C. P and G. S.

Approved:
Richard Styles,
C. C. P. and G. S.

Form No. 6513.[2]

The State of *Texas*,
County of *Freestone*.
Suit pending in the *District* Court of *Freestone* County.

John Doe, plaintiff,
against
Richard Roe, defendant.
No. *212*.

Know all men by these presents, that we, *John Doe*, as principal, and *Samuel Short* and *William West*, as sureties, do hereby acknowledge ourselves jointly and severally bound to pay to the officers of said court all costs that may be adjudged against the plaintiff in the above entitled suit, during the pendency or at the final determination thereof, and judgment for the said costs may be rendered against us.

Witness our hands, this *seventh* day of *October*, A. D. 1897.

John Doe.
Samuel Short.
William West.

Approved this *seventh* day of *October*, A. D. 1897.

John Hancock, Clerk,
District Court, *Freestone* Co., *Texas*.

Form No. 6514.[3]

Know all men by these presents, that I, *Samuel Short*, am held and firmly bound unto the *commonwealth* of *Virginia*, in the sum of *two hundred and fifty* dollars to be paid to the said *commonwealth*, for which payment, well and truly to be made, I bind myself, my heirs, executors and administrators, firmly by these presents. And I hereby waive the benefit of my homestead exemption as to this obliga-

1. Under this rule the plaintiff may deposit a sum of money instead of giving the above undertaking; the amount thereof to be fixed by the clerk.

2. *Texas*. — Rev. Stat. (1895), art. 1441.
Arizona. — Rev. Stat. (1887), § 907.
A deposit of money has been held a sufficient compliance with a rule for a bond for costs. Henderson *v.* Riley, 1 Tex. App. Civ. Cas., § 483.

3. *Virginia*. — Code (1887), § 3539.
West Virginia. — Code (1891), c. 138, § 2.

tion, and any claim or right to discharge any liability to the *commonwealth* arising under this bond, with coupons detached from the bonds of this state. Sealed with my seal, and dated this *fourth* day of *October*, in the year one thousand eight hundred and *ninety-seven*.

The condition of the above obligation is such, that whereas a suit hath been instituted in the *Circuit* Court of the *County* of *Albermarle* by *John Doe* against *Richard Roe* for (*Here describe the cause of action*), and a suggestion was entered by *Richard Roe*, the said defendant, that the said plaintiff, *John Doe*, is not a resident of the state of *Virginia*, and that security was required of him for the payment of the costs and damages[1] which may be awarded to the said defendant and of the fees due or to become due in the said suit to the officers of the said court. Now if the above bound *Samuel Short* shall well and truly pay all such fees as are due or may become due from the said *John Doe* to the officers of the said court in the prosecution of the said suit, and moreover shall well and truly pay to the said defendant all such costs and damages as may be awarded to him in case the said plaintiff shall be cast therein, and condemned to pay the same, then this obligation is to be void, otherwise to remain in full force and virtue.

Samuel Short. (SEAL)

Executed, acknowledged, etc., in the presence of
Leonard A. Ford.

Form No. 6515.[2]

Circuit Court, *Dane* County.

John Doe, plaintiff,
against
Richard Roe, defendant.

Whereas, an order has been made in the above entitled action, requiring the plaintiff above named to file security for all costs that may be incurred by the defendant in said action, in the sum of *two hundred and fifty* dollars, within *twenty* days after the service of said order upon said plaintiff, and staying all proceedings on the part of said plaintiff in said action until such security be filed;

Now, therefore, we, *Samuel Short* and *William West*, of the city of *Madison*, county of *Dane*, and state of *Wisconsin*, do undertake that the said plaintiff will pay, on demand, all costs that may be awarded to the said defendant in said action, in any court, not exceeding the sum of *two hundred and fifty* dollars.

In testimony whereof, the parties above named have hereunto set their hands and seals this *fourth* day of *October*, A. D. 1897.

Samuel Short. (SEAL)
William West. (SEAL)

In presence of *Leonard A. Ford.*
Charles Mainjoy.

(*Justification of sureties.*)[3]

1. **In West Virginia** the words "and damages" need not be used, the statute requiring the undertaking to be "for payment of the costs which may be awarded to the defendant, and of the fees due or to become due in such suit to the officers of the court." W. Va. Code (1891), c. 138, § 2.

2. *Wisconsin.* — Sanb. & B. Anno. Stat. (1889), § 2946.

3. See the title JUSTIFICATION OF SURETIES.

(*b*) *In Justice's Court.*

Form No. 6516.

(Mills' Anno. Stat. Colo. Ill. (1891), § 2634.)

State of *Colorado*, } ss.
Dolores County. }

John Doe }
vs. } Demand $*60*.
Richard Roe. }

I, *Samuel Short*, do enter myself security for all costs that may accrue in the above case, this *fifth* day of *March*, 1*898*.

Samuel Short. (SEAL)

Form No. 6517.

(Starr & C. Anno. Stat. Ill. (1896), c. 79, par. 177.)

State of *Illinois*, } ss.
——— District. }

John Doe } Before *John Marshall*,
vs. } Justice of the Peace.
Richard Roe. }

I, *Richard Styles*, do enter myself security for all costs that may accrue in the above cause.

Dated this *sixteenth* day of *April*, 1*897*.

Richard Styles.

Form No. 6518.[1]

State of *Kansas*, } ss.
Linn County. }

Whereas, *John Doe* intends to commence an action against *Richard Roe* before *Abraham Kent*, a justice of the peace of *Potosie* township in said county, and whereas the said *John Doe* is a nonresident of said county; now we the undersigned, residents of said *Linn* county, undertake to pay the said *Richard Roe* all costs which may accrue in said action.

Samuel Short.
William West.

Approved by me this *fifth* day of *March*, A. D. 1*898*.

Abraham Kent, Justice of the Peace.

1. *Kansas.* — Gen. Stat. (1889), § 5042. **Plaintiff Removing Pending Suit.** — Where plaintiff removes after the action is commenced, and security is required under the provisions of Kan. Gen. Stat. (1889), § 5043, an undertaking should be entitled in the cause and recite that "Whereas, *John Doe*, the plaintiff in the above entitled action, after the commencement thereof has removed from the said county of *Linn*; now we, the undersigned, residents of said county, bind ourselves to the above named defendant for the payment of all costs which may have accrued or which may accrue" (*concluding as in the text*).

Form No. 6519.

(Mo. Rev. Stat. (1889), § 6156.)[1]

John Doe, plaintiff,
against
Richard Roe, defendant. } Obligation for Costs.

We bind ourselves to pay all costs that have accrued or may hereafter accrue in this cause.

John Styles.
Richard Styles.
Oliver Elsworth.

Approved *April 16*, 1897.
Abraham Kent, Justice of the peace.

Form No. 6520.[2]

Justice's Court for the Precinct of *Central Portland.*

State of *Oregon*,
County of *Multnomah.* } ss.

John Doe, plaintiff,
against
Richard Roe, defendant. } Undertaking for Costs.

We, *John Doe*, plaintiff, and *Samuel Short*, surety, undertake to pay *Richard Roe*, the defendant in this action, all costs and disbursements that may be adjudged to him in this action.

Dated at *Portland*, this *fifth* day of *March*, 1898.

John Doe, Plaintiff.
Samuel Short, Surety.

(*Justification of surety.*)[3]

(2) In Election Contest.

Form No. 6521.

(Precedent in Hilliard *v.* Brown, 103 Ala. 319.)[4]

The State of *Alabama*,
Pike County. } Whereas, *T. H. Brown*, an elector of the county of *Pike* in said State, has this day filed in the office of the clerk of the *circuit* court of said county, his grounds of contest of the election of *W. J. Hilliard* to the office of *Judge of Probate* of said county, at an election held on the *1st* day of *August*, 1892: Now, therefore, we, the undersigned, hereby acknowledge ourselves to be bound as security for the costs of said con-

1. See also forms in Mo. Rev. Stat. (1889), p. 2264, Nos. 159, 160.

2. *Oregon.*—Hill's Anno. Laws (1892), § 2063.

3. For forms connected with the justification of sureties see the title Justification of Sureties. As to when justification is necessary, see Holcomb *v.* Teal, 4 Oregon 352.

4. This bond is drawn in conformity to the requirements of Ala. Civ. Code (1886), § 428. See also Sand. & H. Dig. Ark. (1894), §§ 2702, 2704.

test. In witness whereof, we have hereunto set our hands and seals this *17th* day of *August*, 1892.

Approved *August 17th*, 1892.
O. Worthy, Clerk.

T. H. Brown. (SEAL)
W. A. McBryde. (SEAL)
O. R. Dykes. (SEAL)
L. M. Treadwell. (SEAL)
J. P. Wood. (SEAL)
O. C. Wiley. (SEAL)

b. In Criminal Cases.

Form No. 6522.

(Sand. & H. Dig. Ark. (1894), § 2323.)

State of *Arkansas*
against
Richard Roe.

I, *Samuel Short*, as principal, and *William West*, as security, bind ourselves to pay all costs in this cause.

Signed this *fourteenth* day of *April*, A. D. 1897.

Samuel Short.
William West.

Form No. 6523.[1]

State of *Michigan*,
County of *Lenawee*. } ss.

Be it remembered, that on the *fifth* day of *March*, A. D. 1898, before me, *Abraham Kent*, a justice of the peace of *Adrian township* in said county, personally came *John Doe*, *Samuel Short* and *William West*, all of the *township* of *Adrian* in the county of *Lenawee* and state of *Michigan*, and severally and respectively acknowledged themselves to be indebted to the people of the state of *Michigan* in the sum of *one hundred* dollars each, to be levied of their respective goods and chattels, lands and tenements, for the use of said people, if default shall be made in the conditions following:

Whereas, the above bounden *John Doe* has this day made complaint on oath before me, that at the *township* of *Adrian* in the said county, on the *third* day of *March*, A. D. 1898, *Richard Roe* did (*Here describe the offense charged*).

Now, therefore, the condition of this recognizance is such, that if the said *John Doe* shall pay all costs which shall accrue to the court sheriff, constable and jury upon the proceedings to be had upon said complaint, if he does not establish the same (and unless I, or the court before whom the trial for said offense shall be had, shall certify in my or its minutes of said trial, that there was probable cause for the making of said complaint), then this recognizance shall be void, otherwise in force.

John Doe.
Samuel Short.
William West.

Taken, subscribed and acknowledged before me the day and year first above written.

Abraham Kent, Justice of the Peace.

1. *Michigan.* — How. Anno. Stat. (1882), § 9063. See also Wyoming Laws (1893), c. 30, § 1.

5. Notice of Security Filed.

Form No. 6524.[1]

Circuit Court, *Dane* County.

John Doe, plaintiff,
against
Richard Roe, defendant.

To *Richard Roe*, defendant above named:

Pursuant to the order heretofore made in the above entitled action, requiring the above named plaintiff to file security for costs herein, and staying proceedings on the part of said plaintiff meanwhile,

Take notice, that the said plaintiff * has filed with the clerk of the *Circuit* Court of *Dane* county an undertaking (of which a copy is herewith served upon you) with *two* sufficient sureties, to the effect that said plaintiff will pay on demand all costs that may be awarded to said defendant in such action, in any court, not exceeding *two hundred and fifty* dollars, the sum mentioned in said order, and that the stay of proceedings on the part of said plaintiff in said action, directed by said order, is hereby terminated.

Dated *March 15*, A. D. *1898*.

Yours, etc.,
Jeremiah Mason, Plaintiff's Attorney.

6. Dismissal for Failure to Give Security.

a. Affidavit in Support of Motion.[2]

Form No. 6525.[3]

State of *Ohio*,
Allen County, ss. } In the Court *of Common Pleas.*

John Doe, plaintiff,
against
Richard Roe, defendant.

Joseph Story, being duly sworn, deposes and says:

I. That he is the attorney for the defendant in this action.

II. That on the *first* day of *April*, *1897*, upon motion of the defendant, an order was made and entered herein upon due notice to the plaintiff, the Honorable *John Marshall*, presiding, requiring plaintiff, as a nonresident, to file security for costs to the defendant within *ten* days from said date, and that said order was duly served upon plaintiff's attorney on the *second* day of *April*, *1897*.

1. *Wisconsin.* — Sanb. & B. Anno. Stat. (1889), § 2946.

New York. — Birds. Rev. Stat. (1896), p. 719, § 67.

Money Deposit. — Where, in place of filing an undertaking, plaintiff has paid money into court as under the provisions of Birds. Rev. Stat. N. Y. (1896), p. 719, § 67, the notice should be as follows: (*Commencing as in Form No. 6524, and continuing down to**) "has paid into court the sum of *two hundred and fifty* dollars, to be applied to the payment of any costs which may be awarded against him in this action.

Dated" (*concluding as in Form No. 6524*).

2. For forms of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

3. *Ohio.* — Bates' Anno. Stat. (1897), § 5341.

III. That said period of *ten* days expired on the *twelfth* day of *April*, 1897, but that plaintiff failed to file security before the expiration of said time, and by failure so to do he has not complied with the requirements of the order of *April first*, 1897.

IV. That thereafter and up to the present time the plaintiff has wholly failed and neglected to file security for costs as directed.[1]

Wherefore the defendant is entitled to an absolute order that the complaint herein be dismissed with costs and that he have judgment accordingly. *Joseph Story.*

Sworn to before me this *seventeenth* day of *April*, 1897.

Abraham Kent,
Notary Public, *Allen* County, State of *Ohio.*

b. Notice of Motion.[2]

Form No. 6526.[3]

(*Title of court and cause as in Form No. 6525.*)

To *John Doe*, plaintiff above named:

You are hereby notified that on the *fifteenth* day of *March*, 1898, defendant will apply to the Hon. *John Marshall*, one of the judges of said court, at the court-room, for an order dismissing said cause for failure of plaintiff to comply with the order to give security for costs. Affidavits will be used in support of said motion.

Dated *March 5*, 1898.

Joseph Story, Defendant's Attorney.

c. Motion.[4]

Form No. 6527.[5]

(*Title of court and cause as in Form No. 6525.*)

Defendant moves that this cause be dismissed for failure of plaintiff to comply with the order to give security for costs.

Joseph Story, Defendant's Attorney.

d. The Order.[6]

1. Where an order *nisi* is granted and security is not filed until after the expiration of the time therein limited, the practice is to refuse to dismiss the complaint if the security be filed at any time before the order be made absolute. Cornuel *v.* Heinze, 67 Hun (N. Y.) 652, 51 N. Y. St. Rep. 652; Robinson *v.* Meyer, 25 Ark. 79; King *v.* Jackson, 25 Neb. 467; Pflaum *v.* Grinberg, 5 Heisk. (Tenn.) 220; Kyle *v.* Stinson, 13 Smed. & M. (Miss.) 301; Snowden *v.* McDaniel, 7 Mo. 313.

2. For forms of notices, generally, consult the title MOTIONS.

3. *Ohio.* — Bates' Anno. Stat. (1897), § 5341.

4. For forms of motions, generally, consult the title MOTIONS.

5. *Ohio.* — Bates' Anno. Stat. (1897), § 5341.

6. For statutes relating to dismissal for failure to file security see as follows:

Alabama. — Civ. Code (1886), § 2858.

Arizona. — Rev. Stat. (1887), § 906.

Arkansas. — Sand. & H. Dig. (1894), § 782.

California. — Code Civ. Proc. (1897), § 1037.

Colorado. — Mills' Anno. Stat. (1891), § 675.

Delaware. — Rev. Stat. (1893), p. 792.

(1) Dismissing Suit.

(*a*) *Order Nisi.*

Form No. 6528.[1]

(*Title of court and cause as in Form No. 6490.*)

Upon reading and filing the affidavit of *Joseph Story*, verified the *third* day of *April*, 1897, and (*enumerating the several papers on which the motion was based*), and after hearing *Joseph Story*, of counsel for the defendant, and *Jeremiah Mason*, of counsel for the plaintiff (or *and after reading and filing affidavit* or *admission of due service of notice of this motion and no one appearing in opposition*), Ordered,

I. That plaintiff's complaint herein be and hereby is dismissed with costs of the action, unless plaintiff shall file security for costs herein according to the order of the *seventh* day of *April*, 1897, and also pay the costs mentioned in said order within *five* days from the date of service of this order.

II. That plaintiff pay (*concluding as in Form No. 6495*).

(*b*) *Absolute Order.*

Form No. 6529.[2]

In the *Superior* Court of the *City and* County of *San Francisco*, State of *California*.

Present: Hon. *John Marshall*, Judge.

John Doe, plaintiff, against *Richard Roe*, defendant. } Order Dismissing Action for Failure to File Security for Costs.

Upon reading and filing the affidavit of *Joseph Story*, verified the *second* day of *May*, 1897, from which it appears that the plaintiff in this action is a nonresident; that a notice requiring said plaintiff to furnish security for costs was served upon him by the defendant's

District of Columbia. — Comp. Stat. (1894), c. 55, § 30.
Florida. — Rev. Stat. (1892), § 1301.
Idaho. — Rev. Stat. (1887), § 4916.
Illinois. — Starr & C. Anno. Stat. (1896), c. 33, § 3.
Indiana. — Horner's Stat. (1896), § 589.
Iowa. — Code (1897), § 3848.
Kentucky. — Bullitt's Civ. Code (1895), § 617.
Maryland. — Pub. Gen. Laws (1888), art. 24, § 9.
Missouri. — Rev. Stat. (1889), § 2915.
Montana. — Code Civ. Proc. (1895), § 1872.
Nebraska. — Comp. Stat. (1897), § 6209.
New Mexico. — Comp. Laws (1884), § 1843.
New York. — Code Civ. Proc., § 3277 (Birds. Rev. Stat. (1896), p. 720, § 72).
North Dakota. — Rev. Codes (1895), § 5599.
Ohio. — Bates' Anno. Stat. (1897), § 5341.
Oklahoma. — Stat. (1893), § 4833.
Oregon. — Hill's Anno. Laws (1892), § 2063.
Rhode Island. — Gen. Laws (1896), c. 247, § 4.
Texas. — Rev. Stat. (1895), art. 1440.
Utah. — Rev. Stat. (1898), § 3355.
Wyoming. — Rev. Stat. (1887), § 2688.

1. *New York.* — Code Civ. Proc., § 3277 (Birds. Rev. Stat. (1896), p. 720, § 72).

2. *California.* — Code Civ. Proc. (1897), § 1037.

See also the following statutes:
Idaho. — Rev. Stat. (1887), § 4916.
Montana. — Code Civ. Proc. (1895), § 1872.
Utah. — Rev. Stat. (1898), § 3355.

attorney on the *first* day of *April*, 1897, and that *thirty* days have elapsed since the service of such notice and yet no security for costs has been filed; now, after hearing *Joseph Story*, of counsel for the defendant, and *Jeremiah Mason*, of counsel for the plaintiff, in opposition, upon motion of counsel for the defendant,

Ordered: That the complaint herein be and is hereby dismissed.

Dated *May 3*, 1897. *John Marshall*, Judge.

Form No. 6530.[1]

(*Title of court and cause as in Form No. 6490.*)

Upon reading the orders of this court entered the *first* day of *April*, 1897, and the *twenty-fifth* day of *April*, 1897, and upon reading and filing the affidavit of *Joseph Story*, verified the *first* day of *May*, 1897, by which it appears that the plaintiff has not complied with the requirements of the orders above mentioned; now, after hearing *Joseph Story*, of counsel for the defendant, and *Jeremiah Mason*, of counsel for the plaintiff, upon motion of the defendant, ordered:

I. That the complaint of the plaintiff herein be and is hereby dismissed, and that judgment be entered in favor of the defendant accordingly.

II. That plaintiff pay (*concluding as in Form No. 6495*).

Form No. 6531.[2]

John Doe
against
Richard Roe.

Upon reading the suggestion of the defendant, entered upon the record the *twenty-first* day of *April*, 1897, and the order to file security made herein on the same day and date, and it appearing that *sixty* days from said date have elapsed, and that the plaintiff has neither proved residence nor filed security for costs according to the statute, either within said *sixty* days or afterward up to the present time,

Be it ordered, that this action be and is hereby dismissed.

(2) Denying Motion Where Security is Filed After Expiration of Time.

Form No. 6532.

John Doe
against
Richard Roe.

The motion of the defendant to dismiss the petition in this cause for failure to comply with an order made herein on the *tenth* day of *April*, 1897, requiring him to file security for costs, as prescribed by law within *fifteen* days, and in default thereof providing that his

1. *New York.* — Code Civ. Proc., § 3277 (Birds. Rev. Stat. (1896), p. 720, § 72).

2. *Virginia.* — Code (1887), § 3539. *West Virginia.* — Code (1891), c. 138, § 2.

action be dismissed, came on for hearing, and it appearing that said plaintiff has since the expiration of said *fifteen* days filed due security for costs, said motion is overruled and denied.

II. SUITS IN FORMA PAUPERIS.

1. Application for Leave to Sue.

a. In General.

Form No. 6533.[1]

In the *Supreme* Court of the *District of Columbia.*

John Doe, plaintiff,
against
Richard Roe, defendant. } No. *172.*

To the *Supreme* Court of the *District of Columbia* holding an Equity Court:

The petition of your petitioner respectfully showeth:

I. That your petitioner having filed his bill in this honorable court against said defendant, thereby setting forth that (*Here state concisely the substance of the bill*).

II. That your petitioner is not worth *twenty-five* dollars in all the world, his wearing apparel and the matters in question in this cause only excepted, and that he is utterly unable to prosecute his said suit unless he be permitted to do so *in forma pauperis.*

III. Wherefore your petitioner prays that he may be permitted to prosecute his said suit *in forma pauperis*, and that he may have the necessary writs and process without costs or charge for the same, and that there may be assigned to him learned counsel, which shall give their counsel nothing taking for the same, and that there may be appointed in his behalf attorneys and all other officers requisite and necessary to be had for the speed of the said suit to be had and made, which shall do their duties without any reward for their counsels, help and business in the same. And your petitioner requests that *Jeremiah Mason*, Esquire, be assigned to him as solicitor and counsel in said cause.

And this your petitioner will ever pray, etc.

John Doe.

I, *Jeremiah Mason*, counsellor-at-law of the *Supreme* Court of the *District of Columbia*, do hereby certify that I have examined the cause upon which the plaintiff's bill herein is based, and I conceive that the plaintiff has just cause to be relieved touching the matter of this petition, and for which he has exhibited his bill.

Dated *May 6th*, 1897. *Jeremiah Mason.*

1. *District of Columbia.*— Comp. Stat. (1894), c. 55, § 32.
New Jersey.— Gen. Stat. (1895), p. 2598, § 368, *et seq.*

Petition of defendant *in forma pauperis* is similar, save that it does not state the contents of the bill.

Form No. 6534.

(Kan. Gen. Stat. (1889), § 4684.)[1]

State of *Kansas*, } ss.
Cowley County. }

John Doe, plaintiff, }
against } In the *District* Court of said County.
Richard Roe, defendant. }

I do solemnly swear that the cause of action set forth in the petition hereto prefixed is just, and I do further swear that by reason of my poverty I am unable to give security for costs.

John Doe.

Subscribed and sworn to before me this *twenty-first* day of *April*, 1897.

Abraham Kent,
Notary Public, *Cowley* County.

Form No. 6535.[2]

State of *Illinois*, } ss.
County of *La Salle*. }

John Doe, being duly sworn, deposes and says that he is desirous of commencing suit in the *Circuit* Court of said county of *La Salle* against *Richard Roe*; that he is a poor person, and unable to prosecute his suit in this behalf and to pay the costs and expenses thereof, and that he has reason to believe, and does believe, that his cause of action for which he desires to bring suit is a meritorious one.

John Doe.

Subscribed and sworn to before me this *fifth* day of *May*, 1897.

Abraham Kent,
Notary Public, *La Salle* County.

Form No. 6536.

(Miss. Anno. Code (1892), § 870.)

In the *Circuit* Court for the County of *De Soto*.

John Doe, plaintiff, }
against }
Richard Roe, defendant. }

State of *Mississippi*, } ss.
County of *De Soto*. }

I, *John Doe*, do solemnly swear that I am a citizen of the state of *Mississippi*, and because of my poverty I am not able to pay the costs or give security for the same in the suit (*describing it*) which I have

1. This same form is set out in Okla. Stat. (1893), § 4478, and substantially the same form is sufficient under Mont. Code Civ. Proc. (1895), § 1873.

2. *Illinois*. — Starr & C. Anno. Stat. (1896), c. 33, par. 6.

This form of affidavit is used where the plaintiff makes application prior to the convening of the term of a court of record. Where the court is in session, the affidavit used is substantially like that set out in Form No. 6536. See similar statutes as follows:

Colorado. — Mills' Anno. Stat. (1891), § 676.

Kentucky. — Gen. Stat. (1888), c. 26, § 1.

begun (or *which I am about to commence*), and that, to the best of my belief, I am entitled to the redress which I seek by such suit.

John Doe.

Subscribed and sworn to before me this *seventh* day of *May*, 1897.

Abraham Kent,
Clerk *De Soto Circuit* Court.

Form No. 6537.[1]

Supreme Court, *City and* County of *New York.*

In the Matter of the Application of *John Doe* for Leave to Sue as a Poor Person.

To the *Supreme* Court of the State of *New York.*

The petition of *John Doe* respectfully shows:

I. That he resides in the city, county and state of *New York.*

II. That he has a cause of action against the *Third Avenue Railroad Company*, arising upon this state of facts, namely: That upon the *third* day of *November last*, at about *six* o'clock in the *after*noon, he was crossing *Third* avenue in the exercise of due care, and by the negligence of said *Third Avenue Railroad Company's* servant, to your petitioner unknown, said servant then being in control and management of a car of said railroad company, then being propelled by cable power upon *Third* avenue in said city, your petitioner was struck by said cable car and grievously injured, wholly without fault or negligence on his part.[2]

III. That your petitioner desires to begin an action in this court against said *Third Avenue Railroad Company* for the above cause.[3]

IV. That your petitioner is not worth *one hundred* dollars besides the wearing apparel and furniture necessary for himself and family and the subject matter of this action, and is unable to prosecute this action unless allowed to do so as a poor person.[4]

V. That your petitioner is a common day-laborer, and is obliged to earn his livelihood by that means alone, and that for many months past he has been unable to work owing to injuries received in the

1. This form is drawn under Birds. Rev. Stat. N. Y. (1896), p. 2219, § 14.

In several other states the statute is substantially the same, the chief difference being in the amount that petitioner is worth. See for example the following:

Arkansas. — Sand. & H. Dig. (1894), § 799.

Colorado. — Mills' Anno. Stat. (1891), § 676.

Illinois. — Starr & C. Anno. Stat. (1896), c. 33, par. 5.

Indiana. — Horner's Stat. (1896), § 260.

Missouri. — Rev. Stat. (1889), §§ 2918, 2919.

New Mexico. — Comp. Laws (1884), § 1844.

2. The nature of the action brought, or intended to be brought, must be stated in the petition. Birds. Rev. Stat. N. Y. (1896), p. 2219, § 14. A copy of the complaint may be set out or annexed and referred to; and if not so set out, the nature of the injuries should be specified.

3. Where an action has been begun, this paragraph should read: "That your petitioner has begun an action against said *Third Avenue Railroad Company* for the above cause," and should state the condition of the case, showing that there has been no laches in applying for leave to sue as a poor person.

4. This paragraph is required by Birds. Rev. Stat. N. Y. (1896), p. 2219, § 14, subs. 2.

above stated manner by the fault and negligence of said company, and he has now become and is impoverished.

VI. That no previous application for leave to sue as a poor person has been made herein.[1]

Wherefore your petitioner prays leave to prosecute the *Third Avenue Railroad Company* as a poor person, and further that the court will assign him attorney and counsel for that purpose.

January 1, 1898. *John Doe.*

City and County of *New York*, ss.

John Doe, being duly sworn, says that he has read the foregoing petition, and knows the contents thereof, and that the same is true to his own knowledge, except as to the facts therein stated to be alleged upon information and belief, and as to those facts, he believes it to be true.

John Doe.[2]

Sworn to before me this *first* day of *January*, 1898.

Abraham Kent,
Notary Public, *New York* County.

I, *Jeremiah Mason*, of the city, county and state of *New York*, counsellor-at-law, do hereby certify that I have examined the cause stated in the above petition, and am of the opinion that the applicant has a good cause of action therein.

January 1, 1898 *Jeremiah Mason.*[3]

Form No. 6538.[4]

Mecklenburg County: — In the *Superior* Court.

John Doe against *Richard Roe.* } Application to Sue as a Pauper.

To Hon. *John Marshall*, Judge (or *Clerk*)[5] of *Superior* Court, *Mecklenburg* County:

This is to certify: 1st. That I have examined the case of the plaintiff in the above entitled action, and believe that he has a good and meritorious cause of action in fact and law.

2d. That I will prosecute said action as his counsel without any fee or reward whatever.

Jeremiah Mason, Attorney.[6]

1. This paragraph is required only when an *ex parte* application is made.

2. The petition must be verified by the applicant's affidavit, unless the applicant is an infant under the age of fourteen years, and in that case by the affidavit of his guardian appointed in said action. Birds. Rev. Stat. N. Y. (1896), p. 2219, § 14.

3. The petition must be supported by a certificate of a counsellor-at-law to the effect that he has examined the case, and is of the opinion that the applicant has a good cause of action. Birds. Rev. Stat. (1896), p. 2219, § 14.

4. *North Carolina.* — Code Civ. Proc. (1891), § 210.

5. **To Whom Made.** — The application may be made either to the judge or to the clerk of the supreme court, and the authority of the clerk to grant the permission to sue as a pauper is not restricted to the limits of his authority as an officer of the probate court. N. Car. Code Civ. Proc. (1891), § 210; Rowark *v.* Gaston, 67 N. Car. 291.

6. **Certificate of Counsel.** — The code does not require a certificate of counsel that the plaintiff has a good cause of action, but merely that he shall prove

Mecklenburg County: — ss.

John Doe, being sworn, says: That he is unable to give sureties, or make the deposit required by law, to enable him to prosecute the above action against the defendant, *Richard Roe* above named, and if required so to do, could not prosecute his said action. He therefore prays that he may be allowed to sue in said action as a pauper.

John Doe.

Sworn before me this *fifth* day of *May*, 1897.

Abraham Kent, Notary Public.

Form No. 6539.[1]

State of *Tennessee*, } ss.
County of *Smith.* }

I, *John Doe*, do solemnly swear that owing to my poverty I am not able to bear the expenses of the action which I am about to commence in the *Chancery* Court of *Smith* county against *Richard Roe*, and that I am justly entitled to the redress sought, to the best of my belief.

John Doe.

Sworn and subscribed before me this *fifth* day of *March*, 1898.

John Hancock, Clerk.

Form No. 6540.[2]

John Doe, plaintiff, against *Richard Roe*,[3] defendant. } *District* Court of *Freestone* County, *October* Term, 1897.

John Doe, being duly sworn, says that he is the plaintiff in the above entitled case, and that he is too poor to pay the costs of court, and is unable to give security therefor.

John Doe.

Subscribed and sworn to before me this *sixth* day of *October*, 1897.

Norton Porter,
Notary Public, *Freestone* County.

this fact by one or more witnesses. N. Car. Code Civ. Proc. (1891), § 210. And it has been held that his own affidavit is sufficient proof of the fact, at least in so far that where the clerk has allowed the plaintiff to sue *in forma pauperis* merely on his own affidavit, setting out the facts required by statute, and that he had a good cause of action, the court has refused to dismiss his suit. Sumner *v.* Candler, 74 N. Car. 265. But a certificate of counsel has been held sufficient proof of a good cause of action. Miazza *v.* Calloway, 74 N. Car. 31. And further the rule has been laid down in Brendle *v.* Heron, 68 N. Car. 496, that while this section of the act does not expressly require that plaintiff shall have a certificate of an attorney to the effect that he has a good cause of action, yet, upon a fair construction of the act, no officer authorized to allow a person to sue *in forma pauperis* should do so, at least in general, without such certificate. The act, however, is only directory, and the matter is necessarily entirely in the discretion of the judge or clerk.

1. Tenn. Code (1896), § 4928, where a statutory form will be found.

2. *Texas.*— Rev. Stat. (1895), art. 1442. **Sufficient Affidavit.** — An affidavit which states that plaintiff is unable to give security for or to make a deposit sufficient to cover all the costs, but that he cannot swear that he is unable to pay the costs as they accrue, and that he has paid all accrued costs except a small balance, to cover which he has made a deposit with the clerk, is a sufficient answer to the rule for costs under this statute. Long *v.* McCauley, (Tex. 1887) 3 S. W. Rep. 689.

3. The affidavit should give the proper

b. Where Application is First Made on Appeal.

Form No. 6541.[1]

Georgia, *Bibb* County.

In the *Superior* Court of said County.

John Doe
against
Richard Roe.

I, *John Doe*, plaintiff in the above cause, do swear that I am advised and believe[2] that I have a good cause of appeal in the above stated case, and that owing to my poverty[3] I am unable to pay the costs or give security required by law in cases of appeal.

John Doe.

Sworn to and subscribed before me this *tenth* day of *May*, 1897.

Norton Porter,
N. P. and Ex-Officio J. P.

c. Upon Claim for Tax Seizure.

Form No. 6542.

(2 Ga. Code (1895), § 4618.)

Georgia, *Bibb* County.

I, *John Doe*, do swear that I do not interpose this claim for delay only; that I bona fide claim the right and title to the same; that I am advised and believe that the claim will be sustained; and that from poverty I am unable to give bond and[4] security as now required by law.

John Doe.

(*Jurat as in Form No. 6541.*)

names of all the parties, but failure so to state the names must be taken advantage of by motion pointing out the defect in the affidavit, and not by a simple motion to dismiss. Hubby *v.* Harris, 63 Tex. 456.

1. *Georgia.* — 2 Code (1895), § 4465, as *amended* act Dec. 21, 1897.

2. Where the words "he is advised and believes that he has a good cause of appeal" were omitted, the affidavit was held insufficient, but it was said to be the privilege of the plaintiff to move to reinstate the case by amending the affidavit at any time within the term. Holsenbach *v.* Martin, 28 Ga. 73.

3. An affidavit which omits the words "owing to his poverty" is not a sufficient compliance with the statute. An affidavit reading as follows: "Personally came before me *John Gibbons*, who being duly sworn deposeth and saith that he is advised and believes that he has a good cause of appeal and that he is unable to give security on entering the same," was held insufficient both for the above reason and because it did not state that he was unable to give the security required by law in cases of appeal. Gibbons *v.* McComb, 3 Ga. 252.

Affidavit by Trustee. — This form of affidavit would not be sufficient where the appeal was prosecuted by a trustee. In such case the affidavit should state that the "inability to give security arose from the poverty of the trust estate." Scott *v.* Turpin, 30 Ga. 964.

4. A similar section of the *Georgia* code has been amended so that in the affidavit the word "or" is used in place of "and." See *supra*, note 1.

2. Order.

a. Of Reference.

Form No. 6543.[1]

At a *Special* Term of the *Supreme* Court held at the *County Court-house* in *New York City* on the *second* day of *January*, 1896.

Present: Hon. *John Marshall*, Justice.

In the Matter of the Petition of *John Doe* for Leave to Prosecute as a Poor Person.

Upon reading and filing the annexed petition of *John Doe*, verified on the *first* day of *January*, 1896, and the certificate of *Jeremiah Mason*, his counsel, dated the *first* day of *January*, 1896, and it appearing to the satisfaction of the court that the facts alleged by the petitioner are true and that said petitioner has a good cause of action, and upon hearing *Jeremiah Mason*, of counsel for the petitioner, and *Joseph Story*, of the counsel for the defense in opposition,* Ordered:

I. That the matter be referred to *Daniel Webster*, Esquire, counselor of this court, to examine the facts and circumstances of the case set out in said petition, and to report whether in his opinion said petitioner has a good cause of action against *The Third Avenue Railroad Company* named therein, cognizable in and within the jurisdiction of this court, and whether said petitioner is entitled to prosecute the said action as a poor person.

II. That if said referee is satisfied that said petitioner is entitled to prosecute as a poor person and that he has reasonable grounds to prosecute the action in this court, that he report the name of a proper person for assignment as attorney and counsel in the prosecution of such action.

Enter: *J. M.*, J. *S.* C.

b. Granting Leave to Sue.

Form No. 6544.

(*Commencing as in Form No. 6543, and continuing down to* *)

Ordered:

I. That the petitioner be allowed to prosecute as a poor person, and that he have assigned to him attorneys, counsel, and all other officers requisite for prosecuting his said suit, who shall do their duty therein without reward or compensation for the same.

II. That *John Jay*, Esquire, is hereby assigned to him as attorney and counsel for that purpose.

Enter: *J. M.*, J. *S.* C.

1. In a case where the facts are not fairly within the view of the court, as is usually the case in actions for personal injuries resulting from negligence, the court will not grant leave to sue as a poor person without first ordering a reference, but in cases not of this class the court will issue an order sometimes on an *ex parte* application.

Form No. 6545.[1]

Mecklenburg County: — ss.

John Doe against *Richard Roe.* } Order Granting Leave to Sue as a Pauper.

In the above entitled action, upon the certificate and affidavit above set forth, it is Ordered:

1st. That the above named *John Doe* be allowed to prosecute his said suit as a pauper.

2d. That no officer[2] shall require of him any fee, and he shall recover no costs.

3d. That *Jeremiah Mason* be assigned to him as counsel to prosecute said action.

This *fifth* day of *May*, 1897.

John Marshall,
Judge (or *Clerk*) *Superior* Court,[3]
County of *Mecklenburg*.

Form No. 6546.[4]

It is ordered, that *John Doe* be admitted to prosecute his suit against *Richard Roe in forma pauperis*; and *Jeremiah Mason* is hereby appointed counsel in his behalf, according to the prayer of the foregoing petition.

John Marshall,
Judge *Freestone County* Court.

c. Denying Leave to Sue.

Form No. 6547.

(*Title of court and cause as in Form No. 6543.*)

Upon reading and filing the petition of *John Doe*, verified the *first* day of *January*, 1896, and the certificate of *Jeremiah Mason*, his counsel, dated the *first* day of *January*, 1896, and upon reading and filing in opposition the affidavits of *Albert J. Elias* and *Michael Murphy*, both verified on the *tenth* day of *January*, 1896, and it failing to appear to the satisfaction of the court that the facts alleged by the petitioner are true (or *it appearing that this motion has been unreasonably delayed until after the case has been noticed for trial*), and on hearing *Jeremiah Mason*, of counsel for the petitioner, and *Joseph Story*,

1. *North Carolina.* — Code Civ. Proc. (1891), §§ 210–212.

2. A plaintiff suing *in forma pauperis* must pay the witnesses whom he summons. Only officers of the court can be included in the order relieving from costs. Morris *v.* Rippy, 4 Jones L. 49 (N. Car.) 533; Bailey *v.* Brown, 105 N. Car. 127.

But if the plaintiff suing *in forma pauperis* is successful in his suit he is not entitled to recover the costs of his witnesses. Draper *v.* Buxton, 90 N. Car. 182.

3. The written authority of a judge or clerk of a superior court, authorizing the plaintiff's suit as a pauper, must be filed with the clerk and he will issue summons. N. Car. Code Civ. Proc. (1891), § 209.

4. *Texas.* — Rev. Stat. (1895), arts. 1109, 1164.

No caption is required, as the judge's order is subscribed to the petition.

of counsel for the defense, in opposition, Ordered: That the petition be and is hereby denied.

Enter: *J. M.*, J. *S.* C.

d. Annulling Leave to Sue.

Form No. 6548.[1]

(*Title of court and cause as in Form No. 6543.*)

Upon reading and filing the affidavit of *Richard Roe*, verified the *tenth* day of *January*, 1896, from which it appears that *John Doe*, plaintiff in this action, has been guilty of improper conduct in the prosecution thereof, for which cause it is proper that the order of this court, made the *second* day of *January*, 1896, allowing said *John Doe* to prosecute said action as a poor person, should be annulled, and upon reading and filing proof of due service of notice of this motion to *Jeremiah Mason*, attorney for the defendant, and after hearing *Jeremiah Mason*, of counsel for the defendant, and no one appearing in opposition, upon motion of said counsel for the defendant, Ordered: That the aforementioned order granting leave to said *John Doe* to prosecute said action as a poor person be and the same is hereby annulled.

Enter: *J. M.*, J. *S.* C.

III. TAXATION.

1. In General.

a. Notice of Taxation.[2]

Form No. 6549.[3]

To *Joseph Story*, Esq., Attorney for *Defendant*:

Take notice that the foregoing is a true copy of the *plaintiff's* bill

1. *New York.* — Code Civ. Proc., § 462 (Birds. Rev. Stat. (1896), p. 2220, § 17).

In *Mississippi* the court will dismiss an action "commenced or continued on affidavit of poverty, if satisfied that the allegation of poverty is untrue or that the cause of action is frivolous and malicious." Miss. Anno. Code (1892), § 871.

2. Costs are taxed by the clerk upon notice to the opposite party in the following states:

California. — Code Civ. Proc. (1897), § 1033.

Connecticut. — Gen. Rules Prac., No. X, § 16.

Massachusetts. — Pub. Stat. (1882), c. 198, § 23.

Michigan. — How. Anno. Stat. (1882). §§ 8996, 8997.

Minnesota. — Stat. (1894), § 5505.

Montana. — Code Civ. Proc. (1895), § 1867.

New York. — Code Civ. Proc., § 3263 (Birds. Rev. Stat. (1896), p. 716, § 58).

North Dakota. — Rev. Codes (1895), § 5585.

Oregon. — Hill's Anno. Laws (1892), § 556.

Rhode Island. — Gen. Laws (1896), c. 247, § 17.

South Carolina. — Code Civ. Proc. (1893), § 326.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 2927.

For a letter proposing to tax a bill of costs, which was held not a notice of taxation, see Brown *v.* Ferguson, 2 How. Pr. (N. Y. Supreme Ct.) 128.

3. *Michigan.* — How. Anno. Stat. (1882), § 9002.

of costs in the within entitled cause, proposed to be taxed, and of the affidavit of disbursements, required by law, to be read in support thereof; and that application will be made to the clerk of the said court to tax the same, at his office, on the *fifth* day of *May*, A. D. 1898, at *ten* o'clock *A.* M.

Dated this *thirtieth* day of *April*, A. D. 1898.

Jeremiah Mason,
Attorney for the *Plaintiff*.

Form No. 6550.

Take notice that I shall present a bill of costs, of which the foregoing is a true copy,[1] to the clerk of this court for adjustment, at his office in the *county court-house*, in the village of *Riverhead*, on the *twenty-fourth* day of *May*, 1898, at *ten* o'clock in the *fore*noon of that day.[2]

May 18, 1898. Yours, etc.,
Jeremiah Mason,
Attorney for Defendant (or *Plaintiff*).

To *Joseph Story*, Esq.,
Attorney for Plaintiff (or *Defendant*).[3]

Form No. 6551.[4]

Circuit Court, *Dane* County.

John Doe, plaintiff,
against
Richard Roe, defendant.

To *Jeremiah Mason*, Attorney for *Plaintiff*:

Please take notice that the *defendant* in the above entitled action will apply to the clerk of the aforesaid court, at his office in *Madison*, in the county of *Dane* and state of *Wisconsin*, on the *fifth* day of *May*, A. D. 1898, at *ten* o'clock in the *fore*noon, to tax his costs and disbursements in said action, and that the same when so taxed be inserted in the entry of judgment in said action.

Yours, etc.,
Joseph Story, Attorney for *Defendant*.

1. **A copy of the bill of costs** specifying the items, with the disbursements stated in detail, must be served with the notice of taxation. N. Y. Code Civ. Proc., § 3263 (Birds. Rev. Stat. (1896), p. 716, § 58); Gildersleeve *v.* Halsey, 3 Sandf. (N. Y.) 756.

2. **Five days notice** of taxation of costs is required unless all the attorneys serving said notice and served with said notice reside in and have an office in the same town or city where the bill of costs has been taxed. Two days' notice is then sufficient. N. Y. Code Civ. Proc., § 3263 (Birds. Rev. Stat. (1896), p. 716, § 58).

3. **Upon Whom Served.** — The notice must be served upon the attorney for each adverse party who has appeared, and is interested in reducing the amount thereof. N. Y. Code Civ. Proc., § 3263 (Birds. Rev. Stat. (1896), p. 716, § 58).

4. *Wisconsin.* — Sanb. & B. Anno. Stat. (1889), § 2927.

b. Proof of Right to Tax.

(1) Certificate of Judge.

Form No. 6552.

(Precedent in Hudson *v.* Guttenberg, 9 Abb. N. Cas. (Brooklyn City Ct.) 418.)[1]

[At a *Special* Term of the *City* Court *of Brooklyn* held at the *County Court-house*, on the *fifteenth* day of *December*, 1880.

Present: Hon. *Joseph Neilson*, C. J.

Charles Hudson, plaintiff,
against
Frederick Guttenberg, defendant.][2]

On reading and filing affidavit, I, *Joseph Neilson*, chief judge of the court, do hereby certify that in the trial of the above action before me[3] on the *8th* day of *December*, 1880, three separate and distinct causes of action were set forth in the complaint and separate and distinct issues joined thereon, and that the jury found for the plaintiff on the second cause, and for the defendant on the first and third causes of action set forth in the complaint; and I do therefore certify that the defendant is entitled to two bills of costs against the plaintiff and which may be set off against the bill of costs to which plaintiff is entitled.

J. N.

(2) Affidavits.[4]

(*a*) *By Attorney, of Costs and Disbursements.*

Form No. 6553.

(Precedent in Burnham *v.* Hays, 3 Cal. 116.)[5]

State of *California*, County of *San Francisco.*

G. W. Beck, one of the attorneys of the plaintiff above named, being duly sworn, deposeth and saith, that the items of the foregoing bill of costs are correct, to his best knowledge and belief, and that the disbursements have necessarily been incurred in the action. And further saith not.

G. W. Beck.

Sworn to and subscribed before me on the *26th May*, 1852.

H. Marshall, Clerk.

1. *New York.* — Code Civ. Proc., § 3248 (Birds. Rev. Stat. (1896), p. 711, § 43).

2. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

3. **Where Title to Real Property is Involved.** — Where upon the trial the title to real property comes in question, the certificate may continue from this point as follows: "on the *eighth* day of *December*, 1880, the question of title to real estate was raised and put in issue by the pleadings therein, and came in question on the trial. *J. N.*"

4. For forms of affidavits, generally, consult the title Affidavits, vol. 1, p. 548.

5. This affidavit annexed to the bill of costs was held to be sufficient.

Form No. 6554.[1]

State of *Michigan*, } ss.
County of *Wayne*. }

Jeremiah Mason, being duly sworn, says that the items of costs charged in the foregoing bill of costs, as disbursements, have actually been paid, or the liability therefor incurred, and were necessary and are reasonable in amount; that the witnesses therein named were in good faith made to attend and were deemed material and necessary, in the within entitled cause, and they respectively traveled the number of miles, and actually attended the number of days specified; that *John Doe*, the plaintiff in said cause, was in attendance upon said court for the time charged for the purpose of being sworn as a witness, and not to assist in the management of said cause, and traveled the number of miles specified in said bill of costs, for the purpose of giving evidence; and that the copies and exemplifications charged for were actually and necessarily used, or necessarily and in good faith obtained for use.

Jeremiah Mason.

Sworn to and subscribed before me this *fifth* day of *May*, A. D. 1*898*.
(SEAL) *Norton Porter*,
Notary Public, *Wayne* County.

Form No. 6555.

(Precedent in Dallemand *v.* Swensen, 54 Minn. 33.)[2]

State of *Minnesota*, } ss.
County of *Hennepin*. }

Frank R. Hubachek being duly sworn, says that he is one of the attorneys of the plaintiffs in the above entitled action; that the foregoing is a true and correct statement of the costs and disbursements of said plaintiffs in the above entitled action, and that all the items thereof have been actually and necessarily paid or incurred therein, by and on behalf of said plaintiffs; and that each of the above named witnesses was a material[3] witness for the plaintiffs in said action and was sworn and testified, and that he necessarily traveled the number of miles set opposite his name going from his said place of residence to, and returning from the place of trial, and necessarily attended the number of days set opposite his said name.

Frank R. Hubachek.

Subscribed and sworn to before me this *26th* day of *July*, 1*892*.
(SEAL) *Edith A. Saxton*,
Notary Public, *Hennepin* County, *Minnesota*.

1. *Michigan*. — How. Anno. Stat. (1882), § 9002.

2. This form of affidavit was held sufficient.

3. The following clause, to wit: "And deponent further says, that a number of said persons were not called and sworn in the case, though they were subpœnaed, or their attendance procured, in good faith, in anticipation of a defense to be made by the defendant, in accordance with his notice under the plea of the general issue in said cause, but that, unexpectedly to deponent, the defendant did not call any witnesses on the defense, and for this reason it became unnecessary to call such witnesses on the part of deponent," has been held too vague; for the necessity as well as the materiality must clearly appear from the affidavit. Gilbert *v.* Kennedy, 22 Mich. 5.

Form No. 6556.[1]

Supreme Court, *City and* County of *New York.*

John Doe, plaintiff,
against
Richard Roe, defendant.

City and County of *New York*, ss.

Jeremiah Mason, being duly sworn, deposes and says: *

I. That he is attorney for the plaintiff in this action, and was present as counsel at the trial of this cause.

II. That the foregoing disbursements have been actually made or incurred in the cause of this action, except the items (*specifying them*), which items are claimed as prospective disbursements, and as to these, that he believes them as stated above to be correct.

III. That *Samuel Short* was summoned as a witness for the plaintiff at the trial of this cause by the service upon him of a subpœna; that the travel fees demanded for his attendance are at the statutory rate for the distance of *three hundred* miles; that said *Samuel Short* resides in the city of *Albany*, where he was served with the subpœna.

IV. That *William West* attended the trial of this cause as a witness for the plaintiff at his request; that the travel fees which are demanded for his attendance are at the statutory rate for the distance of *twenty* miles; that said *William West* resides in the city of *Yonkers.*

V. That the said *Samuel Short* and *William West* were respectively present as witnesses at the trial during *two* days, namely, the *seventh* day of *May* and the *eighth* day of *May last*, that their testimony was (or *was believed to be*) material to the cause of the plaintiff herein. That the distances for which travel fees are asked are the distances by the usual and reasonable route from their respective places of residence to the place of trial and return.[2]

1. *New York.* — Code Civ. Proc., § 3267 (Birds. Rev. Stat. (1896), p. 717, § 62).

Taxation is by the clerk, upon affidavits similar to those used in *New York* in the following states:

Alabama. — Civ. Code (1886), § 2855.

Arizona. — Rev. Stat. (1887), § 912.

Arkansas. — Sand. & H. Dig. (1894), § 807.

California. — Code Civ. Proc. (1897), § 1033.

Colorado. — Mills' Anno. Stat. (1891), § 692.

Idaho. — Rev. Stat. (1887), § 4912.

Illinois. — Starr & C. Anno. Stat. (1896), p. 1075, par. 25.

Michigan. — How. Anno. Stat. (1882), § 9002.

Minnesota. — Stat. (1894), § 5505.

Missouri. — Rev. Stat. (1889), § 2941.

Montana. — Code Civ. Proc. (1895), § 1867.

Nevada. — Gen. Stat. (1885), § 3508.

North Dakota. — Rev. Codes (1895), § 5585.

Oregon. — Hill's Anno. Laws (1892), § 556.

South Carolina. — Code Civ. Proc. (1893), § 326.

South Dakota. — Dak. Comp. Laws (1887), § 5197.

Utah. — Rev. Stat. (1898), § 3350.

Washington. — Ballinger's Anno. Codes & Stat. (1898), § 5173.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 2927.

2. The affidavit should show the name and place of residence of each of the witnesses; the distances they severally resided from the place of trial according to the usual traveled route, and the number of miles they respectively traveled as such witnesses for the purpose of getting to the place of trial and return therefrom, and that they were material and necessary, or that the party believed them to be so. Wheeler *v.* Lozee, 12 How. Pr. (N. Y. Supreme Ct.) 446; Taaks *v.* Schmidt, 25 How. Pr. (N. Y. Supreme Ct.) 340; Hicks *v.* Brennan, 10 Abb. Pr. (N. Y. Supreme Ct.) 304.

VI. That the copies for papers for which charge is made above were actually and necessarily used in this case (or *necessarily obtained for use*).

Joseph Story.

Sworn to before me this *15th* day of *May*, 1896.

Abraham Kent,
Notary Public, *New York* County.

Form No. 6557.[1]

State of *South Dakota*, } ss.
County of *Hughes*. }

Jeremiah Mason came personally before me, and having been first duly sworn, deposes and says that he is the attorney of said *plaintiff* in the above entitled action; that the above bill and items of costs and disbursements therein are just and correct, and have been or will be necessarily incurred in said action.

Jeremiah Mason.

Subscribed and sworn to before me this *fifth* day of *May*, 1898.

(SEAL)

Norton Porter,
Notary Public, *Hughes* County.

(*b*) *By Referee, for Reference Fees.*

Form No. 6558.[2]

(*Title of court and cause, and venue as in Form No. 6556.*)

Richard Styles, being duly sworn, deposes and says:

I. That he was appointed referee in this cause by consent on the *first* day of *April*, 1895.

II. That in the necessary business of such reference he held *fifty-one* hearings on *fifty-one* different days, as here tabulated (*giving dates in full*).

III. That after the submission of the controversy deponent necessarily spent *ten* days in examining the evidence and in making his report, to wit: (*Here set out the days in full.*)[3]

(*Signature and jurat as in Form No. 6556.*)

(*c*) *By Witness, for Travel Fees.*[4]

1. *South Dakota.* — Dak. Comp. Laws (1887), § 5197.

2. If there is any controversy as to the fee taxed for reference, the best practice is to present an affidavit made by the referee himself. Shultz *v.* Whitney, 9 Abb. Pr. (N. Y. C. Pl.) 71.

3. The affidavit should clearly show the time spent by the referee in the business of the reference, and that this time was necessarily required. Brown *v.* Windmuller, 36 N. Y. Super. Ct. Rep. 75.

4. **By Sheriff for Travel Fees.** — In People *v.* Pearson, 4 Ill. 286, the affidavit, omitting the formal parts, is as follows:

"*James M. Maxcy*, being first duly sworn, doth depose and say, that he was, in the year eighteen hundred and *forty*, a deputy of *Garret Elkin*, who was then sheriff of *Sangamon* county. That at the *June* term, eighteen hundred and *forty*, a writ of attachment issued out of the *Supreme* Court of this State directed to any and all sheriffs of all counties of the state of *Illinois*, against *John Pearson*, to answer for a contempt of said *Supreme* Court, in refusing to obey a peremptory writ of

Form No. 6559.[1]

(*Title of court and cause, and venue as in Form No. 6556.*)

William West, being duly sworn, deposes and says that he came to *New York* from *Yonkers* to attend the trial of this cause on the *seventh* day of *May*, 1894, as a witness for the plaintiff, and at his request, and that he would not have come to the city of *New York* on that day except for the purpose of being such witness.

(*Signature and jurat as in Form No. 6556.*)

c. Objection to Items.

(1) Notice to Clerk.

Form No. 6560.[2]

State of *Minnesota*, } In the *District* Court.
County of *Ramsey*. } *Second* Judicial District

John Doe, plaintiff,
against
Richard Roe, defendant.

Please take notice that the defendant in the above entitled action objects to the taxation of the item (*Here set out the item and amount verbatim*) as disbursements for witness fees of *Richard Styles* made by the plaintiff in said action, said item being contained in and part of the bill of costs herein, which was duly served upon said defendant; and the grounds of his objection to the taxation of such item are as follows, to wit: that the trial was set down for a certain day, being the *fifth* day of *May*, 1897, and that it was not necessary for said

mandamus, issued out of the said court, and to him directed and delivered; which said writ of attachment was delivered to this deponent to execute. That this deponent went immediately in search of said *Pearson*, who was in the city of *Springfield*, on the day of the issuing of said writ. This deponent further saith that, although he went immediately in search of said *Pearson*, he was not able to find him within the county of *Sangamon*, but learned that he had covertly and secretly left the city and was fleeing from the process of this court, for the purpose of evading justice; and this deponent conceiving that it was his duty to pursue the fugitive, hired a horse and gave chase to said *Pearson*, and traveled *six* days before he was able to overtake him. That he overtook him in *Clay* county, and caused him to be arrested by the sheriff of said county of *Clay*, who delivered the prisoner to this affiant, for the purpose of bringing him to *Springfield*, to answer for his contempt to this court. That this deponent brought said *Pearson* to *Springfield*, being engaged in the pursuit of said *Pearson*, and in bringing him back to this court, *ten* days. That this deponent necessarily expended, for his expenses in pursuing said *Pearson*, and bringing him back to court, the sum of *twenty-eight* dollars and *seventy-five* cents, and for horse hire the sum of *thirty-eight* dollars. This deponent, therefore, prays this court to direct the clerk of this court to tax the amounts thus expended by him, for expenses and horse hire, with the costs in the above entitled cause.

James C. Maxcy.

Sworn and subscribed, this *13th* day of *January*, 1842, before me.

E. Peck, C. *S.* C."

1. Witnesses' fees can be charged on an affidavit made by them that they attended as witnesses, and would not have attended except for the purpose of being witnesses. Taaks *v.* Schmidt, 25 How. Pr. (N. Y. Supreme Ct.) 340.

2. Minn. Stat. (1894), § 5505. The objection must be in writing and must specify grounds.

witness to attend the whole number of days for which disbursements for him are claimed, but that it was necessary for him to attend upon *two* only of those days.[1]

Joseph Story,
Attorney for Defendant.

To *Jeremiah Mason*, Esq.,
Attorney for Plaintiff,
and
To *Abraham Kent*,
Clerk of the *District* Court, *Second* Judicial District.

(2) CERTIFICATE OF CLERK.

Form No. 6561.[1]

State of *Minnesota*, } In the *District* Court.
County of *Ramsey*. } *Second* Judicial District.

John Doe, plaintiff,
against
Richard Roe, defendant.

I, *Abraham Kent*, clerk of the *District* Court for the *Second* Judicial District, state of *Minnesota*, do hereby certify that the above bill of costs was duly brought on for taxation before me, by the plaintiff, on the *eleventh* day of *May*, 1897, and that a written objection to the item (*specifying it*) was made by the defendant and duly filed with me in the following form: (*Here set out a copy of the objection filed*), and that I allowed the taxation of said bill, including said item, over his objection.

Abraham Kent,
Clerk *District* Court, *Second* Judicial District.

2. Retaxation.[3]

1. Where the objection was "to the item of $17.48, charged for Baker's witness fees" and the ground was "because said cause was set down for trial upon day certain, and it was not necessary to have the witness present so many days," the objection filed was held sufficient, the court saying that the form of the certificate was a mere question of practice and that this form was deemed sufficient by the lower court. Davidson *v.* Lamprey, 17 Minn. 32.

2. Minn. Stat. (1894), § 5505. No objection not so certified by the clerk can be raised before the court upon appeal. Davidson *v.* Lamprey, 17 Minn. 32.

3. In a large number of states no notice of the primary taxation by the clerk is served upon the opposite party; but any party aggrieved makes application to the court for the taxation upon notice. For statutes relating to retaxation see as follows:

Arkansas. — Sand. & H. Dig. (1894), § 809.

Colorado. — Mills' Anno. Stat. (1891), § 693.

Illinois. — Starr & C. Anno. Stat. (1896), p. 1076, par. 26.

Iowa. — Code (1897), § 3864.

Kansas. — Gen. Stat. (1889), § 4695.

Kentucky. — Stat. (1894), § 906.

Mississippi. — Anno. Code (1892), § 891.

Missouri. — Rev. Stat. (1889), § 2941.

New Jersey. — Gen. Stat. (1895), p. 2579, § 282; p. 2580, § 284.

North Carolina. — Code Civ. Proc. (1891), § 532.

Oklahoma. — Stat. (1893), § 4490.

Oregon. — Hill's Anno. Laws (1892), § 556.

Vermont. — Stat. (1894), § 1698.

a. Where Costs have been Taxed Without Notice.

(1) Notice.

Form No. 6562.[1]

Please take notice that the within bill of costs will be presented for retaxation to the county clerk of the county of *Suffolk*, at his office in the village of *Riverhead*, on the *nineteenth* day of *May*, 1898, at *ten* o'clock in the *fore*noon.

(*Date, signature and address as in Form No. 6550.*)

Form No. 6563.[2]

Please take notice that on the *fifth* day of *May*, 1898, at *ten* o'clock *A.* M., or as soon thereafter as counsel can be heard, application will be made to *John Hancock*, clerk of said court, at the *court-house* in the city of *Bismarck*, in the county of *Burleigh*, state of *North Dakota*, to have the costs and disbursements in the above entitled action, which were taxed by the clerk of said court on the *first* day of *May*, 1898, and entered in said judgment, a copy of the items of which is herewith served upon you, retaxed, and that any sums deducted therefrom, upon such retaxation, will be applied upon the judgment and execution in this action.

Dated *May 2*, 1898.

Yours respectfully,

Jeremiah Mason, Attorney for *Plaintiff*.

To *Joseph Story*, Esq., Attorney for *Defendant*.

(2) Affidavit for Order to Show Cause.

Form No. 6564.[3]

(*Commencing as in Form No. 6556, and continuing down to* *.)

I. That he is the attorney for the defendant in this action.

II. That judgment for the plaintiff was entered herein on the *first* day of *April*, 1897.*

III. That the bill of costs herein was presented by the plaintiff's attorney to the county clerk of the county of *New York* on the *third* day of *April*, 1897, and was by him taxed and allowed in favor of said plaintiff.

IV. That no notice of taxation of costs was served upon the defendant.

(*Signature and jurat as in Form No. 6556.*)

Virginia.— Code (1887), §§ 3552, 3554.
Washington.— 2 Hill's Anno. Stat. (1891), § 843.
West Virginia.— Code (1891), c. 138, §§ 12, 14.

1. Costs may be taxed in the first instance without notice, but where this course is followed notice of retaxation must be served. N. Y. Code Civ. Proc., § 3264 (Birds. Rev. Stat. (1896), p. 717, § 59).
North Dakota.— Rev. Codes (1895), § 5586.

2. *North Dakota.*— Rev. Codes (1895), § 5586.

3. *New York.*— Code Civ. Proc., § 3264 (Birds. Rev. Stat. (1896), p. 717, § 59).
North Dakota.— Rev. Codes (1895), § 5586.

(3) Order to Show Cause.

Form No. 6565.[1]

Supreme Court, *Suffolk* County.

John Doe, plaintiff,
against
Richard Roe, defendant.

Upon reading the affidavit of *Joseph Story*, verified the *eighteenth* day of *May*, 1897, Ordered:

That the plaintiff herein show cause, before Mr. Justice *Marshall*, at the *special* term of this court, to be held at *Riverhead* on the *twenty-fifth* day of *May*, 1897, why an order should not issue directing the retaxation of costs in this cause, and the crediting, upon the execution, of any amount by which said costs as originally taxed shall be reduced.

John Marshall, J. S. C.

b. Where Items have been Allowed or Refused.

(1) Affidavit.

Form No. 6566.[2]

(*Commencing as in Form No. 6564, and continuing down to* *.)

III. That due notice was served upon him by plaintiff's attorney that the bill of costs, a copy of which is annexed to this affidavit, marked Exhibit *A*, would be presented to the county clerk of *New York* county for adjustment, at his office in the city of *New York*, on the *fourteenth* day of *May*, 1897, at *ten* o'clock in the *fore*noon.

IV. That deponent was present at the said time and place, and made objection to said clerk to several items, to wit: (*Here specify the items objected to*),[3] and that he presented in support of his objections the affidavits submitted herewith, marked Exhibit *B* and *C*.[4]

V. That deponent's said objection was overruled by said clerk, and said items were by him allowed.

(*Signature and jurat as in Form No. 6564.*)

(2) Notice of Motion.

Form No. 6567.[5]

1. *New York.* — Code Civ. Proc., § 3264 (Birds. Rev. Stat. (1896), p. 717, § 59).
North Dakota. — Rev. Codes (1895), § 5586.

2. *New York.* — Code Civ. Proc., § 3265 (Birds. Rev. Stat. (1896), p. 717, § 61).
North Dakota. — Rev. Codes (1895), § 5587.

3. The moving affidavit for retaxation must show specifically the items objected to. Jermain *v.* Lake Shore, etc., R. Co., 5 L. Bul. (N. Y.) 58.

4. No affidavits can be used except those presented to the clerk. Sherry *v.* Carey, 18 Civ. Proc. Rep. (N. Y. Super. Ct.) 256.

5. *California.* — Code Civ. Proc. (1897), § 1033.
Idaho. — Rev. Stat. (1887), § 4912.
Montana. — Code Civ. Proc. (1895), § 1867.
Utah. — Rev. Stat. (1898), § 3350.
See also Hill's Anno. Laws Oregon (1892), § 557.

In the *Superior* Court of the County of *Los Angeles*, State of *California*.

John Doe, plaintiff,
against
Richard Roe, defendant.
} Notice. — Retaxation of Costs.

Take notice that the above named defendant, being dissatisfied with the bill of costs claimed by the plaintiff and served upon the said defendant on the *tenth* day of *May*, 1897, because (*Here specify the grounds of objection and the items objected to*), will move before the Honorable *John Marshall*, at *chambers*,[1] on the *fourteenth*[2] day of *May*, 1897, at *ten* o'clock in the *fore*noon, for an order annulling the bill of costs so served upon the defendant and filed by the plaintiff in the office of the clerk of this county and taxing and adjusting the costs in this cause anew.

May 10, 1897.

Joseph Story, Defendant's Attorney.

To *Jeremiah Mason*, Esq.,
Plaintiff's Attorney.

(3) Motion.

(a) *In General.*

Form No. 6568.

(Precedent in Teagarden *v.* Commissioners, 49 Kan. 148.)[3]

[State of *Kansas*, *Linn* County. } ss. In the *District* Court in and for the County and State aforesaid.

Joseph Teagarden et al.,
against
The Board of Commissioners of Linn County.
} Motion to Retax Costs.][4]

Now comes the defendant and moves the court to retax the costs in this case and tax them against the plaintiffs, instead of the defendant, and render judgment therefor against said plaintiffs, for the reason that this action is an appeal from the decision and award of the county commissioners of said county granting to the plaintiffs $25 damages for the location and establishment of a public highway over and across the lands of said plaintiffs; that a warrant of said county, duly and legally made and executed by said county, was tendered to said plaintiffs, in the sum of $25, in payment of said damages, before this case was appealed to the *district* court, and said warrant remained in the office of the county clerk of said county, subject to the order of said plaintiffs; that the said plaintiffs refused to

1. Costs may be taxed upon such application either by "the court in which the judgment was rendered or by the judge thereof at chambers." Cal. Code Civ. Proc. (1897), § 1033.

2. The party dissatisfied with the costs claimed has five days after the notice of the filing of the bill of costs in which to make his motion. Cal. Code Civ. Proc. (1897), § 1033.

3. The motion for retaxation in this case was sustained, and the judgment affirmed by the supreme court.

4. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

accept the same and prosecuted their appeal to a final judgment in this court; that said warrant was at all times subject to the order and disposition of said plaintiffs, from the time of its execution and tender to the plaintiffs up to the verdict and judgment upon appeal to this court; that the plaintiffs, upon the trial of this case upon appeal to this court, recovered a judgment for $20 and no more.

[*Joseph Story*, Attorney for Defendants.][1]

(*b*) *For Retaxation and Forfeiture of Clerk's Fees.*

Form No. 6569.[2]

Pulaski Circuit Court.

John Doe, plaintiff,
against
Richard Roe, defendant.

On this *tenth* day of *May*, 1897, comes *John Doe*, by his attorney, and says that he is aggrieved by the taxation of costs against him by the clerk of this court in the above entitled action, for (*Here state the error made by the clerk in taxing the costs*), and upon these grounds he moves the court that the costs herein be retaxed by the court by (*Here specify the changes to be made in the retaxation*), and further, since it appears by the plaintiff's own affidavit herewith filed that he has paid an unlawful charge by reason of the said first taxation, the plaintiff moves the honorable court to declare that the said clerk of this court shall forfeit all his fees and shall also pay to the plaintiff by his said taxation aggrieved the whole amount which he has paid by reason of the allowing of such unlawful charge, such amount being the sum of *thirty* dollars.

Jeremiah Mason, Plaintiff's Attorney.

(4) ORDER.

Form No. 6570.[3]

(*Title of court and cause as in Form No. 6543.*)

Upon reading and filing the affidavit of *Joseph Story*, verified the

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. The party who has paid an unlawful charge by reason of an error in taxation by the clerk obtains an order forfeiting the clerk's fees and directing the clerk to reimburse the party for the payment required by the unlawful taxation.

Arkansas. — Sand. & H. Dig. (1894), § 809.

Colorado. — Mills' Anno. Stat. (1891), § 693.

Illinois. — Starr & C. Anno. Stat. (1896), p. 1076, par. 26.

In *Iowa* and *Missouri* the clerk's fees are not forfeited, but the clerk pays the costs of retaxation and reimburses the party for the unlawful charge. Iowa Code (1897), § 3864; Mo. Rev. Stat. (1889), § 2941.

In *New Mexico* the officer in fault pays to the party injured three times the amount of the charges, the collection of which penalty is enforced by execution. N. Mex. Comp. Laws (1884), § 2213.

3. This form is adapted from the facts in McLean *v.* Hoyt, 56 How. Pr. (N. Y. Supreme Ct.) 351.

Precedents — *Striking out Items.* — In Woodland Bank *v.* Hiatt, 59 Cal. 582,

seventeenth day of *May*, 1897, with the bill of costs thereto annexed, and the affidavits of *Samuel Short* and *William West*, verified respectively on the *sixth* day of *May*, 1897, and the *eighteenth* day of *May*, 1897, and upon hearing *Joseph Story*, of counsel for the defendant, and *Jeremiah Mason*, of counsel for the plaintiff, in opposition, upon motion of said counsel for defendant, Ordered:

That the adjustment of costs in this action be set aside, and that the bill of costs be adjusted and amended by striking therefrom the following items, to wit: (*Here specify the items to be stricken out*), and that the judgment entered herein be amended and reduced as to costs by taking therefrom *sixty* dollars, and that the clerk of this court amend the judgment roll and docket accordingly.

Enter: *J. M.*, J. *S.* C.

c. Where Items have been Omitted.

(1) Motion.

Form No. 6571.

(Precedent in Nichols *v.* Marsh, 131 U. S. 402.)[1]

[In the *Supreme* Court *of the United States of America.*
October Term, 1888.

Elon A. Marsh, Minard Lefever and James Scott against *Nichols, Shepard and Company.* — In Equity. No. *72.*

In the *Supreme* Court *of the United States of America.*
October Term, 1888.

Nichols, Shepard and Company against *Elon A. Marsh, Minard Lefever and James Scott.* — In Equity. No. *95.*][2]

And now comes the said defendant *Nichols, Shepard & Co.*, by *Charles F. Burton*, their solicitor, and moves the court now here,

the order, omitting the formal parts, was as follows:

"It is ordered, that in the motion to tax costs, the item of *eighty* dollars and *sixty-five* cents for transcribing testimony be stricken out, and the costs fixed at *seventy-one* dollars and *twenty* cents."

By Adding Items. — In Clark *v.* White, 17 Kan. 181, the order adding items which was made upon an agreed statement of facts was as follows:

"And thereupon at the *April* Term, 1874, of said *Neosho* county *district* court, the said motion of plaintiff named in the foregoing agreed statement of facts came on for hearing before said court, and was submitted, heard and determined on the said agreed statement, which was all the evidence that was introduced on the hearing of said motion; and in consideration of the same, the court sustained the motion of plaintiff, and ordered and adjudged that the clerk of the *Neosho* county *district* court retax the costs in said cause by assessing against defendant and in favor of plaintiff the costs of the witnesses mentioned and referred to in said agreed statement, the same to be included in plaintiff's judgment against defendant."

1. For the order see *infra*, Form No. 6572. See also Tenn. Code (1896), § 4953.

2. The words and figures enclosed by [ ] will not found in the reported case, but have been added to render the form complete.

that they, the said *Nichols, Shepard & Co.*, do recover against the said *Elon A. Marsh, Minard Lefever* and *James Scott*, as costs to be taxed in their favor, one-half of the amount required for printing the record and supervising the printing of the record in said causes, in addition to the amount, taxable and to be taxed in their favor, in the above entitled cause.

This motion is based on the record in said causes and on the affidavit[1] of *Charles F. Burton*, hereto attached, and will be brought on for hearing on *Monday*, the *25th* day of *February*, at the opening of said court.

To *R. A. Parker*, Esq.,
Solicitor for *Marsh, Lefever and Scott.*

Charles F. Burton,
Solicitor for *Nichols, Shepard & Co.*

(2) Order.

Form No. 6572.

(Precedent in Nichols *v.* Marsh, 131 U. S. 403.)

[In the *Supreme* Court *of the United States of America.*
October Term, 1888.

Nichols, Shepard and Company against *Elon A. Marsh, Minard Lefever and James Scott.* } In Equity. No. *95.*][2]

On consideration of the motion for a retaxation of costs in this cause, and of the argument of counsel thereupon, had as well in support of as against the same:

It is now here ordered by the court that the amount advanced by the appellants in this cause toward printing the record be recoverable by them from the appellees herein.

IV. Additional Allowance.[3]

1. Notice of Motion.

1. The affidavit was in the words and figures following, to wit:

"State and *Eastern* District of *Michigan*, } ss.
County of *Wayne*. }

Charles F. Burton, duly sworn, deposes and says, that he is the solicitor for *Nichols, Shepard & Co.*, in the above entitled appeal and cross appeal, and that in response to the request from the clerk of this court, he sent to said clerk, on the *16th* day of *November*, 1887, the sum of *two hundred and seventy-five* dollars, which the said clerk notified him was the amount of money required to defray the portion of the expense properly to be borne in the first instance, by said *Nichols, Shepard & Co.*, as one-half the cost of printing the record in said cases.

Charles F. Burton.

Subscribed and sworn to before me this *21st* day of *January*, 1889.

(SEAL) *Charles H. Fisk,*
Notary Public,
Wayne County, *Michigan.*"

2. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

3. California.— In the city and county of San Francisco the prevailing party is allowed five per cent. of the amount recovered together with any sum by him so paid in the cause as costs and disbursements to be included in the

Form No. 6573.[1]

Supreme Court, *City and* County of *New York.*

John Doe, plaintiff,
against
Richard Roe, defendant.

Please take notice that upon the affidavit of *Jeremiah Mason*, verified the *tenth* day of *May*, 1897, and upon the certificate of *Richard Styles*, referee herein, and on all the proceedings in this cause, the plaintiff (or *defendant*) will apply to this court at a *special* term to be held by the Honorable *John Marshall*, justice, at the *New York County Court-house*, on the *nineteenth* day of *May*, 1897, at *ten* o'clock in the *fore*noon, or as soon thereafter as counsel can be heard, for an order granting him an additional allowance for costs, under provision of section 3253 of the Code of Civil Procedure.

May 11, 1897.

Jeremiah Mason, Attorney for *Plaintiff.*
Office and P. O. address, *111 Broadway, New York City.*

To *Joseph Story*, Attorney for *Defendant.*

2. Certificate of Referee.

Form No. 6574.[2]

Supreme Court, *City and* County of *New York.*

John Doe, plaintiff,
against
Richard Roe, defendant.

I, *Richard Styles*, the referee before whom this cause was tried, do

judgment against the adverse party; provided said five per cent. shall be allowed only in litigated cases and shall not exceed the sum of one hundred dollars on any one judgment. "An Act to regulate fees in the city and county of San Francisco," § 6 (Stat. 1866, p. 66). The law is still in force notwithstanding the adoption of the codes. Whitaker *v.* Haynes, 49 Cal. 596.

Minnesota. — For a statute allowing additional allowance in actions for the recovery of money only where an appeal was taken for delay merely, see Minn. Stat. (1894), § 5517.

1. The motion for an additional allowance is usually made at the trial, and when so made notice of motion is unnecessary. Mitchell *v.* Hall, 7 How. Pr. (N. Y. Supreme Ct.) 491; Mann *v.* Tyler, 6 How. Pr. (N. Y. Supreme Ct.) 236; Saratoga, etc., R. Co. *v.* McCoy, 9 How. Pr. (N. Y. Supreme Ct.) 339. When the motion is made after trial, however, it must be upon notice, Woodruff *v.* New York, etc., R. Co., (Buffalo Super. Ct.) 31 N. Y. St. Rep. 7; Mann *v.* Tyler, 6 How. Pr. (N. Y. Supreme Ct.) 236; Howe *v.* Muir, 4 How. Pr. (N. Y. Supreme Ct.) 252.

2. Where the trial has been by reference, it is the best practice to present among the motion papers a certificate by the referee. Fox *v.* Gould, 5 How. Pr. (N. Y. Supreme Ct.) 280; Gould *v.* Chapin, 4 How. Pr. (N. Y. Supreme Ct.) 186; Main *v.* Pope, 16 How. Pr. (N. Y. Supreme Ct.) 271; Dode *v.* Manhattan R. Co., 70 Hun (N. Y.) 376. In the latter case the court said: "Upon a motion made for an additional allowance the plaintiff failed to produce a certificate of the referee that the case was difficult and extraordinary. It is usual, and we regard it as the better practice, not to grant an additional allowance without a certificate of the referee who tried the case, but the absence of it is not jurisdictional and does not deprive the court of the power to consider the motion, and determine for itself whether the case falls within the language of the Code." In the last case the court granted the certificate and its action was sustained in 140 N. Y. 637.

hereby certify that the investigation or trial of this cause involved difficult questions of law which required and evidently received much examination and preparation on the part of the counsel of the respective parties, and I further certify that said difficult and extraordinary questions of law were (*Here state the nature of the questions involved*).

May 19, 1897.

Richard Styles.

3. Affidavits.[1]

a. In Support of Motion.

Form No. 6575.[2]

(*Title of court and cause, and venue as in Form No. 6476.*)

Jeremiah Mason, being duly sworn, deposes and says:

I. That he was the attorney and counsel for the *plaintiff* in the above entitled action.

II. That the issues involved and litigated were (*Here state their nature, and number them consecutively*), and that said issues were litigated with great bitterness.

III. That a large number of witnesses, namely, *twenty-five*, were called on the part of the *defendant*, and that a large number of witnesses, namely, *fifteen*, were necessarily called on the part of the *plaintiff*.

IV. That the issues above mentioned, numbered *2* and *3*, were questions which involved the examination and cross-examination of expert witnesses, and that deponent, as counsel for the plaintiff, was obliged to make a careful study of the subject involved in these issues, and that the time spent by deponent in the preparation for trying said issues was about *thirty* days.[3]

V. That to secure the testimony in question and procure the attendance of witnesses, *plaintiff* was obliged to spend as follows: (*Here itemize the expenditures.*)

VI. That judgment was rendered herein for the *plaintiff* on the *fourteenth* day of *May*, 1897, and that the costs herein have not yet been taxed and adjusted.[4]

(*Signature and jurat as in Form No. 6476.*)

b. In Opposition to Motion.

Form No. 6576.[5]

(*Title of court, cause and venue as in Form No. 6476.*)

1. For forms of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

2. This form is based on the facts in the case of McCulloch *v.* Dobson, (Supreme Ct.) 15 N. Y. Supp. 602; *affirmed* 133 N. Y. 114.

3. In Gori *v.* Smith, 3 Abb. Pr. N. S. (N. Y. Super. Ct.) 51, it was said that "parties claiming any additional sum ought to furnish the court with some specific facts, such as moneys actually expended or liabilities actually incurred by them, or time or labor consumed by both counsel or servants; the time consumed on the trial, the number of trials, postponements and all arguments at the general term, whether there was a long account involved or a reference had."

4. Application cannot be made after the costs are finally taxed. Hudson *v.* Guttenberg, 9 Abb. N. Cas. (Brooklyn City Ct.) 415.

5. This form is based on the facts in Gould *v.* Chapin, 4 How. Pr. (N. Y. Supreme Ct.) 185.

Joseph Story, being duly sworn, deposes and says:

I. That he was attorney and counsel for the *defendant* in the above entitled action.

II. That he denies that the case was difficult or extraordinary; that the only questions of fact or law which were controverted were (*Here specify them*).

III. That the time occupied in the trial did not exceed *two* hours, and that the summing up on both sides occupied only from *two* to *three* hours.

IV. That the cause was decided by referee within an hour after it was submitted to him.

V. That a referee's certificate was obtained by the plaintiff *ex parte* without notice to defendant's attorney or application therefor.

(*Signature and jurat as in Form No. 6476.*)

4. Order.

Form No. 6577.[1]

(*Title of court and cause as in Form No. 6543.*)

Upon reading and filing the affidavit of *Jeremiah Mason*, verified the *nineteenth* day of *May*, 1897, and the affidavit of *Joseph Story*, in opposition, verified the *nineteenth* day of *May*, 1897, and upon reading and filing the certificate of the referee herein, granted the *seventeenth* day of *May*, 1897, and upon all the papers filed in this action, by which it appears that the plaintiff has recovered the sum of *three thousand* dollars, that a defense was interposed, but that the case was difficult and extraordinary, Ordered:

That the plaintiff be and is hereby allowed *five* per cent. upon the amount of such recovery as an additional allowance above the usual costs.

Enter: *J. M.*, J. *S.* C.

V. AWARD OF COSTS.

1. Against Parties.

a. Plaintiff.

Form No. 6578.

(Precedent in Haskins *v.* Wallet, 63 Tex. 215.)

No. *148.* *Henry Wallet* v. *H. H. Brockman.*

In this cause the plaintiff failing to appear and prosecute the same, it is ordered by the court that this cause be dismissed and that the plaintiff pay all costs in this behalf expended, for which execution issue.

H. Clay Pleasant,
Judge D. C., *K.* C.

1. *New York.* — Birds. Rev. Stat. (1896), p. 714, § 48.

b. Defendant.

Form No. 6579.

(*Title of court and cause as in Form No. 6543.*)

It appearing that the summons and complaint in this action were duly and personally served upon the above named defendant on the *twenty-ninth* day of *April*, 1897, and that the time to appear and plead has fully expired, and further that said defendant has neither appeared nor pleaded, now the court having computed the amount which the plaintiff ought to recover and is entitled to recover herein, and damages having been duly assessed as below stated, upon motion of *Jeremiah Mason*, plaintiff's attorney, Ordered:

That *John Doe*, plaintiff, recover of said *Richard Roe*, defendant, the sum of *one hundred* dollars and ———[1] dollars, costs and disbursements, said sums amounting in all to ——— dollars.

Enter: *J. M.*, J. *S.* C.

2. Against Persons not Parties.

a. Attorney.

(1) For Nonresident Plaintiff.[2]

Form No. 6580.[3]

The State of *Alabama*, } *Circuit* Court.
Tuscaloosa County. } *October* Term, 1896.

John Doe, plaintiff,
against
Richard Roe, defendant.

This day comes the defendant *Richard Roe*, by his attorney, and moves the court for an award and order of judgment for costs of *fifty-two* dollars and *eighty-three* cents in this suit, against *Jeremiah Mason*, Esq., upon the ground that he has prosecuted this suit without requiring said plaintiff to give and without said plaintiff having

1. The order for costs against the defendant is included in and a part of the judgment. The amount of costs is left blank, to be filled by the taxing officer.

2. Statutes exist in many of the states making the attorney of a nonresident liable for costs in case security is not filed by such plaintiff.

Alabama.— Civ. Code (1886), § 2860.
Arkansas.— Sand. & H. Dig. (1894), § 786.
Colorado.— Mills' Anno. Stat. (1891), § 675.
District of Columbia.— Comp. Stat. (1894), c. 55, § 30.
Florida.— Rev. Stat. (1892), § 1301.
Georgia.— 2 Code (1895), § 5613.
Illinois.— Starr & C. Anno. Stat. (1896), p. 1066, par. 3.
Kentucky.— Bullitt's Civ. Code (1895), § 621.
Minnesota.— Stat. (1894), § 5519.
Missouri.— Rev. Stat. (1889), § 2915.
New York.— Code Civ. Proc., § 3278.
Oregon.— Hill's Anno. Laws (1892), § 566.
Wisconsin.— Sanb. & B. Anno. Stat. (1889), § 2948.

3. *Alabama.*— Civ. Code (1886), § 2860.

The formal phraseology of this form is taken from the precedents in Elliott *v.* Clements, 5 Ala. 471; Pratt *v.* Keils, 28 Ala. 391; Wynn *v.* Simmons, 33 Ala. 272; Barclay *v.* Barclay, 42 Ala. 346.

given security for costs, said plaintiff being a nonresident, and it is made to appear to the satisfaction of the court by the affidavit of defendant, sworn to the *first* day of *October*, 1896, that the plaintiff is a nonresident of this state, and it appearing further from said affidavit and the record of this cause that a judgment has been rendered and entered herein in favor of the defendant, entitling said defendant to full costs and that said costs have been taxed in favor of the defendant in the sum of *fifty-two* dollars and *eighty-three* cents, and that the plaintiff herein gave no security for costs; and further that *Jeremiah Mason*, Esq., counsellor of this court, prosecuted this case in behalf of said plaintiff without requiring him to file such security for costs; upon proof to the satisfaction of this court of due service of notice of this motion upon said *Jeremiah Mason*, Esq., who being called, came not,[1] and after hearing *Joseph Story*, of counsel for the defendant, it is now thereupon considered and ordered by this court that said *Jeremiah Mason*, Esq., within *ten* days from the date of the service of a copy of this order upon him, pay to defendant herein the said sum of *fifty-two* dollars and *eighty-three* cents, taxed as costs of the defendant in this action together with the costs by him, the defendant, upon his motion in this behalf expended.

Dated *October 8*, 1896.

John Marshall, *Circuit* Judge.

(2) Where Scandalous and Impertinent Matter is Stricken Out.

Form No. 6581.[2]

(*Title of court and cause as in Form No. 6543.*)

Upon reading and filing the affidavit of *Jeremiah Mason*, verified the *eighteenth* day of *May*, 1897, and upon reading and inspecting the *answer* in this action in said affidavit mentioned, which was filed herein on the *seventeenth* day of *May*, 1897, after hearing *Jeremiah Mason*, of counsel for the plaintiff, and *Joseph Story*, of counsel for the defendant, in opposition, upon motion of *Jeremiah Mason*, attorney for the plaintiff, Ordered:

I. That paragraphs IV and V of said *answer* be and the same are hereby stricken out as scurrilous, irrelevant and defamatory, and as having been maliciously and unnecessarily inserted.

II. That said *Joseph Story*, attorney for the defendant, be and hereby is commanded to pay to said plaintiff's attorney, within *ten* days after the service upon him of a copy of this order, *ten* dollars, costs of this motion, which are hereby charged upon him personally,[3] for his misconduct in filing said answer.

Enter: *J. M.*, J. *S.* C.

1. See Connoly *v.* Alabama, etc. R. Co., 29 Ala. 373; Barclay *v.* Barclay, 42 Ala. 347.

2. This form is based on the facts in the case of McVey *v.* Cantrell, 8 Hun (N. Y.) 522.

3. The fault of filing a scandalous or impertinent plea usually rests with the attorney, and the order to pay costs is properly made against him rather than against the party. McVey *v.* Cantrell, 8 Hun (N. Y.) 522.

b. Against Executor, Assignee or Trustee.

(1) Certificate of Judge.

Form No. 6582.[1]

I, *John Marshall*, justice of the *Supreme* Court, before whom trial of this cause was had on the *fourth* day of *January*, 1891, do hereby certify that at said trial it appeared that before the beginning of this action the plaintiff duly presented to the defendant, within the time limited, by a notice published by the defendant as prescribed by law requiring creditors to present their claims, a demand upon the claim in this action in question for the sum of *three hundred* dollars;[2] and that the defendant unreasonably resisted and neglected to pay said claim, viz.: (*Here specify the facts appearing upon the trial.*)[3]

Dated *January 4*, 1891.

John Marshall, J. S. C.

(2) Order.

Form No. 6583.

At a *Special* Term of the *Supreme* Court, held at the *County Courthouse* in *New York City*, on the *nineteenth* day of *May*, 1897.

Present, Hon. *Roger A. Pryor*, Justice.

John Doe, plaintiff,
against
Richard Roe, as executor of the estate of Richard Styles, deceased, defendant.

Upon reading and filing the affidavit of *Jeremiah Mason*, verified the *seventeenth* day of *May*, 1897, and the certificate[4] of the Honorable *John Marshall*, justice, given the *twelfth* day of *May*, 1897, and upon all the proceedings in this cause, from which it appears that prior to the beginning of this action the plaintiff made due demand upon the defendant within the duration of the time prescribed by the defendant in a notice published pursuant to law, requiring creditors to present their claim against the decedent, said demand being for an amount not in excess of the sum recovered in this action, and based upon the claim upon which recovery is here had; but the defendant unwarrantably resisted and refused to pay the same; and further that the plaintiff offered to refer the claim in question according to the statute, but that the defendant wholly neglected and refused so to refer, and that the plaintiff has now recovered a judgment herein for *four*

1. *New York.* — Code Civ. Proc., § 1836.

2. Or the order may continue from this point as follows: "refused, though the defendant made request therefor, to refer the claim as prescribed by law."

3. When a case is charged to have been unreasonably defended, the facts which appear upon the trial may properly be referred to; and in such cases, if the certificate does not state all the facts fully and fairly, they may be shown by affidavits. Ely *v.* Taylor, 42 Hun (N. Y.) 205.

4. Where a rule of costs is claimed against an executor because he refused to refer or because the payment of the claim was unreasonably resisted or rejected, the certificate of the judge as to these facts is absolutely necessary. Matson *v.* Abbey, 141 N. Y. 179; Hallock *v.* Bacon, 64 Hun (N. Y.) 90.

hundred dollars upon the *tenth* day of *May*, 1897. Now, upon reading and filing proof of due service of notice of this motion[1] upon *Joseph Story*, attorney for the defendant, and on motion of *Jeremiah Mason*, attorney for plaintiff, Ordered:

That full costs be awarded to the plaintiff herein, and that the clerk of this court be directed to tax the same, said costs to be paid out of the estate of the decedent (or *said costs to be paid by the defendant personally*).[2]

Enter: *R. A. P.*, J. *S.* C.

c. Against Person Beneficially Interested.[3]

(1) Affidavit in Support of Motion.

Form No. 6584.[4]

(*Title of court and cause, and venue as in Form No. 6476.*)

Richard Roe, being duly sworn, deposes and says:

I. That he is the defendant in the above entitled action.

II. That the action was commenced on the *fourteenth* day of *June*, 1888, issues joined on the *sixteenth* day of *June*, 1888, and the case tried before the Honorable *P. Henry Dugre* and a jury on the *twelfth* day of *July*, 1890, and that a verdict was rendered in favor of the plaintiff in the sum of *six* cents.

III. That the costs of the action were thereafter duly taxed in favor of the defendant, and judgment entered in favor of the defendant on the *tenth* day of *July*, 1890, for *one hundred and thirty-four* dollars and *ninety-four* cents, and that on the *tenth* day of *Angust*, 1890, said judgment was amended and entered *nunc pro tunc* by deducting therefrom said *six* cents awarded to the plaintiff by the jury.

IV. That execution was issued on said judgment on the *fourth* day of *September*, 1890, and thereafter on the *fifteenth* day of *September*, 1890, was returned wholly unsatisfied.[5]

V. That prior to the beginning of this action, and on or about the *second* day of *January*, 1888, the claim upon which this action was founded was owned by one *Edward Woodruff*, a nonresident of this state, residing at *Rahway*, *New Jersey*; that on or about the said date

1. This order can be obtained only by motion upon notice. It cannot be granted *ex parte*. Slocum *v.* Barry, 38 N. Y. 46; Dodge *v.* Crandall, 30 N. Y. 294; Fish *v.* Crane, 9 Abb. Pr. N. S. (N. Y. Supreme Ct.) 252; Schenck *v.* Rickaby, 20 Civ. Proc. Rep. (N. Y. Supreme Ct.) 384.

2. Whether the costs should be charged against the defendant personally or against the estate he represents may depend upon other facts appearing on the trial which may be shown by affidavits if necessary. Ely *v.* Taylor, 42 Hun (N. Y.) 205.

3. In several states there is express statutory provision for entering the order against the party beneficially interested in the action to pay the costs.

Alabama. — Civ. Code (1886), § 2845.

Maryland. — Pub. Gen. Laws (1888), art. 24, § 8.

Missouri. — Rev. Stat. (1889), § 2930.

South Carolina. — Code Civ. Proc. (1893), § 333.

Virginia. — Code (1887), § 3546.

4. This form, drawn under N. Y. Code Civ. Proc., § 3247, is adapted from the facts in the case of Pendleton *v.* Johnson, 21 Civ. Proc. Rep. (N. Y. Super. Ct.) 272.

5. The return of the execution unsatisfied is sufficient evidence of inability to collect from the assignee,

the said claim was assigned by said *Edward Woodruff* to the plaintiff of record herein in order that said plaintiff might sue thereon and to avoid the necessity of giving security for costs, but that said *Edward Woodruff* retained and still retains the beneficial interest in said claim.

VI. That the plaintiff herein stated to the deponent on several occasions that he had no interest in the claim, and that the proceeds thereof applied to said *Edward Woodruff*

(*Signature and jurat as in Form No. 6476.*)

(2) Notice of Motion.

Form No. 6585.

(*Title of court and cause as in Form No. 6476.*)

Please take notice that upon the annexed affidavit of *Richard Roe*, verified on the *seventh* day of *May*, 1897, and upon all the proceedings in this action, the defendant will move at a *special* term of the *Supreme* Court to be held by the Honorable *John Marshall*, justice, on the *nineteenth* day of *May*, 1897, for an order directing you to pay to the defendant's attorney[1] the costs awarded to the defendant in this action, upon the ground that you are the person beneficially interested in the cause herein and the wrongful promoter of said action.

(*Date, signature and address as in Form No. 6489.*)

(3) Order.

Form No. 6586.

(*Title of court and cause as in Form No. 6543.*)

Upon reading and filing the affidavit of *Richard Roe*, verified the *thirty-first* day of *May*, 1891, and upon all the proceedings in this cause, from which it appears that prior to the commencement of this action one *Edward Woodruff* assigned to the plaintiff the legal title to the claim herein sued, but retained the equitable and beneficial interest therein, and that upon the *fifteenth* day of *May*, 1891, the defendant recovered judgment for costs against the plaintiff herein in the sum of *one hundred and thirty-four* dollars and *eighty-eight* cents, which costs were duly taxed and entered in the judgment,[2] and execution thereon returned wholly unsatisfied on the *twentieth* day of *August*, 1891; now upon hearing *Joseph Story*, of counsel for defendant, and upon reading and filing proof of due personal service of notice of this motion upon said *Edward Woodruff*, and no one appearing in opposition, Ordered:

I. That said *Edward Woodruff*, as the person beneficially interested

Perrigo *v.* Dowdall, 25 Hun (N. Y.) 234.

1. This form is adapted from Metropolitan Addressing, etc., Co. *v.* Goodenough, 21 Civ. Proc. Rep. (N. Y. Super. Ct.) 268, in which case it was held that the judgment for costs belonged to the attorneys and that it was not a mistake to apply for an order directing the payment of the costs to the attorneys.

2. An order against a third person for costs as a party beneficially interested cannot be made until after judgment against the nominal party is perfected. Fredericks *v.* Niver, 28 Hun (N. Y.) 417.

in the prosecution of this action and connected with said prosecution, pay to *Joseph Story*, attorney for the defendant, *Richard Roe*, within *five* days after a copy of this order shall be served upon him, the costs recovered by said defendant, *Richard Roe*, against the plaintiff herein, said costs amounting to the sum of *one hundred and thirty-four* dollars and *eighty-eight* cents, with interest from the *tenth* day of *July*, 1890, up to the date of such payment.

II. That the defendant have *ten* dollars costs of this motion against said *Edward Woodruff*.

And if said *Edward Woodruff* shall fail to pay said costs and interest within *five* days, Ordered further, that process issue from this court to enforce this order.

Enter: *D. M.*, J. *S.* C.

c. Motion against Security for Costs of Intervenors.

Form No. 6587.

(Precedent in Craig *v.* Leitensdorfer, 127 U. S. 768.)[1]

[*William Craig*, Appellant, against *Thomas Leitensdorfer*. } In Equity, No. *310*.][2]

And now comes the appellant by his solicitors *Benj. F. Butler* and *O. D. Barrett*, and gives this court to be informed, that this cause having been heard and determined by said court and a mandate to the *Circuit* Court being about to be sent down, the matter of certain costs still remains to be adjusted and settled in this cause. That is to say:

Leann S. King and *Thomas J. Allen*, who, by interlocutory order of said court passed the *18th* day of *January*, 1886, were permitted to be heard in court, or by brief, in said cause, as "persons who claimed to have acquired title to the premises in dispute, or to some part thereof, from or through the appellee, since said suit was begun," on condition each should file a stipulation in the cause with security to the satisfaction of the clerk to pay all costs and expenses, accruing on said appeal since the last term of the court, that may be finally adjudged against the appellee, including the cost of printing the record and the clerk's fees for supervising. And said *King* and said *Allen* each filed such stipulation with instruments of security duly executed by each, the instrument filed by said *King* having the signature and seal of *John N. Smith* and *Charles R. Lockridge* of *Kansas City*, *Mo.*, as sureties, thereto affixed in the full and just sum of *three thousand* dollars, which said security in the matter of said *King* was satisfactory to the clerk of this court. Said *Allen* did file like security, having executed under his hand and seal, and under the hands and seals of *Charles R. Haywood* and *A. D. Wilson* of *Arapahoe Court*,

1. Upon this motion an order was granted that the sureties for the intervenors pay the costs taxed before the last day of the term, and that if they failed so to do a writ of attachment should issue to enforce the payment.

2. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

Colorado, in the full and just sum of *three thousand* dollars, which security in the matter of said *Allen* was satisfactory to the clerk of this court. All which now fully appears in the copies of said securities hereto annexed marked *A. D.*

And the court here is further informed that judgment having been rendered by this court in this case in favor of the appellant, that the costs since the *October* term, 1884, including the costs of printing the record and the clerk's fees for supervising, which costs, amounting to the full and just sum of *eleven hundred fifteen* dollars and *two* cents, ($1115.02), as taxed by said clerk, and for the payment of which said *Allen* and said *King* and their sureties were jointly and legally bound, are long since due and unpaid, although duly taxed; of all of which said *King* and said *Allen* have had due and reasonable notice through their attorneys of record in this cause, but neither of them has paid said costs, or any part thereof, or filed with said clerk any reason why they should not so do.

Wherefore the appellant moves the court here to estreat said instruments of security for said costs, and order judgment to be entered thereon as taxed by said clerk and proper process of attachment to issue against all said persons, jointly and severally, so that the judgment of this court may be rendered effectual, and said costs may be paid to the Clerk of this Court.

Benj. F. Butler,
O. D. Barrett,
Solicitors for the Counsel.

e. Against Prosecutor in Criminal Action.[1]

Form No. 6588.

The State of Alabama against *Richard Roe.* } Prosecution for (*describe offense*).

In this case, the prosecution appearing to be malicious and frivolous, the costs are taxed against *John Doe*, the prosecutor.

John Marshall,
Judge of the *County* Court.

1. Statutes requiring the unsuccessful prosecutor of a criminal action to pay costs exist in many states. His liability depends sometimes upon a certificate that the prosecution was malicious or without probable cause, sometimes upon the absence of the certificate that the prosecution was founded upon probable cause and sometimes upon the mere failure of the prosecution.

Alabama.— Crim. Code (1886), § 4355.
Arizona. — Pen. Code (1887), §§ 2229, 2230.
Colorado. — Mills Anno. Stat. (1891), § 696.
Georgia. — 3 Code (1895), § 1082.
Idaho. — Rev. Stat. (1887), § 8302.
Iowa. — Code (1897), §§ 5238, 5606.
Maine. — Rev. Stat. (1882), c. 82, § 125.
Michigan. — How. Anno. Stat. (1882), §§ 7110, 9063.
North Dakota. — Rev. Codes (1895), § 7965.
Ohio. — Bates' Anno. Stat. (1897), § 6471.
Tennessee. — Code (1896), §§ 7611–7613.
Virginia. — Code (1887), § 4081.
Washington. — 2 Hill's Anno. Stat. (1891), § 1224.

VI. ACTION TO RECOVER COSTS AGAINST PARTY DISCONTINUING ACTION.

Form No. 6589.

(Precedent in Griffin *v.* Farwell, 20 Vt. 151.)[1]

[State of *Vermont*, } To any sheriff or constable in the state or to
Rutland County, ss: } *Daniel Doe*, an indifferent person, Greeting:

By the authority of the state of *Vermont*, you are hereby commanded to attach the goods, chattels or estate of *Richard Farwell*, of *Rutland*, in the county of *Rutland*, to the value of *twenty* dollars, and him notify thereof according to law; and also notify him to appear before the *County* Court next to be held at *Rutland*, within and for said county of *Rutland*, on the *second Tuesday* of *June*, 1847, and also notify him to cause his appearance herein to be entered with the clerk of said court, on or before the expiration of *forty-two* days from the date thereof, then and there, in said court, to answer to *John Griffin* of *Rutland*, in a plea of trespass on the case][2] for that, to wit, on or about the *first* day of *May*, 1845, at *Westhaven* in the county of *Rutland*, the defendant, without any cause of action, prayed out a writ of attachment in his favor against the plaintiff, in due form of law, signed by *William C. Kittridge*, justice of the peace in and for the county of *Rutland* aforesaid, and returnable before said justice *Kittridge*, at *Westhaven* aforesaid, on the *second* day of *June*, 1845; and afterwards, to wit, on or about the *fifteenth* day of *May*, 1845, the defendant procured to the said writ to be legally served on the plaintiff, at *Fairfax* in the county of *Franklin*, by *Reuben Dewey*, who then was and still is legal constable of the town of *Fairfax* aforesaid, by arresting the body of the plaintiff thereon, and after the service of said writ on said plaintiff, and before the return day thereof, he, the plaintiff, incurred great costs and expenses and charges in procuring evidence, taking depositions and retaining counsel to defend said suit, to wit, the sum of *twenty* dollars; and after the plaintiff had incurred the said costs and expenses, as aforesaid, and before the return day of said writ, to wit, on the *thirtieth* day of *May*, 1845, the defendant, without the consent of the plaintiff, and against his will, and with a view to prevent the plaintiff from recovering his said costs, so incurred in preparing to defend said suit, as aforesaid, withdrew and discontinued his said suit against the plaintiff, and neglected and refused to return said writ to said justice *Kittridge*, and wholly neglected and refused to enter and prosecute his said suit against the plaintiff; whereby the plaintiff was prevented from recovering before said justice *Kittridge* his said costs, so by him incurred as aforesaid; and that the defendant has hitherto neglected and refused to pay said costs to the plaintiff, [to

1. It was held in this case that the plaintiff might sustain an action of trespass on the case against the defendant, and was entitled to recover at least to the extent of the taxable costs which he had incurred in preparing his defense.

2. The words and figures within [ ] are not in the reported case, but have been added to complete the form.

the damage of the plaintiff in the sum of *twenty* dollars, for the recovery of which, with just costs, the plaintiff brings suit.

Fail not, but service and return make within *twenty-one* days from date.

Dated at *Rutland* in the county of *Rutland* this *8th* day of *May*, A. D. 1847.

Abraham Kent, Clerk.][1]

VII. NOTICE TO RECOVER ILLEGALLY EXACTED COSTS.

Form No. 6590.[2]

To *John Hancock*, Clerk of the *Circuit* Court, County of *Leon*, *Florida*:

Take notice that in the *Circuit* Court for the county of *Leon* on *Friday*, the *fourteenth* day of *May*, 1897, *John Doe* will apply for an inquiry into the validity of certain charges and fees, from him exacted by you, the said *John Hancock*, in the case of *John Doe* against *Richard Roe* in this court tried; the said charges and fees which said *John Doe* claims were invalid and excessive, being (*Here specify*), and in case said charges and fees shall be found to be invalid and unlawfully exacted, he will move for judgment against you, the said *John Hancock*, according to the statute.

Jeremiah Mason, Attorney for *John Doe*.

1. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. *Florida.* — Rev. Stat. (1892), § 1305, subs. 2.

COUNTERCLAIM.

See the title SET-OFF AND COUNTERCLAIM.

COUNTERFEITING.

By Walter R. Dedrick.

I. Making Counterfeit Money, 825.

1. *Coin,* 825.
    a. *Generally,* 825.
    b. *Minor Coin,* 829.
    c. *Foreign Coin,* 830.
        (1) *Generally,* 830.
        (2) *With Intent to Export Same,* 831.
    d. *Gilding Coin,* 831.
    e. *Tokens in Resemblance of Coin,* 832.
2. *Paper Money,* 832.

II. Uttering and Passing Counterfeit Money, 834.

1. *Coin,* 834.
    a. *Generally,* 834.
    b. *Foreign Coin,* 837.
    c. *Gilded Coin,* 838.
    d. *Bringing Coin into the United States with Intent to Defraud,* 839.
2. *Paper Money,* 839.
    a. *Generally,* 839.
    b. *Foreign Bank Note,* 844.

III. Selling and Bartering Counterfeit Money, 845.

1. *Selling,* 845.
2. *Advertising Green Goods,* 846.

IV. Having Counterfeit Money in One's Possession, 847.

1. *Coin,* 847.
    a. *Generally,* 847.
    b. *Foreign Coin,* 850.
2. *Paper Money,* 851.
    a. *Generally,* 851.
    b. *Blank and Unfinished Bank Note,* 855.
    c. *Foreign Bank Note,* 856.

V. Making Instruments for Counterfeiting, 856.

VI. HAVING INSTRUMENTS IN ONE'S POSSESSION, 857.
1. *For Counterfeiting Coin*, 857.
a. Generally, 857.
b. Foreign Coin, 859.
c. One Side Only, 861.
2. *For Counterfeiting Gold Dust*, 861.

CROSS-REFERENCES.

For Forms of Indictments for Counterfeiting Trade-marks, see the title TRADE-MARKS.
For Forms of Indictments for Kindred Offense, see the title FORGERY.
For matters of Procedure, generally, see the title COUNTERFEITING, 5 ENCYCLOPÆDIA OF PLEADING AND PRACTICE, p. 266.

I. MAKING COUNTERFEIT MONEY.

1. Coin.

a. Generally.

Form No. 6591.[1]

In the *District* Court *of the United States of America* for the *Northern* District of *Illinois*.

Of the *October* Term, in the year of our Lord eighteen *ninety-seven*.

Northern District of *Illinois*, sct. The grand jurors for the *United States of America*, inquiring within and for the *Northern* District of *Illinois*, upon their oath present that *John Doe*, late of the city of *Chicago*, in the county of *Cook*, in the district aforesaid, on the *first* day of *August*, in the year of our Lord one thousand eight hundred and *ninety-seven*, and within the jurisdiction of this court,* unlawfully and feloniously did falsely make, forge and counterfeit (or *cause and procure to be falsely made, forged and counterfeited*) a large number, to wit, *fifty*, false, forged and counterfeit gold (or *silver*) coins (or *bars*), each in the resemblance and similitude[2] of a gold (or *silver*) coin (or

1. *United States.* — Rev. Stat. (1878), § 5457.

2. **Likeness and Similitude of Coins Coined at Mint.** — Upon an indictment, found on section 5457 of the Revised Statutes, which states that "the defendants did falsely and feloniously make, forge and counterfeit four pieces of silver coin of the coinage of the United States of America, called a *dollar*, contrary to the statutes," etc., a conviction was had, and upon motion in arrest of judgment it was urged that the indictment did not state a crime, in that it did not state that the coins in question were made in the similitude and resemblance of any silver coins coined at the mint of the United States. The court held that the words of the statute "in resemblance or similitude" are a mere variation or exposition of the principal and preceding words thereof, "falsely make, forge or counterfeit," each of which means to make something in the resemblance or similitude of another, and that to falsely make, forge or counterfeit a silver coin of the coinage of the United States is to make something in the "resemblance or similitude" of such coin; that the phrase "coinage of the United States" is the exact legal equivalent of "coined at the mints of the United States." U. S. *v.* Otey, 31 Fed. Rep. 68.

bar), coined and stamped at the mints (or *assay offices*) of the United States, called an *eagle*[1] (or a *dollar*),[2] against the peace and dignity of the *United States*, and contrary to statute of the same in such case made and provided.

Daniel Webster,
United States District Attorney.

Form No. 6592.[3]

In the *Posey Circuit* Court of *Indiana*, of the *February* Term, 1897.

State of Indiana
against
John Doe.

The grand jury of the county of *Posey*, upon their oath, do present: that *John Doe*, on the *first* day of *January*, 1897, at the county of

Intent to Defraud. — The knowledge and intent to defraud mentioned in section 5457 of the Revised Statutes refers to the crime of passing counterfeit money or having same in one's possession, and an indictment for counterfeiting need contain no averment as to knowledge or intent. U. S. *v.* Otey, 31 Fed. Rep. 68; U. S. *v.* Peters, 2 Abb. (U. S.) 494; U. S. *v.* Russell, 22 Fed. Rep. 390; U. S. *v.* King, 5 McLean (U. S.) 208.

1. Description of Coin. — The designation in the indictment of the coins, alleged to have been made, as coins called fifty cent pieces and twenty-five cent pieces, instead of the half dollar and the quarter dollar, by which names they are called in the act of congress, regulating the coinage of the country, is not a material variance, and will not support a motion in arrest of judgment. U. S. *v.* Burns, 5 McLean (U. S.) 23. And describing coins in the alternative form, as "fifty cent pieces or half dollars," is not objectionable. U. S. *v.* Burns, 5 McLean (U. S.) 23.

2. Or if bars, describing said bars, giving weight, fineness and device stamped thereon.

3. *Indiana.* — Horner's Stat. (1896), § 2208.

For similar statutes see as follows:

Alabama. — Crim. Code (1896), § 3856.

Arizona. — Pen. Code (1887), § 747.

Arkansas. — Sand. & H. Dig. (1894), § 1591.

California. — Pen. Code (1897), § 477.

Colorado. — Mills' Anno. Stat. (1891), § 1259.

Connecticut. — Gen. Stat. (1888), § 1578.

Florida. — Rev. Stat. (1892), § 2493.

Georgia. — 3 Code (1895), § 235.

Idaho. — Rev. Stat. (1887), § 7035.

Illinois. — Starr & C. Anno. Stat. (1896), p. 1287, par. 228.

Iowa. — Code (1897), § 4861.

Kansas. — Gen. Stat. (1889), § 2254.

Maine. — Rev. Stat. (1883), c. 121, § 2.

Maryland. — Pub. Gen. Laws (1888), p. 470, § 36.

Massachusetts. — Pub. Stat. (1882), c. 204, § 14.

Michigan. — How. Anno. Stat. (1882), § 9227.

Mississippi. — Anno. Code (1892), § 1098.

Montana. — Pen. Code (1895), § 847.

Nebraska. — Comp. Stat. (1897), § 6815.

Nevada. — Gen. Stat. (1895), § 4638.

New Hampshire. — Pub. Stat. (1891), c. 274, § 8.

New Jersey. — Gen. Stat. (1895), p. 1081, § 180.

New Mexico. — Comp. Laws (1884), § 794.

Ohio. — Bates' Anno. Stat. (1897), § 7099.

Oregon. — Hill's Anno. Laws (1892), § 1813.

Pennsylvania. — Pepp. & L. Dig. (1894), p. 1138, § 99.

Rhode Island. — Gen. Laws (1896), c. 280, § 7.

Tennessee. — Code (1896), §§ 6614, 6619.

Utah. — Rev. Stat. (1898), § 4350.

Vermont. — Stat. (1894), § 4984.

Virginia. — Code (1887), § 3735.

Washington. — Pen. Code (1891), § 66.

West Virginia. — Code (1891), c. 146, § 3.

Posey aforesaid, unlawfully and feloniously, did falsely forge and counterfeit *ten*[1] pieces of coin, each piece in the likeness and similitude of the gold (or *silver*) coin of the United States, called a *dollar*,[2] and at that time current in the state of *Indiana*,[3] with intent to defraud some person or persons to the grand jury unknown, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of *Indiana*.

Daniel Webster, Prosecuting Attorney.

Form No. 6593.

(Precedent in State *v.* Griffin, 18 Vt. 199.)

[State of *Vermont*, }
Addison County. }

Be it remembered, that at a *County* Court begun and holden at *Middlebury*, within and for the county of *Addison*, on the *first Tuesday* of *June*, in the year of our Lord one thousand eight hundred and *forty-five*, the grand jurors within and for the body of the county of *Addison* aforesaid, now here in court duly impaneled and sworn, upon their oath present that *James Griffin*, at *Weybridge* in the county of *Addison* aforesaid,][4] with intent the good people of this state and of the United States to deceive and defraud, with force and arms, on the *tenth* day of *April* A. D. 18*45*, *ten* pieces of false, forged and counterfeit coin and money, of pewter, lead, tin and zinc and other mixed metals, in the similitude of the good, legal and current money and silver coins of the United States, [which are current by law and usage in this state,][5] called "*half dollars*," then and there unlawfully, and

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 4459.

Wyoming. — Rev. Stat. (1887), § 925.

In *Missouri* it is provided that a person counterfeiting coin "shall, if such offense be not punishable by the laws of the United States, on conviction, be guilty," etc. Rev. Stat. (1889), § 3632.

1. Number of Pieces. — Where an indictment alleged that the accused "did falsely make, forge and counterfeit the silver coin of the United States, to wit, the silver coin commonly known and called a dollar, and did make in the resemblance and similitude of the silver dollar (a coin of the United States), certain forged and counterfeit coins of base metal, with intent," etc., it was held that the failure to state the number of counterfeit coins rendered the indictment insufficient. U. S. *v.* Weikel, 8 Mont. 124.

2. Description of Coin. — The indictment must particularly set forth the kind of coin alleged to be counterfeited by denomination or name, but it is not necessary to set forth devices or inscriptions thereon. Peek *v.* State, 2 Humph. (Tenn.) 78. See also U. S. *v.* Otey, 31 Fed. Rep. 68; State *v.* Griffin, 18 Vt. 198.

3. Time When Current. — An indictment upon a statute for counterfeiting coin "at the time current in this state by law or usage" must allege the genuine coin to be current when the counterfeit is made, for there is no offense if the coin has gone out of circulation. State *v.* Shoemaker, 7 Mo. 177.

4. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

5. Allegation of Currency of Coin Unnecessary. — It was held that the allegation enclosed by [ ] would by reasonable intendment have reference to the time of presenting the indictment instead of the time of committing the offense, and hence would be bad unless such averment were wholly unnecessary and might therefore be rejected as surplusage, which was the case. Redfield, J., said, "Neither the law or usage of this state can have effect to create currency;

feloniously did forge, make and counterfeit,[1] contrary [to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the state.][2]

Form No. 6594.[3]

The State of Texas
against
John Doe.

In the name and by the authority of the state of *Texas.*

The grand jurors for the county of *Freestone*, state aforesaid, duly organized as such at the *October* term, A. D. 1896, of the *District* Court for said county, upon their oaths in said court present: That *John Doe*, on the *first* day of *May*, A. D. 1896, in the county and state aforesaid, did fraudulently, with intent that the same should be passed in this state and elsewhere, make and counterfeit *fifty* coins in the semblance of true gold (or *silver*) coins of the denomination of *one dollar*, the said counterfeited coins having in their composition a less proportion of the precious metal aforesaid, of which the true coin intended to be imitated is composed, than is contained in said true coin, and which said true coin, so counterfeited as aforesaid, then and there by law and usage passed as money in the United States, against the peace and dignity of the state.

Andrew Jackson,
Foreman of the Grand Jury.

Form No. 6595.[4]

Supreme Court, *Rensselaer* County.

The People of the State of New York
against
John Doe.

The grand jury of the county of *Rensselaer* by this indictment accuse *John Doe* of the crime of forgery in the second degree, com-

and we cannot suppose that the legislature, in enacting the statute, had reference to any other currency, except the legal currency of the United States. And in this indictment it is alleged that the coin was in imitation of the current money and silver coin of the United States, called half-dollars. This is sufficient; and the additional averment that they were current by law, or usage, in this state is only drawing a conclusion from the general state of the laws of this state and the United States, which will always be judicially noticed by the court."

1. The allegation that the defendant "ten pieces of false, forged and counterfeit coin," etc., "did forge, make and counterfeit," was held to be not open to the objection that the defendant was charged with making coin in imitation of the false and not of the true coin, the confusion of ideas arising only from the ambiguous use of the word "counterfeit" in two different senses.

2. See *supra*, note 4, p. 827.

3. *Texas.* — Pen. Code (1895), arts. 557, 564.

4. **Forgery in the Second Degree.** — In some states the statute provides that a person is guilty of forgery in the second degree who, with intent to defraud, forges any gold or silver coin, whether of the United States or any foreign state, government or country. Minn. Stat. (1894), § 6692; N. Y. Pen. Code, § 511 (Birds. Rev. Stat. (1896), p. 1330, § 5); N. Dak. Rev. Codes (1895), § 2428.

The territory of *Oklahoma* has a similar statute, but does not denominate the offense forgery. See Okla. Stat. (1893), § 2354.

mitted as follows: The said *John Doe* on the *first* day of *June*, A. D. 1897, at the city of *Troy*, in this county, did falsely, fraudulently and feloniously make, forge and counterfeit *ten* pieces of the gold (or *silver*) coin of the United States, each of which said pieces was called a *dollar*, with intent to defraud some person or persons to the grand jury aforesaid unknown.

Benjamin F. Butler,
District Attorney of the County of *Rensselaer*.

b. Minor Coin.

Form No. 6596.[1]

(*Commencing as in Form No. 6591, and continuing down to* *) unlawfully and feloniously did falsely make, forge and counterfeit (or *cause and procure to be falsely made, forged and counterfeited* or *willingly aid and assist in falsely making, forging and counterfeiting*) *five hundred* coins,* in the resemblance and similitude[2] of the minor coinage,[3] which had theretofore been coined at the mints of the United States, to wit, *five hundred* coins called *five* (or *three* or *one*) *cent pieces*, against the peace (*concluding as in Form No. 5691*).

Form No. 6597.

(Bullitt's Crim. Code Ky. (1895), p. 148, No. 3.)[4]

Franklin Circuit Court.

The Commonwealth of Kentucky
against
John Doe.

The grand jury of *Franklin* county, in the name and by the authority of the *commonwealth* of *Kentucky*, accuse *John Doe* of the crime of counterfeiting, committed as follows, viz.: The said *John Doe* on the *first* day of *September*, 1897, in the county aforesaid, did counterfeit *one hundred* copper coins of the United States, known as *one cent pieces*, which were then passing as current money in the *commonwealth* of *Kentucky*, with intent to defraud, against the peace and dignity of the *commonwealth* of *Kentucky*.

1. *United States.* — Rev. Stat. (1878), § 5458.
2. See *supra*, note 2, p. 825.
3. As to what are minor coins, see U. S. Rev. Stat. (1878), § 3515.
4. *Kentucky.* — Stat. (1894), § 1181.
Similar statutes exist in other states as follows:
Alabama. — Crim. Code (1886), § 3856.
Georgia. — 3 Code (1895), § 235.
Nebraska. — Comp. Stat. (1897), § 6815.
New Jersey. — Gen. Stat. (1895), p. 1081, § 181.
Ohio. — Bates' Anno. Stat. (1897), § 7099.
Oregon. — Hill's Anno. Laws (1892), § 1813.
Pennsylvania. — Pepp. & L. Dig. (1894), p. 1141, § 105.
Tennessee. — Code (1896), §§ 6614, 6619.
Virginia. — Code (1887), § 3735.
West Virginia. — Code (1891), c. 146, § 3.

c. Foreign Coin.

(1) Generally.

Form No. 6598.[1]

(*Commencing as in Form No. 6596, and continuing down to* *) in the resemblance and similitude of a foreign silver (or *gold*) coin, to wit, a silver (or *gold*) coin of the *Dominion of Canada* called a *ten cent piece*, which was then in actual use and circulation as money within the United States (or *which said coin is by law current in the United States*),[2] against the peace (*concluding as in Form No. 6591*).

Form No. 6599.

(Ala. Crim. Code (1886), p. 269, No. 30.)[3]

The State of *Alabama*, } *Circuit* court, *February* term, 1897.
Dale county. }

The grand jury of said county charge that, before the finding of this indictment,* *John Doe* counterfeited a silver coin of the *republic of Mexico*, called a *dollar*, which was at the time, by law, usage and custom, current in this state, against the peace and dignity of the state of *Alabama*.

Daniel Webster,
Solicitor of the *third* circuit.

1. *United States.* — Rev. Stat. (1878), § 5457.

2. Foreign Coin Not Current in the United States. — An indictment alleging that "*Joseph Gardner*, late of the township of *Bloomfield*, in the county of *Essex*, and in the district of *New Jersey*, on the *15th* day of *June*, in the year of our Lord 1835. with force and arms, etc., at the township of *Bloomfield*, in the county of *Essex*, in the district of *New Jersey* aforesaid, and within the jurisdiction of this court, did falsely and feloniously make, forge and counterfeit *one hundred* pieces of false and counterfeit coin, each piece thereof in the resemblance and similitude of a foreign coin, to wit, a silver coin of *Spain* called a *head pistareen*, which by law was then, and still is, made current in the United States of America; against the form of the statute of the United States of America in such case made and provided," and in a second count charged that the accused "did feloniously and willingly aid and assist in falsely and feloniously making, forging and counterfeiting *one hundred* pieces of false and counterfeit coin," describing them as in the first count, was held bad for the reason that the coin described in the indictment was not a part of the Spanish milled dollars and not a silver coin of Spain, made current by law in the United States, as was then necessary under the 20th section of the act of 1825. U. S. *v.* Gardner, 10 Pet. (U. S.) 618.

3. *Alabama.* — Crim. Code (1886), § 3856.

Substantially the same form is given in Hill's Anno. Laws Oregon (1892), p. 1004, No. 17; Minn. Stat. (1894), § 7239, No. 22. In *Minnesota*, however, the crime is called forgery in the second degree. See Minn. Stat. (1894), § 6692.

For statutes of similar tenor see as follows:

New Jersey. — Gen. Stat. (1895), p. 1081, § 181.

North Carolina. — Code (1883), § 1035.

Virginia. — Code (1887), § 3735.

Under the *New Jersey* statute, however, it is not necessary that the coin should at the time be current in the state.

Aiding and Assisting. — Where the indictment charged that the defendant "did feloniously aid and assist *Bazaleel Phelps*, in making and counterfeiting *fifteen French guineas*, *one hundred Spanish milled dollars*, and *one hundred pistareens*, of false and base metal, in likeness and imitation of the true

(2) With Intent to Export Same.

Form No. 6600.[1]

State of *Maine*.

Kennebec, ss. At the *Superior* Court, begun and holden at *Augusta*, within and for said county of *Kennebec*, on the *first Tuesday* of *September*, in the year of our Lord one thousand eight hundred and *ninety-seven*, the grand jurors for said state upon their oath present that *John Doe* of *Augusta*, in the county of *Kennebec*, *laborer*, at *Augusta*, in said county of *Kennebec*, on the *first* day of *August*, in the year of our Lord one thousand eight hundred and *ninety-seven*, with force and arms, did then and there wilfully, unlawfully and feloniously forge and counterfeit *fifty* gold (or *silver*) coins, each in the resemblance and similitude of a true and genuine gold (or *silver*) coin of *Great Britain*, called a *sovereign* (or *shilling*), with intent then and there to export the said false, forged and counterfeit coins to *Great Britain*, and with the intent and for the purpose of defrauding the said foreign government and its subjects, against the peace of said state, and contrary to the form of the statute in such case made and provided.

Richard Roe, Forema

Daniel Webster, County Attorney.

d. Gilding Coin.[3]

Form No. 6601.[2]

The State of *Nebraska*, } ss.
Lancaster County. }

Of the *October* term of the *District* Court of the *second* judicial district of the state of *Nebraska* within and for *Lancaster* county, in said

coins," etc., it was held that the allegation that defendant aided and assisted was substantially the same as that he did counterfeit. State *v.* Stutson, Kirby (Conn.) 52.

1. *Maine.* — Rev. Stat. (1883), c. 121, § 5.

See also the following statutes of similar tenor, to wit:

Iowa. — Code (1897), § 4868.

Mississippi. — Anno. Code (1892), § 1099.

North Dakota. — Rev. Codes (1895), § 7429.

Oklahoma. — Stat. (1893), § 2355.

2. **Mutilating Coin.** — For a statute punishing the defacing, mutilating, impairing, diminishing, falsifying, scaling or lightening of coin see U. S. Rev. Stat. (1878), § 5459.

3. *Nebraska.* — Comp. Stat. (1897), § 6816.

Similar statutes exist in the following states, to wit:

Ohio. — Bates' Anno. Stat. (1897), § 7100.

Pennsylvania. — Pepp. & L. Dig. (1894), p. 1139, § 100.

English Precedent. — In Reg. *v.* Turner, 2 Moody C. C. 43, will be found the following indictment, to wit:

"The jurors of our lady the Queen upon their oath present, that *Alexander Turner*, late of the parish of *St. Mary Matfelow*, otherwise *Whitechapel*, in the county of *Middlesex*, and within the jurisdiction of the said Court, laborer, on the *27th* day of *January*, in the *1st* year of the reign of our sovereign Lady *Victoria*, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, with force and arms, at the parish aforesaid, and within the jurisdiction of the said Court, *three* pieces of the Queen's current silver coin called *sixpences*, then and there feloniously did gild with materials capable of produc-

state, in the year of our Lord one thousand eight hundred and *ninety-seven*, the grand jurors, chosen, selected and sworn, in and for the county of *Lancaster*, in the name and by the authority of the state of *Nebraska*, upon their oaths present that *John Doe*, late of the county aforesaid, on the *first* day of *August*, in the year of our Lord one thousand eight hundred and *ninety-seven*, in the county of *Lancaster*, and state of *Nebraska* aforesaid, then and there being, did unlawfully, wilfully and feloniously * gild a large number, to wit, *fifty* silver coins, then currently passing in the said state of *Nebraska*, called *quarter dollars*, thereby giving to each of said silver coins the appearance of a certain gold coin of the United States, to wit, of a *half eagle* (*or other gold coin, naming it, then passing in the state of Nebraska*), with intent to injure and defraud, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of *Nebraska*.

Daniel Webster, County Attorney.

e. Tokens in Resemblance of Coin.

Form No. 6602.[1]

(*Commencing as in Form No. 6591, and continuing down to* *) unlawfully and feloniously did make (or *cause to be made*) *ten* certain coins of gold (or *silver*), of original design and intended for the use and purpose of current money, the said coins then and there being coins not authorized by law, and he, the said *John Doe*, not being then and there authorized by law to make the same, against the peace (*concluding as in Form No. 6591*).

2. Paper Money.

Form No. 6603.[2]

(*Commencing as in Form No. 6591, and continuing down to* *) unlaw-

ing the color of gold, with intent to make the same resemble and pass for the Queen's current gold coin called *half-sovereigns*, against the form, etc., and against the peace of our said lady the Queen, her crown and dignity."

1. *United States.* — Rev. Stat. (1878), § 5461.

For a statute prohibiting the making of any coin, card, token or device in metal, or its compounds, intended to be used as money in place of any of the minor coins see U. S. Rev. Stat. (1878), § 5462.

2. *United States.* — Rev. Stat. (1878), §§ 5414, 5413.

See also U. S. Rev. Stat. (1878), § 5415, which prohibits the counterfeiting of notes issued by any banking association.

Notes of Foreign Bank. — For statute prohibiting the counterfeiting of the notes of any bank or other corporation of a foreign country see 23 U. S. Stat. at Large, p. 22, c. 52, § 3.

An indictment alleging that defendant, on a day named, "caused to be printed *three* certain impressions, each in the likeness of a certain part, to wit, the face, except the signatures and numbers, of a genuine treasury note of the denomination of *200 milreis* of the empire of *Brazil*, with intent to defraud said empire, and other parties to the grand jurors unknown," charges an offense under this statute. U. S. *v.* White, 25 Fed. Rep. 716. See also U. S. *v.* Arjona, 120 U. S. 482.

fully and feloniously, with intent to defraud,[1] did falsely make, forge and counterfeit a certain obligation and security of the United States, to wit, a *treasury note* of the denomination of *fifty* dollars, the tenor of which said false, forged and counterfeited treasury note is as follows, to wit (*Here set out a copy of the note*), against the peace (*concluding as in Form No. 6591*).

Form No. 6604 [2]

Commonwealth of *Massachusetts*, } ss.
County of *Hampshire*. }

At the *Superior* Court, begun and holden at *Northampton*, within and for the county of *Hampshire*, on the *second Monday* of *September*, in the year of our Lord one thousand eight hundred and *ninety-seven*.

The jurors for the *commonwealth* of *Massachusetts*, upon their oath, present that *John Doe*, late of *Williamsburg*, in the county of *Hampshire* aforesaid, on the *first* day of *July*, in the year of our Lord one thousand eight hundred and *ninety-seven*, at *Williamsburg* in the county aforesaid, did falsely make, forge and counterfeit a certain bank bill purporting to be payable to the bearer thereof, and to be signed in behalf of the president, directors and company of the *Hampshire County Bank*, the same being an incorporated banking company by law licensed and authorized as a bank within this *commonwealth*, which said forged and counterfeited bank bill is of the

1. It is sufficient to charge an intent to defraud in the general language of the statute, without setting forth the name of any person intended to be defrauded. U. S. *v.* Jolly, 37 Fed. Rep. 108.

2. *Massachusetts.* — Pub. Stat. (1882), c. 204, § 4.

Similar statutes exist in other states as follows:

Alabama. — Crim. Code (1886), § 3851.
Arizona. — Pen. Code (1887), § 740.
California. — Pen. Code (1897), § 470.
Colorado. — Mills' Anno. Stat. (1891), § 1258.
Delaware. — Rev. Stat. (1893), c. 129, p. 949.
Florida. — Rev. Stat. (1892), § 2485.
Idaho. — Rev. Stat. (1887), § 7028.
Illinois. — Starr & C. Anno. Stat. (1896), p. 1286, par. 223.
Indiana. — Horner's Stat. (1896), § 2206.
Iowa. — Code (1897), § 4856.
Maine. — Rev. Stat. (1883), c. 121, § 2.
Maryland. — Pub. Gen. Laws (1888), p. 471, § 37.
Michigan. — How. Anno. Stat. (1882), § 9215.
Minnesota. — Stat. (1894), § 6690.
Montana. — Pen. Code (1895), § 840.
Nebraska. — Comp. Stat. (1897), § 6810.
Nevada. — Gen. Stat. (1885), § 4637.
New Hampshire. — Pub. Stat. (1891), c. 274, § 4.
New Mexico. — Comp. Laws (1884), § 785.
New York. — Pen. Code, § 509.
North Carolina. — Code (1883), § 1030.
Ohio. — Bates' Anno. Stat. (1897), § 7091.
Oregon. — Hill's Anno. Laws (1892), § 1809.
Pennsylvania. — Pepp. & L. Dig. (1894), p. 1141, § 107.
Texas. — Pen. Code (1895), arts. 530, 531.
Utah. — Rev. Stat. (1898), § 4343.
Vermont. — Stat. (1894), § 4980.
Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 4454.
Wyoming. — Rev. Stat. (1887), § 924.

See also the following statutes, to wit:

Arkansas. — Sand. & H. Dig. (1894), § 1596.
Kentucky. — Stat. (1894), § 1189.
Mississippi. — Anno. Code (1892), § 1098.
Missouri. — Rev. Stat. (1889), § 3633.
Washington. — Ballinger's Anno. Codes & Stat. (1897), § 7128.
West Virginia. — Code (1891), c. 146, § 3.

purport and effect following: (*Here insert an exact copy of the bill, in words and figures*),[1] with intent the said president, directors and company of the said *Hampshire County Bank* to injure and defraud, against the peace of said *commonwealth*, and contrary to the form of the statute in such case made and provided.

Daniel Webster, District Attorney

II. UTTERING AND PASSING COUNTERFEIT MONEY.

1. Coin.[2]

a. Generally.

1. Where an indictment for counterfeiting a bank bill alleges that the bill was "in the words and figures following" or "of the tenor following," a strict recital is necessary, but the number of the bill, and the figures on the margin, or the words at the top, expressing its amount, are not parts of the bill and need not be set out. Com. *v.* Bailey, 1 Mass, 62; Com. *v.* Stevens, 1 Mass. 203.

2. Requisites of Indictment—Generally. —For the formal parts of an indictment in a particular jurisdiction consult the title INDICTMENTS.

For statutes relating to the offense of uttering counterfeit coins see as follows:

Alabama. — Crim. Code (1886), § 3856.
Arizona. — Pen. Code (1887), § 747.
Arkansas. — Sand. & H. Dig. (1894), § 1591.
California. — Pen. Code (1897), § 477.
Colorado. — Mills' Anno. Stat. (1891), § 1259.
Connecticut. — Gen. Stat. (1888), §1578.
Georgia. — 3 Code (1895), § 235.
Idaho. — Rev. Stat. (1887), § 7035.
Illinois. — Starr & C. Anno. Stat. (1896), p. 1287, par. 228.
Indiana. — Horner's Stat. (1896), § 2210.
Iowa. — Code (1897), § 4862.
Kansas. — Gen. Stat. (1889), § 2268.
Kentucky. — Stat. (1894), § 1181.
Maine. — Rev. Stat. (1883), c. 121, § 3.
Massachusetts. — Pub. Stat. (1882), c. 204, § 15.
Minnesota. — Stat. (1894), § 6702.
Mississippi. — Anno. Code (1892), § 1111.
Missouri. — Rev. Stat. (1889), § 3646.
Montana. — Pen. Code (1895), § 847.
Nebraska. — Comp. Stat. (1897), § 6815.
Nevada. — Gen. Stat. (1885), § 4638.
New Hampshire. — Pub. Stat. (1891), c. 274, § 9.
New Jersey. — Gen. Stat. (1895), p. 1081, § 180.
New Mexico. — Comp. Laws (1884), § 795.
New York. — Pen. Code, § 521.
North Dakota. — Rev. Codes (1895), § 7438.
Ohio. — Bates' Anno. Stat. (1897), § 7099.
Oregon. — Hill's Anno. Laws (1892), § 1814.
Pennsylvania. — Pepp. & L. Dig. (1894), p. 1140, § 103.
Rhode Island. — Gen. Laws (1896), c. 280, § 8.
Tennessee. — Code (1896), § 6616.
Texas. — Pen. Code (1895), art. 561.
Utah. — Rev. Stat. (1898), § 4350.
Vermont. — Stat. (1894), § 4984.
Virginia. — Code (1887), § 3735.
West Virginia. — Code (1891), c. 146, § 3.
Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 4460.
Wyoming. — Rev. Stat. (1887), § 925.
United States. — Rev. Stat. (1878), § 5457.

Pass and Utter. — Where an indictment charged that the defendant did "utter and pass" certain counterfeit coins, and the words used in the statute were "put off," it was held that the language of the indictment was substantially the same as that of the statute. Buckley *v.* State, 2 Greene (Iowa) 162.

To Whom Uttered. — The name of the person to whom counterfeit coin was passed should be set forth with certainty in the indictment, unless the name is unknown, and if so that fact should be stated. Gabe *v.* State, 6 Ark. 540; Rouse *v.* State, 4 Ga. 136; Gentry *v.* State, 6 Ga. 503; Buck-

ley *v.* State. 2 Greene (Iowa) 162; U. S. *v.* Bejandio, 1 Woods (U. S.) 294.

Description of Coin — *Generally.*—The indictment must particularly set forth the kind of coin alleged to be counterfeited, that is to say, the denomination or name, as dollar, half dollar or dime, but the place of coinage and date are immaterial. To aver counterfeit coin to be in the likeness of silver coin current in the commonwealth is insufficient. Com. *v.* Stearns, 10 Met. (Mass.) 258; Peek *v.* State, 2 Humph. (Tenn.) 78. See also Gabe *v.* State, 6 Ark. 540; Gentry *v.* State, 6 Ga. 503; State *v.* Shoemaker, 7 Mo. 177; State *v.* Beeler, 1 Brev. (S. Car.) 482; U. S. *v.* Bejandio, 1 Woods (U. S.) 294.

Insufficient Description. — In Com. *v.* Fields, 5 Ky. L. Rep. 610, it was held that the averment "a counterfeit coin of the half-dollar denomination, resembling the coin commonly called half dollar of the United States of America," was not a sufficient description of the coin.

Where an indictment for passing counterfeit coin described the coin as "a ten dollar gold coin," but failed to state what government issued such coin, or by what authority or when it was issued, it was held that there was nothing averred by which the coin could be identified and that the description was insufficient. Waller *v.* Com., 97 Ky. 509.

Time When Current — *Generally.*—The time when the genuine coin was current should be alleged when required by statute. Nicholson *v.* State, 18 Ala. 531; Waller *v.* Com., 97 Ky. 509. But may be omitted where the statute does not require it, and if made may be rejected as surplusage. Smith *v.* State, 8 Ohio 295.

Sufficient Averment. — An indictment charging that the defendant uttered, in payment, counterfeit coins, "made and counterfeited to the likeness and similitude of the good, true and current money and silver coin, currently passing in this state, called '*Spanish dollars*,'" is good, but must be supported by proof that such coins were current. Fight *v.* State, 7 Ohio, pt. 1, 181.

Insufficient Averment.—Where an indictment alleged that the defendant "had in his custody and possession a certain piece of false money and coin, forged and counterfeit to the similitude and likeness of a certain good gold money and coin current in said commonwealth by the usages thereof as money, called a *California five dollar gold piece*; and the aforesaid piece of forged and counterfeit money and coin the said *Bond* did then and there utter and pass in payment as true to one *Nancy W. Fairbanks* with intent her, the said *Nancy W. Fairbanks*, to cheat, injure and defraud; he, the said *Bond*, then and there well knowing the aforesaid piece of money and coin to be false, forged and counterfeit; against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided," the defendant's exceptions to a verdict of guilty were sustained on the ground that gold coins not issued by authority of congress, nor of any foreign government, although in circulation, are not "gold coins current by law or usage," the uttering of which is prohibited. Com. *v.* Bond, 1 Gray (Mass.) 564.

Contradictory Allegations. — An indictment charging that the defendant "one piece of false and counterfeit money and silver coin, made and counterfeited in imitation and similitude of a piece of good, legal and current money and silver coin of this state, called a *Mexican dollar*, of the value of *one* dollar, at that time current within this state by law and usage, and in actual use and circulation within this state, then and there, feloniously did offer and attempt to pass, utter and publish as true, to one *B. P. Franklin*, with intent then and there him, the said *Franklin*, to defraud, he, the said defendant, at the time when he so offered and attempted to pass as true said false and counterfeit money and silver coin, then and there well knowing the same to be false and counterfeit, against the form," etc., was held defective in that the averment that the counterfeit coin was a "piece of good, legal and current money and silver coin of the state of Missouri" is contradictory and repugnant to the subsequent averment that the coin is a "Mexican dollar, current within this state by law and usage." State *v.* Shoemaker, 7 Mo. 177.

The intent to defraud should be alleged when the statute requires it. And in *South Carolina* it has been held that an indictment for passing counterfeit coin must charge it with an intent to defraud some particular person. State *v.* Odel, 3 Brev. (S. Car.) 552.

Scienter. — The indictment should contain an averment of scienter. Gabe *v.* State, 6 Ark. 540; Gentry *v.* State, 6

Form No. 6605.[1]

(*Commencing as in Form No. 6591, and continuing down to* *) knowingly, unlawfully and feloniously did pass, utter and publish a certain false, forged and counterfeit gold (or *silver*) coin, in the resemblance and similitude of a gold (or *silver*) coin called an *eagle* (or *dollar*), coined and stamped at the mints of the United States, with intent to defraud one *Richard Roe*,[2] he, the said *John Doe*, then and there well knowing the said coin to be false, forged and counterfeit, against the peace (*concluding as in Form No. 6591*).

Form No. 6606.

(Precedent in Gabe *v.* State, 6 Ark. 540.)[3]

[*State of Arkansas* against *William Gabe, alias Santa Anna.*] *Pulaski Circuit* Court.][4]

The grand jurors for the State of *Arkansas*, duly returned [impaneled, sworn and charged as such in the name and by the authority of the State of *Arkansas*, upon their oaths][4] present that *William Gabe*, alias *Santa Anna*, late of [said county of *Pulaski*,][4] on the *ninth* day of *September*, in the year of our Lord one thousand eight hundred and *forty-five*, in the county of *Pulaski* aforesaid, *one* piece of base and adulterated[5] coin, in imitation of and resembling a piece of the *gold* coin which then and there was, and now is, current by law in this State, called a *gold eagle*, and otherwise commonly known as a *ten dollar gold piece*, feloniously and fraudulently did pass to one *Eli Clemens*,[6] he, the said *William Gabe*, alias *Santa Anna*, at the time he so passed the said piece of base and adulterated coin, then and there well knowing the same to be base and adulterated, false and counterfeit, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of *Arkansas*.

[*Daniel Webster*, Prosecuting Attorney.][4]

Ga. 503; State *v.* Shoemaker, 7 Mo. 177; State *v.* Beeler, 1 Brev. (S. Car.) 482; Peek *v.* State, 2 Humph. (Tenn.) 78.

1. *United States.* — Rev. Stat. (1878), § 5457. See also *supra*, note 2, p. 834.

2. **To Whom Uttered — Intent to Defraud.** — Where an indictment contained three counts, one of which charged the defendant with uttering and passing a counterfeit coin with intent to defraud one Robert Harris, and the other two with uttering, etc., with intent to defraud some person or persons to the grand jury unknown, it was held that the averment of intent to defraud some person or persons, which is required in an indictment under the United States statute, is a substitute for an averment specifying the name of the person to whom the coin was passed, and that to require both averments to be made is requiring too much particularity. U. S. *v.* Bejandio, 1 Woods (U. S.) 294.

3. For the present statute in *Arkansas* see *supra*, note 2, p. 834.

4. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

5. It was held in this case that the words "base" and "adulterated," in common parlance, signified the same thing, and that there is no repugnancy in charging in the indictment that the defendant passed one piece of base "and" adulterated coin.

6. It was held in this case that the allegation that the coin was passed to a particular person is material, and the christian name of such person must be proved as charged.

Form No. 6607.

Precedent in McKinley *v.* State, 8 Humph. (Tenn.) 72.)[1]

[State of *Tennessee*, *Jackson* County. } *Circuit* Court, *December* Term, 1846.][2]

The grand jurors for the State of *Tennessee* elected, impaneled, sworn and charged to inquire for the body of the county of *Jackson*, in the State of *Tennessee*, upon their oath present that[3] *Eliza McKinley*, *spinster*, on the *first* day of *October*, eighteen hundred and *forty-six*, with force and arms in the county of *Jackson*, in the State of *Tennessee*, *four* pieces of false, base, forged, adulterated and counterfeit coin, made and counterfeited to the likeness and in imitation of the good, legal and current *silver* coin, then and there current in the State of *Tennessee*, called *dollars*, as and for such pieces of the good, legal and current coin of the State of *Tennessee*, called *dollars*, then and there deceitfully and fraudulently did utter, tender and pass to one *William Goodall*. She, the said *Eliza McKinley*, at the time she so uttered, tendered and passed the said *four* pieces of base, false, adulterated and counterfeit coin, well knowing the same to be false, base, adulterated and counterfeit, against the form of the statute in such case made and provided, and against the peace and dignity of the State.

[*West H. Humphreys*, Attorney General.][2]

b. Foreign Coin.

Form No. 6608.

(Precedent in Gentry *v.* State, 6 Ga. 504.)[4]

Georgia, *Cass* County:

The Grand Jurors [chosen, selected and sworn for the county of

1. See also the second count in Peek *v.* State, 2 Humph. (Tenn.) 79, which was held sufficient and was as follows:

"And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the aforesaid *James Peek*, *yeoman*, afterwards, to wit, on the *1st* day of *February*, 1838, with force and arms, in the county of *Overton*, in the state of *Tennessee*, *fifty* pieces of false, fraudulent, counterfeit, base and adulterated coin to the likeness and similitude of the good, legal and current money and *silver* coin, current in the state of *Tennessee*, called *dollars*, as and for pieces of such good legal and current money and *silver* coin, called *dollars*, then and there did deceitfully utter, tender and pass to one *Edward N. Cullom*; he, the said *James Peek*, *yeoman*, at the time he so uttered, tendered and passed the said *fifty* pieces of false, fraudulent, base and counterfeit money and coin, well knowing the same to be false, fraudulent, forged, base and adulterated, and counterfeit, against the form of the statute in such case made and provided, and against the peace and dignity of the state."

See also list of statutes *supra*, note 2, p. 834.

2. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

3. This indictment, though sufficient in form, was held insufficient for the reason that the word "that" was inserted after the word "present" by way of amendment, and the record failed to disclose that the amendment was made by the grand jury.

4. This form was drawn under a statute identical with that now in force, to wit, 3 Ga. Code (1895), § 235. See also list of statutes cited *supra*, note 2, p. 834.

Precedent. — In Kirk *v.* Com., 9 Leigh (Va.) 627, the indictment, which was sufficient, charged the offense as fol-

Cass, to wit (*naming them*)],[1] in the name and behalf of the citizens of *Georgia*, charge and accuse *John Gentry* with the offense of fraudulently and falsely tendering in payment a base coin, knowing the same to be base; for that the said *John Gentry*, on the *12th February*, 18*45*, in the county aforesaid, did tender to one *Arthur Haire*, *one* piece of base coin, made and counterfeited to the likeness and similitude of good legal and current *silver* coin, called a *Spanish dollar*, knowing the same to be base, contrary to the laws of said state, the good order, peace and dignity thereof; and the Jurors aforesaid, in the name and behalf of the citizens of *Georgia*, farther charge the said *John Gentry* with having committed the offense of falsely and fraudulently uttering a counterfeit and forged coin, knowing the same to be counterfeit and forged; for that the said *John Gentry*, on the *12th* day of *February*, 18*45*, in the county and state aforesaid, *one* piece of base and counterfeit money, made and counterfeited to the likeness and similitude of legal and current *silver* coin called a *dollar*,[2] did falsely and fraudulently utter and tender[3] the said counterfeit dollar, knowing the same to be counterfeit, contrary to the laws of said state, the good order, peace and dignity thereof.

[*Superior* Court. } *J. Milner*, Solicitor General.
February Term, A. D. 18*49*. } *Arthur Haire*, Prosecutor.][1]

c. Gilded Coin.

Form No. 6609.[4]

(*Commencing as in Form No. 6601, and continuing down to* *) pass to one *Richard Roe*, *two* silver coins, currently passing in this state,

lows, to wit: "That *James Kirk*, on the *10th* of *March*, 18*38*, at the county of *Cabell*, feloniously did pass to one *Aly Williams* a certain counterfeit, forged and base coin, of the likeness and similitude of the *Mexican* coin and money called a *dollar*, current within the *commonwealth* of *Virginia* as and for a *dollar*, with intention to injure and defraud the said *Aly Williams*, he the said *James Kirk*, at the time he so aforesaid passed the said base coin, well knowing the same to be false, forged and counterfeit, contrary to the form of the statute."

1. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. **Current Coin.** — It was held that it was sufficiently stated that the coin was passing or in circulation in the state without stating whether the coin was foreign or domestic.

3. **To Whom Uttered.** — It was held that, as the second count charged the offense of uttering and not that of tendering in payment, it was not necessary to state the person to whom the counterfeit money was uttered.

4. *Nebraska.* — Comp. Stat. (1897), § 6816.

See also *supra*, note 2, p. 834.

Precedent. — In Wilson *v.* State, 1 Wis. 184, the second count of the indictment which was drawn under a statute prohibiting the passing and uttering of counterfeit money, charged the passing and uttering of gilded coins as follows:

"That the said *David Wilson*, on the *15th* day of *September*, 18*52*, at the county of *Grant* aforesaid, *one* certain piece of false and counterfeit money, made of base metal and colored with a certain wash, producing the color of gold, to the likeness and similitude of a piece of good, lawful and current gold money and coin of the United States, called a *quarter-eagle*, as and for a piece of good, lawful and current gold money and coin of the United States, called a *quarter-eagle*, unlawfully, unjustly and deceitfully did ut-

called *quarter dollars*, which said silver coins were then and there gilded and had the appearance of gold coins of the United States, currently passing in this state, to wit, *quarter eagles*, with intent to injure and defraud the said *Richard Roe*, he the said *John Doe* then and there knowing the said coins to be gilded as aforesaid and not genuine gold coins, contrary to the form of the statute (*concluding as in Form No. 6601*).

d. Bringing Coin into the United States with Intent to Defraud.

Form No. 6610.[1]

(*Commencing as in Form No. 6591, and continuing down to* *) knowingly, unlawfully and feloniously did bring into the United States from *Toronto*, in the province of *Ontario*, a large number, to wit, *one hundred* false, forged and counterfeit coins, each in the resemblance and similitude of a silver (or *gold*) coin, coined and stamped at the mints of the United States, called a *dollar*, with intent to defraud some person or persons to the grand jury unknown, he the said *John Doe* then and there well knowing the said coins to be false, forged and counterfeit, against the peace (*concluding as in Form No. 6591*).

2. Paper Money.[2]

a. Generally.

ter and pay to one *Amos Chase*, he, the said *Wilson*, well knowing," etc. This indictment was sufficient. For the present *Wisconsin* statute, see *supra*, note 2, p. 834.

1. *United States.* — Rev. Stat. (1878), § 5457.

2. **Requisites of Indictment — Generally.** — For the formal parts of an indictment in a particular jurisdiction consult the title INDICTMENTS.

For statutes relating to the offense of uttering counterteit paper money see as follows:

Alabama. — Crim. Code (1886), § 3851.
Arizona. — Pen. Code (1887), § 740.
Arkansas. — Sand. & H. Dig. (1894), § 1596.
California. — Pen. Code (1897), § 470.
Colorado. — Mills' Anno. Stat. (1891), § 1258.
Connecticut. — Gen. Stat. (1888), § 1578.
Delaware. — Rev. Stat. (1893), c. 129, p. 949.
Florida. — Rev. Stat. (1892), § 2487.
Georgia. — 3 Code (1895), § 239.
Idaho. — Rev. Stat. (1887), § 7028.
Illinois. — Starr & C. Anno. Stat. (1896), p. 1286, par. 223.
Indiana. — Horner's Stat. (1896), § 2208.
Iowa. — Code (1897), § 4858.
Kansas. — Gen. Stat. (1889), § 2268.
Kentucky. — Stat. (1894), § 1189.
Maine. — Rev. Stat. (1883), c. 121, § 3.
Massachusetts. — Pub. Stat. (1882), c. 204, § 6.
Michigan. — How. Anno. Stat. (1882), § 9218.
Minnesota. — Stat. (1894), § 6702.
Mississippi. — Anno. Code (1892), § 1011.
Missouri. — Rev. Stat. (1889), § 3646.
Montana. — Pen. Code (1895), § 840.
Nebraska. — Comp. Stat. (1897), § 6812.
Nevada. — Gen. Stat. (1885), § 4637.
New Hampshire. — Pub. Stat. (1891), c. 274, § 5.
New Jersey. — Gen. Stat. (1895), p. 1082, § 184.
New Mexico. — Comp. Laws (1884), § 787.
New York. — Pen. Code, § 521.
North Carolina. — Code (1883), § 1031.
North Dakota. — Rev. Codes (1895), § 7438.
Ohio. — Bates' Anno. Stat. (1897), § 7091.
Oregon. — Hill's Anno. Laws (1892), § 1810.
Pennsylvania. — Pepp. & L. Dig. (1894), p. 1141, § 107.

Rhode Island. — Gen. Laws (1896), c. 280, § 3.

Tennessee. — Code (1896), § 6601.

Texas. — Pen. Code (1895), art. 542.

Utah. — Rev. Stat. (1898), § 4348.

Vermont. — Stat. (1894), § 4978.

Virginia. — Code (1887), § 3735.

West Virginia. — Code (1891), c. 146, § 3.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 4455.

Wyoming. — Rev. Stat. (1887), § 924.

For other forms of indictments for passing counterfeit notes see the following cases, to wit:

Arkansas. — Mathena *v.* State, 20 Ark. 70.

Illinois. — Swain *v.* People, 5 Ill. 178.

Indiana. — McGregor *v.* State, 16 Ind. 9.

Iowa. — State *v.* Newland, 7 Iowa 242; State *v.* Barrett, 8 Iowa 537; Buckley *v.* State, 2 Greene (Iowa) 162.

Kentucky. — Mount *v.* Com., 1 Duv. (Ky.) 90.

Massachusetts. — Com. *v.* Boynton, 2 Mass. 77; Com. *v.* Taylor, 5 Cush. (Mass.) 605; Com. *v.* Thomas, 10 Gray (Mass.) 483; Com. *v.* Carey, 2 Pick. (Mass.) 47.

Missouri. — Hobbs *v.* State, 9 Mo. 856.

New Hampshire. — State *v.* Carr, 5 N. H. 367.

New York. — People *v.* Lewis, 1 Wheel. Cr. Cas. (N. Y.) 181.

North Carolina. — State *v.* Dourden, 2 Dev. L. (13 N. Car.) 443.

Pennsylvania. — Com. *v.* Smith, 6 S. & R. (Pa.) 568.

Tennessee. — Peek *v.* State, 2 Humph. (Tenn.) 84; State *v.* Shelton, 7 Humph. (Tenn.) 31; Williams *v.* State, 9 Humph. (Tenn.) 80.

Vermont. — State *v.* Wilkins, 17 Vt. 151.

Virginia. — Com. *v.* Hensley, 2 Va. Cas. 149; Buckland *v.* Com., 8 Leigh (Va.) 732; Murry *v.* Com., 5 Leigh (Va.) 720; Martin *v.* Com., 2 Leigh (Va.) 745; Brown *v.* Com., 2 Leigh (Va.) 769.

Use of Certain Words — "*Did.*" — Where an indictment charged that the defendant "feloniously utter and publish," etc., omitting the word "did," it was held insufficient, being too vague and uncertain. State *v.* Halder, 2 McCord L. (S. Car.) 377.

"*Dispose and Put Away.*" — Where an indictment charged that the defendant "did dispose of and put away," and the words of the act were "utter and publish," it was held insufficient, in that the allegation of the indictment was more general than the words of the act, and that the words of the statute should have been followed. State *v.* Petty, Harp. L. (S. Car.) 59.

"*Altered and Counterfeited.*" — Under the *Ohio* act of 1835 an indictment for uttering a bank bill which charges the bill to have been "false, forged, altered and counterfeited," is repugnant. Kirby *v.* State, 1 Ohio St. 185.

Copy of Bank Note — *Generally.* — An indictment for passing counterfeit bank notes must set forth the forged instrument in words and figures, if in existence and within the control of the prosecutor, and in excepted cases the facts upon which the exception rests must be stated. Hooper *v.* State, 8 Humph. (Tenn.) 93; State *v.* Wheeler, 35 Vt. 261. See also Hampton *v.* State, 8 Ind. 336; Wilkinson *v.* State, 10 Ind. 372; Com. *v.* Wilson, 2 Gray (Mass.) 70; Com. *v.* Clancy, 7 Allen (Mass.) 537; Com. *v.* Taylor, 5 Cush. (Mass.) 605; State *v.* Carr, 5 N. H. 367; State *v.* Harris, 5 Ired. L. (27 N. Car.) 287; Thompson *v.* State, 9 Ohio St. 354; Com. *v.* Searle, 2 Binn. (Pa.) 332; State *v.* Wilkins, 17 Vt. 151; Brown *v.* Com., 2 Leigh (Va.) 769; Murry *v.* Com , 5 Leigh (Va.) 720. But it is only necessary to set out the material parts of the note. State *v.* Carr, 5 N. H. 367.

Marginal Numbers. — The marginal numbers and figures are not essential parts of the notes, and hence need not be set forth. Com. *v.* Taylor, 5 Cush. (Mass.) 605; Com. *v.* Bailey, 1 Mass. 62; Com. *v.* Stevens, 1 Mass. 203; State *v.* Carr, 5 N. H. 367; People *v.* Franklin, 3 Johns. Cas. (N. Y.) 299; State *v.* Wheeler, 35 Vt. 261.

Ornamental Devices. — It is not necessary to set forth the ornamental parts of the note, such as devices, mottoes, etc. Hampton *v.* State, 8 Ind. 336; Com. *v.* Searle, 2 Binn (Pa.) 332.

Name of Engraver. — In setting forth the copy of a bank note it is not improper to set out the names and residences of the engravers as the same appear upon the margin of the note. Thompson *v.* State, 9 Ohio St. 354.

Indorsement. — In setting out a counterfeit bank note *in hæc verba*, in an indictment for passing the same, an indorsement appearing to have been made on the note after it was passed is properly omitted. Buckland *v.* Com., 8 Leigh (Va.) 732.

Names of Cashier and President. — Where a person was charged with ut-

tering and passing as true an uncurrent and worthless bank bill of the tenor following:

"State of Rhode Island.

The Tiverton Bank will pay to bearer two dollars on demand. Tiverton, Aug. 1, 1857.

Cash'r. Pres't.

A more particular description of said bank bill the said jurors have not, and cannot give," the indictment was held defective and insufficient in that it did not contain the names of the cashier and president in setting forth the tenor of the bill. The averment that jurors could not give a more particular description did not relieve it from the defect, it not appearing that the bill was ever signed. Com. *v.* Clancy, 7 Allen (Mass.) 537. But where an indictment for passing a counterfeit bank bill, in setting out the tenor of the bill, described it as signed by J. M. Thonpson and bill offered in evidence was signed by J. M. Thompson, it was held that the two names were *idem sonans*, and that there was no fatal variance. State *v.* Wheeler 35 Vt. 261.

Name of State.— It is a fatal variance, in an indictment for uttering a counterfeit bill, to omit the name of the state in the upper margin thereof where the name is not repeated in the body of the bill, the name of the state being a part of the contract. Com. *v.* Wilson, 2 Gray (Mass.) 70.

Describing Bill as Promissory Note.— An indictment for uttering a counterfeit bank bill may describe it as a promissory note. Com. *v.* Carey, 2 Pick. (Mass.) 47; Com. *v.* Thomas, 10 Gray (Mass.) 483; Com. *v.* Paulus, 11 Gray (Mass.) 305; Hobbs *v.* State, 9 Mo. 855; Com. *v.* Hensley, 2 Va. Cas. 149. Except where the statutes impose different penalties for passing counterfeit promissory notes and counterfeit bank notes, in which case an indictment alleging the passing of a counterfeit promissory note and describing a counterfeit bank note is bad. State *v.* Hayden, 15 N. H. 355; State *v.* Ward, 6 N. H. 529.

Averment of Existence and Incorporation of Bank— *Generally.*— The necessity for and manner of alleging the existence and incorporation of the bank, counterfeit notes of which are alleged to have been uttered, will depend largely upon the language of the statute under which the indictment is drawn. Thus where the statute makes it an offense to utter counterfeit bank notes of any bank incorporated by the laws of the state, an indictment for uttering a counterfeit bank note which fails to allege that the bank was incorporated by the laws of the state is insufficient, and the averment is not supplied by an allegation that the bank was a "banking company established in said commonwealth." Com. *v.* Simonds, 11 Gray (Mass.) 306. See also Kennedy *v.* Com., 2 Metc. (Ky.) 36; Jennings *v.* People, 8 Mich. 81; Jones *v.* State, 5 Sneed (Tenn.) 346. But it has been held unnecessary to allege the existence of the bank where the indictment charges a design to defraud an individual. Com. *v.* Carey, 2 Pick. (Mass.) 47.

Under other statutes, however, it has been held unnecessary to aver that the bank had any legal existence. Hobbs *v.* State, 9 Mo. 855; State *v.* Van Hart, 17 N. J. L. 327; Murry *v.* Com., 5 Leigh (Va.) 720.

Sufficient Averments.— Where an indictment charged that the defendant, "designing and intending to injure and defraud one *Millington Patillo*, with force and arms, in the county aforesaid, did pass as good and genuine, to the said *Millington Patillo*, a false, forged and counterfeited promissory note, commonly called a bank note, purporting to be a good and genuine note of *one hundred* dollars on the bank of the State of *South Carolina*, which said false, forged and counterfeited bank note is as follows, that is to say (*setting forth a copy*), with intent then and there to defraud the said *Millington Patillo*, he, the said *James Ward*, at the time he so passed the said counterfeited bank note, well knowing," etc., it was held that the averment of the existence of the bank was sufficient, and conviction was sustained. State *v.* Ward, 2 Hawks (9 N. Car.) 443. Under a statute prohibiting the counterfeiting of bank bills "issued by any banking company incorporated by the congress of the United States, or by the legislature of any state or territory of the United States," an indictment which alleged a counterfeit bank bill to be in imitation of a bank bill "issued by the President, Directors and Company of the Bank of Cumberland, by and under the authority of the legislature of the state of Maine, one of the United States of America," sufficiently averred the existence of the bank and that it was an incorporated institution. State *v.* Wilkins, 17 Vt. 151. And where an in-

dictment charged that the defendant passed a counterfeit bank bill of the denomination of three dollars, purporting "to have been issued by the Andover Bank, *a banking company incorporated by the legislature of the commonwealth of Massachusetts*, made payable to E. F. or bearer on demand," it was held that the portion in italics was not an allegation of the purport of the bill, but of the due incorporation of the banking company, by whom the bill purported to have been issued. State *v.* Wheeler, 35 Vt. 261.

Unnecessary Particularity in Describing Bank. — In an indictment where it was alleged that the defendant "did utter and pass, and tender in payment as true, to one *Peter Kesler*, *two* false, forged and counterfeit bank bills, of the denomination of *two* dollars, purported to be issued by the President, Directors & Co. of the *Massachusetts* Bank, payable to *J. E. Hayden*; a corporation duly organized for that purpose, by the state of *Massachusetts*, with intent to defraud, he, the said *Newland*, well knowing," etc., it was held that, although the bank had been described with unnecessary particularity, it was incumbent on the state to prove the fact alleged. Upon this point the judgment against the defendant was reversed. State *v.* Newland, 7 Iowa 242. See also Com. *v.* Smith, 6 S. & R. (Pa.) 568; People *v.* Davis, 21 Wend. (N. Y.) 309.

Authority of Bank to Issue Notes. — Under the *Minnesota* statute an indictment for uttering counterfeit bank bills must allege that the bills purported to have been issued by a bank authorized by law to issue such bills, and an indictment charging that the defendant did "utter and pass to and upon one *Peter Morrison*, in payment of an indebtedness, *two* several counterfeit bank notes or bills of the denomination of *three* dollars each, purporting to be issued by the *New Haven County* Bank, of the state of *Connecticut*, knowing them to be false and counterfeit, and with intent to injure and defraud the said *Morrison*," does not state facts sufficient to constitute an offense in that it failed to allege that the bank was authorized by law to issue bank bills and that defendant uttered and passed the notes as true and genuine. Benson *v.* State, 5 Minn. 19.

Intent to Defraud — *Generally.* — The indictment must charge that the counterfeit bill was passed with intent to defraud. State *v.* Nicholson, 14 La. Ann. 798; State *v.* Seran, 28 N. J. L. 519; Hooper *v.* State, 8 Humph. (Tenn.) 93. See also Wilkinson *v.* State, 10 Ind. 372; State *v.* Barrett, 8 Iowa 537; Hobbs *v.* State, 9 Mo. 855; State *v.* Dourden, 2 Dev. L. (13 N. Car.) 443; State *v.* Ward, 6 N. H. 529; People *v.* Wilson, 6 Johns. (N. Y.) 320; Stoughton *v.* State, 2 Ohio St. 563; Butler *v.* Com., 12 S. & R. (Pa.) 237; Williams *v.* State, 9 Humph. (Tenn.) 80; Fergus *v.* State, 6 Yerg. (Tenn.) 345; Brown *v.* Com., 2 Leigh (Va.) 769; Martin *v.* Com., 2 Leigh (Va.) 745; Hendrick *v.* Com., 5 Leigh (Va.) 707; Buckland *v.* Com., 8 Leigh (Va.) 732; Jett *v.* Com., 18 Gratt. (Va.) 933.

Person to be Defrauded. — The name of the person to whom counterfeit money was passed should be set forth with certainty in the indictment, unless the name is unknown, and if so that fact should be stated. Buckley *v.* State, 2 Greene (Iowa) 162. See also Williams *v.* State, 9 Humph. (Tenn.) 80. An intent to defraud a firm includes an intent to defraud each member thereof, and an indictment for uttering a forged bank bill with intent to defraud one member thereof is sufficient without setting forth the names of all the persons meant to be injured. Stoughton *v.* State, 2 Ohio St. 563.

Where an indictment alleged an intent to defraud a bank, it was held sufficient. Brown *v.* Com., 2 Leigh (Va.) 769.

And a general allegation of intent is sufficient without naming the person to be defrauded. State *v.* Nicholson, 14 La. Ann. 798. See also Wilkinson *v.* State, 10 Ind. 372; State *v.* Barrett, 8 Iowa 538; Hooper *v.* State, 8 Humph. (Tenn.) 93; Fergus *v.* State, 6 Yerg. (Tenn.) 345.

Scienter. — Guilty knowledge should be distinctly averred in the indictment. State *v.* Seran, 28 N. J. L. 519; Hooper *v.* State, 8 Humph. (Tenn.) 93; State *v.* Morton, 8 Wis. 352; U. S. *v.* Roudenbush, 1 Baldw. (U. S.) 514; U. S. *v.* Carll, 105 U. S. 611. See also Wilkinson *v.* State, 10 Ind. 372; Hobbs *v.* State, 9 Mo. 855; State *v.* Ward, 6 N. H. 529; State *v.* Ward, 2 Hawks (9 N. Car.) 443; State *v.* Dourden, 2 Dev. L. (13 N. Car.) 443; Butler *v.* Com., 62 S. & R. (Pa.) 237; State *v.* Wilkins, 17 Vt. 151; Buckland *v.* Com., 8 Leigh (Va.) 735; Brown *v.* Com., 2 Leigh (Va.) 769; Martin *v.* Com., 2 Leigh (Va.) 745; Murry *v.* Com., 5 Leigh (Va.) 720; Jett

Form No. 6611.[1]

(*Commencing as in Form No. 6591, and continuing down to* *) unlawfully and feloniously did utter, publish and pass to one *Richard Roe*[2] a certain false, forged and counterfeited obligation of the United States, to wit, a certain false, forged and counterfeited United States treasury note[3] of the denomination of *fifty* dollars, which said false, forged and counterfeited treasury note is as follows, that is to say (*Here set out a verbatim copy of the note*), with intent to defraud the said *Richard Roe*, he, the said *John Doe*, then and there well knowing[4] the said false, forged and counterfeited treasury note to be false, forged and counterfeited, against the peace (*concluding as in Form No. 6591*).

Form No. 6612.

(Precedent in Wilkinson *v.* State, 10 Ind. 372.)[5]

v. Com., 18 Gratt. (Va.) 933; U. S. *v.* Howell, 11 Wall. (U. S.) 432.

And in an indictment omitting the words "knowing the same to be forged and counterfeited," the allegation that the counterfeit bill was uttered with intent to defraud does not cure the defect and the indictment is insufficient. State *v.* Nicholson, 14 La. Ann. 798.

1. The charging part of this form, which is based on U. S. Rev. Stat. (1878), §§ 5431, 5413, is subsantially the charging part of the indictment in U. S. *v.* Owens, 37 Fed. Rep. 112. See also U. S. *v.* Carll, 105 U. S. 612; U. S. *v.* Howell, 11 Wall. (U. S.) 432.

Precedent. — Where an indictment charged that the defendant "feloniously did attempt to pass to one *E. S.* as and for a true and good bill or note, a certain false, forged and counterfeit paper writing, the tenor of which," etc., "is as follows: 'the president, directors and company of the Bank of the United States promise to pay twenty dollars on demand, at their office of discount and deposit at Fayetteville, to the order of D. Anderson, cashier thereof, Philadelphia, the 4th of July, 1827, John W. Sandford, cashier, John Huske, president,' with intent to defraud the president, directors and company of the Bank of the United States," it was held that an offense was stated under the act of 1816, 3 U. S. Stat. at Large 275, although the persons whose signatures were forged were not cashier and president of that bank, that it was immaterial whether the bill be signed in the name of real or fictitious persons, or whether it would if genuine be binding on the bank or not. U. S. *v.* Turner, 7 Pet. (U. S.) 132.

2. **To Whom Passed.** — The indictments in U. S. *v.* Owens, 37 Fed. Rep. 112, and U. S. *v.* Howell, 11 Wall. U. S. 433, do not state the name of the person to whom the note was passed, but such an averment is made in the indictment in U. S. *v.* Carll, 105 U. S. 612.

3. **Misdescription of Note.** — Where the note is set forth by its tenor, a misdescription of it as a treasury note, when in fact it is a United States note, is immaterial. U. S. *v.* Marcus, 53 Fed. Rep. 784. But a mistake in the bill number or in the denomination of the bill is a fatal variance. U. S. *v.* Mason, 12 Blatchf. (U. S.) 497.

Likeness and Similitude. — It is not necessary to allege that the notes were in the likeness and similitude of genuine notes. Nor need the indictment aver that any genuine note of the United States has been authorized by law, or ever was in circulation as an obligation of the United States, as the court will take judicial notice of the acts of congress authorizing such obligations and the form and substance thereof. U. S. *v.* Owens, 37 Fed. Rep. 112.

"Words and Figures Following." — The allegation that the note is "in the words and figures following" does not mean that all the words and figures printed on the back of the bill, and forming no part of the contract set forth on its face, are stated. U. S. *v.* Marcus, 53 Fed. Rep. 784.

4. **Scienter.** — An indictment under this section is fatally defective if it fails to allege that the defendant knew the bill to be false, forged and counterfeited. U. S. *v.* Carll, 105 U. S. 611.

5. For present statute in *Indiana* see *supra*, note 2, p. 839. See also

[In the *Porter Circuit* Court of *Indiana*, of the *October* Term, 1857.

State of Indiana
against
Frank Wilkinson.][1]

The grand jurors of the state of *Indiana*, good and lawful men of *Porter* county, impaneled, charged and sworn in the said *Circuit* Court at the term thereof aforesaid, to inquire within and for the body of said county, upon their oaths present, that *Frank Wilkinson*, late of said county, on the *twentieth* day of *March*, A. D. 1857, at *Porter* county, did unlawfully, falsely, fraudulently and feloniously, give, barter, sell, utter, publish, and put away to one *Joseph Jones*, a certain false, forged and counterfeit bank note, which said note was made in imitation of, and did then and there purport to be a bank note for the sum of *five* dollars, issued by the *Farmers' Bank of Kentucky*, made payable to bearer on demand at their bank in *Princeton*, which said [false, forged and counterfeit bank][2] note is of the tenor following, to wit (*Here was set out a copy of the note*), with intent to defraud the said *Joseph Jones*,[3] the said *Frank Wilkinson* then and there well knowing[4] the said note to be false, forged and counterfeit; against the peace and dignity of the state of *Indiana*, and contrary to the form of the statute in such cases made and provided.

Mark L. De Motte, Pros. Att'y.

b. Foreign Bank Note.

Form No. 6613.[5]

(*Commencing as in Form No. 6591, and continuing down to* *) unlawfully and feloniously did utter, pass, put off and tender in payment to one *Richard Roe*, with intent to defraud said *Richard Roe*, one certain false, forged and counterfeited bank note, in the likeness and similitude of a bank note issued by a bank of the *United Kingdom of Great Britain and Ireland*, to wit, the *Bank of England*, and intended by the law and usage of the said foreign government to circulate as money, the tenor of which said false, forged and counterfeited bank note is as follows, to wit (*Here set out a copy of the note*), he, the said *John Doe* then and there well knowing the same to be false,

other sufficient indictments in State *v.* Harris, 5 Ired. L. (27 N. Car.) 287; Jett *v.* Com., 18 Gratt. (Va.) 933.

1. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. This indictment was objected to on the ground of uncertainty, the contention being that the word "said" immediately preceding the words enclosed by [ ] referred to the genuine and not to the counterfeit note, but the court held otherwise and sustained the indictment. The words enclosed by [ ] have been supplied to meet the objection urged.

3. At this point in the precedent will be found the following allegation, "and with intent to have the same put in circulation," but the court held that this was harmless surplusage, being a part of the language of another section of the statute.

4. It was objected to this indictment that it did not aver that Jones, to whom the bill was passed, did not know that it was counterfeit, but the court held that the objection was groundless, no such averment being necessary.

5. *United States.* — 23 Stat. at Large, c. 52, § 4.

forged and counterfeited, against the peace (*concluding as in Form* No. *6591*).

III. Selling and Bartering Counterfeit Money.

1. Selling.

Form No. 6614.

(Precedent in Leonard *v.* State, 29 Ohio St. 409.)

[State of *Ohio*, *Scioto* County, ss. } In the Court *of Common Pleas* of *Scioto* County, *Ohio*, for the Term of *February*, A. D. 1876.

The jurors of the grand jury of the state of *Ohio*, within and for the body of the county of *Scioto*, impaneled, sworn, and charged to inquire of the crimes and offenses committed within said county of *Scioto*, in the name and by the authority of the state of *Ohio*, on their oaths do find and present that *Richard Leonard*, late of said county, on the *first* day of *January*, in the year of our Lord one thousand eight hundred and *seventy-six*, with force and arms, at ——— township, in said county of *Scioto*, and state of *Ohio*,][2] unlawfully, feloniously, and with intent to defraud,[3] did sell and dispose of to one *George Miller* a certain false, forged and counterfeit coin, made in the likeness and similitude of a *silver Mexican dollar*, a coin currently passing as money in the state of *Ohio*, he, the said *Leonard*, then and there well knowing said false, forged and counterfeit coin to be

1. Requisites of Indictment — *Generally.* — For the formal parts of an indictment in a particular jurisdiction consult the title Indictments.

For statutes relating to the offense of selling and bartering counterfeit coin or paper money see as follows:

Arizona. — Pen. Code (1887), § 747.

Arkansas. — Sand. & H. Dig. (1894), § 1596.

California. — Pen. Code (1897), § 477.

Connecticut. — Gen. Stat. (1888), § 1578.

Idaho. — Rev. Stat. (1887), § 7035.

Indiana. — Horner's Stat. (1896), § 2209.

Kansas. — Gen. Stat. (1889), §§ 2256, 2261.

Kentucky. — Stat. (1894), § 1189.

Maryland. — Pub. Gen. Laws (1888), art. 27, § 38.

Missouri. — Rev. Stat. (1889), §§ 3634, 3639.

Montana. — Pen. Code (1895), § 847.

Nebraska. — Comp. Stat. (1897), § 5746.

New Jersey. — Gen. Stat. (1895), p. 1081, § 174.

North Dakota. — Rev. Codes (1895), § 7422.

Ohio. — Bates' Anno. Stat. (1897), § 7104.

Oklahoma. — Stat. (1893), § 2343.

Pennsylvania. — Pepp. & L. Dig. (1894), p. 1140, § 102.

Utah. — Rev. Stat. (1898), § 4350.

Virginia. — Code (1887), § 3735.

West Virginia. — Code (1891), c. 146, § 3.

Unnecessary Averments. — An indictment for having counterfeit bank notes in possession, and for making sale of them, need not charge that the sale was for a consideration, or to the injury of any one where the statute does not require it, or that the notes were indorsed. And if such acts are charged to be felonious it is not error, although the offense is a misdemeanor. Hess *v.* State, 5 Ohio 5.

Having in Possession with Intent to Sell. — For form of indictment for having counterfeit bank notes in possession with intent to sell and barter the same see Bevington *v.* State, 2 Ohio St. 161.

2. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

3. Intent to Defraud. — It is not necessary, in an indictment under the *Ohio* statute, to aver that the sale was made with an intent to defraud. Leonard *v.* State, 29 Ohio St. 408.

false, forged and counterfeit, [contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of *Ohio*.

W. W. Farnham, Prosecuting Attorney.][1]

Form No. 6615.[2]

In the *Posey Circuit* Court of *Indiana*, of the *February* Term, A. D. 1897.

State of Indiana
against
John Doe.

The grand jury of the county of *Posey*, upon their oath, do present that *John Doe*, on the *first* day of *January*, A. D. 1897, at the county of *Posey* aforesaid, did unlawfully and feloniously sell and barter to one *Richard Roe*, one forged and counterfeited bank note, in the likeness and similitude of a bank note issued by the *First National Bank of Louisville, Kentucky*, which said forged and counterfeited bank note is as follows, to wit (*Here set out a copy of the note*), with intent to defraud the said *Richard Roe*, he, the said *John Doe*, then and there well knowing the same to be forged and counterfeited, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of *Indiana*.

Daniel Webster, Prosecuting Attorney.

2. Advertising Green Goods.

Form No. 6616.

(Precedent in People *v.* Albow, 71 Hun (N. Y.) 123.)

[*Supreme* Court, *Dutchess* County.

The People of the State of New York
against
George Albow.][1]

The grand jury of *Dutchess* county, by this indictment, accuses *George Albow* of aiding, abetting and assisting in a scheme of offering or purporting to offer for sale and exchange green goods, so called, being [counterfeit][3] paper money, or pretending so to be

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. This form is drawn under Horner's Stat. Ind. (1896), § 2209, and contains substantially the same state of facts as shown by the indictment in Johnson *v.* State, 2 Ind. 652. See also *supra*, note 1, p. 845.

3. "**Counterfeit.**" — The defendant named in the above indictment, drawn under N. Y. Pen. Code, § 527, having been convicted, the conviction was affirmed in the supreme court (71 Hun (N. Y.) 123), but reversed in the court of appeals (140 N. Y. 130) for the reason that the indictment did not charge the offense described in the statute, there being no averment that the defendant's scheme was to sell or exchange, or offer to exchange, "counterfeit" money, or what purported to be such. Such averments are supplied in the form as given in the text.

Similar statutes are to be found in the following states:

Minnesota. — Stat. (1894), § 6708.

New Jersey. — Gen. Stat. (1894), p. 1082, § 183.

Pennsylvania. — Pepp. & L. Dig. (1894), p. 1145, § 116.

[counterfeit][1] paper money, by means of circular and letters and telegrams addressed and sent to one *Ephraim Cassell* at *East Fork Post Office*, in State of *North Carolina*, in the months of *December*, 1892, and *January*, 1893, and by which the said *Ephraim Cassell* and *Ira Hogshead* were induced to come to the city of *Poughkeepsie*, in the county of *Dutchess* and State of *New York*, to deal with him, said *George Albow*, therefor, and for that the said *George Albow*, on the *12th* day of *February*, 1892, at the city of *Poughkeepsie* in this county, did state to one *Ephraim Cassell*, that he would take him, said *Cassell*, and one *Hogshead* then and there being, to an old gentleman in the city of *New York*, who had *one hundred thousand dollars* of goods like a *one dollar* greenback so called, being a treasury note issued by the government of the United States of America, and then and there said *Albow* showed said *Cassell* said *one dollar* treasury note as aforesaid, when he, said *Ephraim Cassell*, could with said old gentleman exchange *one hundred dollars* of his, *Cassell's*, money for *one thousand dollars* of said old gentleman's [counterfeit][1] money, which said *Albow* then and there said to said *Cassell* at said city of *Poughkeepsie*, on said *12th* day of *February*, 1893, was as good as said *one dollar* bill which he, said *Albow*, showed to said *Ephraim Cassell*, and asked said *Cassell* to go with him at once to said city of *New York*, and also one *Ira Hogshead* to get the said [counterfeit][1] money of the old gentleman, which said [counterfeit][1] money said *Albow* called and designated as "goods," and which offer and statements by said *George Albow* were to carry out the scheme of selling or pretending to sell to said *Cassell* and said *Hogshead* [counterfeit][1] "paper money" or "goods," or what was claimed to be such [with intent then and there to defraud said *Cassell* and said *Hogshead*],[2] contrary to section 527 of the Code of the Penal Code, and contrary to the form of the statute in such case made and provided and against the peace of the People of the State of *New York* and their dignity.

[*Horace D. Hufcut*, District Attorney of the County of *Dutchess*.][3]

IV. Having Counterfeit Money in One's Possession.

1. Coin.[4]

a. Generally.

1. See *supra*, note 3, p. 846.

2. **Intent to Defraud.** — In the dissenting opinion in this case in the supreme court (71 Hun (N. Y.) 123), attention is called to the fact that the indictment did not allege an intent to defraud. No notice of this point is taken by the higher court (140 N. Y. 130), but the statute contains this language, which is accordingly inserted in the text.

3. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

4. **Requisites of Indictment — Generally.** — For the formal parts of an indictment in a particular jurisdiction consult the title INDICTMENTS.

For statutes relating to the offense of having counterfeit coin in one's possession see as follows:

Alabama. — Crim. Code (1886), § 3856.

Arizona. — Pen. Code (1887), § 749.

Arkansas. —Sand. & H. Dig. (1894), § 1597.

California. — Pen. Code (1897), § 479.

Colorado. — Mills' Anno. Stat. (1891), § 1260.

Connecticut. — Gen. Stat. (1888), § 1578.

Florida. — Rev. Stat. (1892), §§ 2493, 2494.

Idaho. — Rev. Stat. (1887), § 7037.

Illinois. — Starr & C. Anno. Stat. (1896), p. 1287, par. 229.

Indiana. — Horner's Stat. (1896), § 2211.

Iowa. — Code (1897), § 4862.

Kentucky. — Stat. (1894), § 1190.

Kansas. — Gen. Stat. (1889), § 2260.

Maine. — Rev. Stat. (1883), c. 121, § 3.

Massachusetts. — Pub. Stat. (1882), c. 204, § 14.

Michigan. — How. Anno. Stat. (1882), §§ 9227, 9228.

Minnesota. — Stat. (1894), § 6787.

Mississippi. — Anno. Code (1892), § 1110.

Missouri. — Rev. Stat. (1889), § 3638.

Montana. — Pen. Code (1895), § 849.

Nebraska. — Comp. Stat. (1897), § 6819.

Nevada. — Gen. Stat. (1885), § 4639.

New Hampshire. — Pub. Stat. (1891), c. 274, § 9.

New Jersey. — Gen. Stat. (1895), p. 1081, § 182. This section prohibits keeping any counterfeit coin with intent to export to defraud any foreign government or its subjects.

New Mexico. — Comp. Laws (1884), § 795.

New York. — Pen. Code, § 526.

North Carolina. — Code (1883), § 1036. This section prohibits having in possession Spanish milled dollars.

North Dakota. — Rev. Codes (1895), § 7436.

Ohio. — Bates' Anno. Stat. (1897), § 7104.

Oklahoma. — Stat. (1893), § 2362.

Rhode Island. — Gen. Laws (1896), c. 280, § 9.

Tennessee. — Code (1896), § 6616.

Texas. — Pen. Code (1895), art. 561.

Utah. — Rev. Stat. (1898), § 4352.

Vermont. — Stat. (1894), § 4984.

Virginia. — Code (1887), § 3738.

West Virginia. — Code (1891), c. 146, § 6.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 4459.

Wyoming. — Rev. Stat. (1887), § 928.

For other forms of indictment see People *v.* Stanton, 39 Cal. 698; Com. *v.* Griffin, 21 Pick. (Mass.) 523; State *v.* Keneston, 59 N. H. 36.

Number of Coins. — Under the statutes of some of the states, the number of coins the defendant had in his possession is immaterial, the statutes being silent on this point, but in other states the defendant must have not less than a specified number in his possession to be guilty of an offense under the statute, or if he had a smaller number will be guilty in a lower degree. See statutes cited *supra*.

Describing Coin by Denomination. — Where the charging part of an indictment was that the defendant "had in his custody and possession a certain piece of false and counterfeit coin, counterfeited in the likeness and similitude of the good and legal silver coin, current within said commonwealth by the laws and usages thereof, called a *dollar*, with intent then and there to pass the same as true; he, the said *Stearns*, then and there well knowing the same to be false and counterfeit," it was objected to as being insufficient and uncertain, the evidence having proved the coin to be in the similitude of a Mexican dollar. It was held that, although the indictment must particularly set forth the kind of coin alleged to be counterfeit, it is sufficient to describe the coin by denomination or name, the place of coinage, date, etc., being immaterial. Com. *v.* Stearns, 10 Met. (Mass.) 256.

Where it is alleged in the indictment that the defendant had in his possession certain pieces of false money or coin, counterfeited in the similitude of silver coin current by law and usage in the state of *Iowa*, it is not necessary to charge that the coin was counterfeited in the similitude of the current coin of the United States. State *v.* Williams, 8 Iowa 533.

"At the Same Time." — Where the statute prohibits the possession of a certain number of counterfeit pieces "at the same time," these exact words must be used, and it is not sufficient to charge that the accused had the number of pieces in his possession on a certain day. Scott *v.* Com., 14 Gratt. (Va.) 687.

Scienter. — Where an indictment alleged that the defendants "wilfully, feloniously and knowingly did have in their possession *five* counterfeit silver coins of the species of the silver coin then and now current in said state of *California*, of the denomination of *half dollars*, with intent then and there wilfully, feloniously and unlawfully to utter and pass the same, with intent then and there to defraud one *Ryan* and other persons to the grand jury unknown," it was held that the defendant's knowledge of the spurious character of the coin was substantially

Form No. 6617.[1]

(*Commencing as in Form No. 6591, and continuing down to* *) unlawfully, knowingly and feloniously did have in his possession *ten* certain false, forged and counterfeit coins (or *bars*), each in the resemblance and similitude of a gold (or *silver*) coin (or *bar*) coined and stamped at the mints (or *assay-offices*) of the United States, called a *dollar* (*or describing the bar, giving weight, fineness and device stamped thereon*), with intent to defraud[2] a certain person or persons to the grand jurors aforesaid unknown,[3] he, the said *John Doe*, then and there well knowing[4] the said false, forged and counterfeit coins (or *bars*) to be false, forged and counterfeited, against the peace (*concluding as in Form No. 6591*).

and sufficiently charged. People *v.* Stanton, 39 Cal. 698.

Allegation of Intent. — It is provided by statute in *Tennessee* that in an indictment for fraudulently keeping in possession counterfeit money or bank notes, it is not necessary to aver in the indictment that the party charged intended to pass or impose the counterfeit money on the community as good money. Tenn. Code (1896), § 7098; Sizemore *v.* State, 3 Head (Tenn.) 26.

1. *United States.* — Rev. Stat. (1878), § 5457.

Insufficient Indictment. — In U. S. *v.* Bicksler, 1 Mackey (D. C.) 341, will be found the following indictment, to wit:

"The grand jurors of the United States of America in and for the county and district aforesaid, upon their oath present: That one *Thomas J. Bicksler*, late of the county and district aforesaid, on the *first* day of *January*, in the year of our Lord one thousand eight hundred and *eighty*, and at divers other days between the said last named day and the date of the taking of this inquisition at the county and district aforesaid, *ten* certain false, forged and counterfeit coins, each in the resemblance and similitude of the minor silver coinage which has been coined at the mints of the United States, called a *half dollar*, *ten* certain false, forged and counterfeited coins, each in the resemblance and similitude of the minor silver coinage which has been coined at the mints of the United States, called a *quarter dollar*, *ten* certain false, forged and counterfeited coins, each in the resemblance and similitude of the minor silver coinage which has been coined at the mints of the United States, called a *dime*, and *ten* certain false, forged and counterfeited coins, each in the resemblance and similitude of the minor silver coinage which has been coined at the mints of the United States, called a *half dime*, with force and arms, unlawfully, knowingly and feloniously did have in his possession with intent to defraud a certain person to the grand jurors aforesaid unknown, against the form of the statute in such case made and provided and against the peace and government of the United States of America." The indictment was held insufficient for the following reasons:

1. That as the offense of having in possession counterfeit gold or silver coin is not complete unless the accused had them in his possession "knowing the same to be false, forged or counterfeit," the indictment must so allege.

2. That under section 3515 of the Revised Statutes none of the particular coins mentioned in the indictment are embraced under the term "minor coins," and as none of these minor coins contain silver, there is no such thing known to the law as "minor silver coinage," and the indictment set forth an offense not known to the law.

3. That the counterfeiting of half dimes cannot be punished under the act relating to minor coins, but must be sought under the act punishing the forging of silver coins

English Precedent. — For an English precedent of indictment for having counterfeit coins in one's possession see Reg. *v.* Martin, 11 Cox C. C. 343.

2. Intent to Defraud. — An allegation of intent to defraud is necessary. U. S. *v.* Otey, 31 Fed. Rep. 72.

3. Person to be Defrauded. — This is a sufficient description of the person to be defrauded. It is not necessary to give the name of such person. U. S. *v.* Bicksler, 1 Mackey (D. C.) 341.

4. Scienter. — The allegation of scienter is necessary. U. S. *v.* Bicksler, 1 Mackey (D. C.) 341.

Form No. 6618.

(Ala. Crim. Code (1886), p. 269, No. 31.)[1]

(*Commencing as in Form No. 6599, and continuing down to* *) *John Doe* had in his possession a counterfeit of a *gold* coin of the United States, of the denomination of *ten* dollars, which was at the time[2] current in this state, knowing the same to be counterfeit, and with intent to defraud or injure, by uttering the same as true, or causing it to be so uttered, against the peace (*concluding as in Form No. 6599*).

b. Foreign Coin.

Form No. 6619.

(Precedent in Com. *v.* Fuller, 8 Met. (Mass.) 313.)[3]

[*Commonwealth* of *Massachusetts*, } ss. At the *Superior* Court, begun
County of *Middlesex*, } and holden at *Lowell*, within and for the county of *Middlesex*, on the *second Monday* of *September*, in the year of our Lord one thousand eight hundred and *forty-four*.

The jurors for the *Commonwealth* of *Massachusetts*, upon their oath present that *David R. Fuller*, late of *Lowell*, in the county of *Middlesex* aforesaid, on the *fifteenth* day of *April*, in the year of our Lord one thousand eight hundred and *forty-four*][4] at *Lowell*, in the county of *Middlesex*, had in his custody and possession, at the same time, *ten* similar pieces of false and counterfeit coin, of the likeness and similitude of the *silver* coin current within this *Commonwealth*, by the laws and usages thereof, called *Mexican dollars*, with intent then and there the said pieces of false and counterfeit coin to utter and pass as true, he the said *David R. Fuller* then and there well knowing the same to be false and counterfeit, against the peace of the *Commonwealth*, and contrary to the form of the statute in such case made and provided.

[*Daniel Huntington*, District Attorney.][4]

Form No. 6620.

(Minn. Stat. (1894), § 7239, No. 23.)

The *district* court for the county of *Ramsay* and state of *Minnesota*:

The State of Minnesota }
vs. }
John Doe. }

John Doe is accused by the grand jury of the county of *Ramsay*, by

1. *Alabama.* — Crim. Code (1886), § 3856.

2. **Time When Current.** — The time when a coin, of which a counterfeit is in the possession of the accused, was current is a material ingredient of the offense, and an indictment alleging merely that defendant "had in his custody and possession the piece of false coin, forged," etc., "to the likeness," etc., "of the good and legal coin, current within the limits of this state, by the laws and usages thereof, called a *half dollar*," was held bad. Nicholson *v.* State, 18 Ala. 529.

3. This form is drawn under an early *Massachusetts* statute, which is identical with Mass. Pub. Stat. (1882), c. 204, § 14. The indictment was held sufficient.

4. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

this indictment, of the crime of having in his possession counterfeit money, committed as follows: The said *John Doe*, on the *first* day of *February* A. D. 1898, at the city of *St. Paul*, in this county, had in his possession a counterfeit of a gold (or *silver*) coin of the *Republic of Mexico*, called a *dollar*, which was at that time current in this state, knowing the same to be counterfeited, with intent to defraud (or *injure*) by uttering the same as true (or *false*).

Dated at *St. Paul*, in the county of *Ramsay*, the *first* day of *April*, A. D. 1898.

A True Bill.

Andrew Jackson, foreman of the grand jury.

2. Paper Money.[1]

a. Generally.

1. Requisites of Indictment — Generally. — For the formal parts of an indictment in a particular jurisdiction consult the title INDICTMENTS.

For statutes relating to the offense of having in one's possession counterfeit paper money see as follows:

Arizona. — Pen. Code (1887), § 745.

Arkansas. — Sand. & H. Dig. (1894), § 1597.

California. — Pen. Code (1897), § 475.

Colorado. — Mills' Anno. Stat. (1891), § 1261.

Connecticut. — Gen. Stat. (1888), § 1578.

Florida. — Rev. Stat. (1892), § 2486.

Georgia. — 3 Code (1895), § 240.

Idaho. — Rev. Stat. (1887), § 7033.

Illinois. — Starr & C. Anno. Stat. (1896), p. 1286, par. 223.

Indiana. — Horner's Stat. (1896), § 2211.

Iowa. — Code (1897), § 4857.

Kansas. — Gen. Stat. (1889), § 2257.

Kentucky. — Stat. (1894), § 1190.

Maine. — Rev. Stat. (1883), c. 121, § 3.

Massachusetts. — Pub. Stat. (1882), c. 204, § 5.

Michigan. — How. Anno. Stat. (1882), §§ 9217, 9220.

Mississippi. — Anno. Code (1892), § 1109.

Missouri. — Rev. Stat. (1889), § 3635.

Montana. — Pen. Code (1895), § 845.

Nebraska. — Comp. Stat. (1897), § 6812.

New Hampshire. — Pub. Stat. (1891), c. 224, § 5.

New Jersey. — Gen. Stat. (1895), p. 1081, § 176.

New Mexico. — Comp. Laws (1884), § 786.

North Dakota. — Rev. Codes (1895), § 7423.

Oregon. — Hill's Anno. Laws (1892), § 1811.

Ohio. — Bates' Anno. Stat. (1897), § 7104.

Pennsylvania. — Pepp. & L. Dig. (1894), p. 1143, § 110.

Rhode Island. — Gen. Laws (1896), c. 280, § 4.

Tennessee. — Code (1896), § 6602.

Texas. — Pen. Code (1895), art. 544.

Utah. — Rev. Stat. (1898), § 4348.

Vermont. — Stat. (1894), § 4980.

Virginia. — Code (1887), § 3738.

West Virginia. — Code (1891), c. 146, § 6.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 4455.

Wyoming. — Rev. Stat. (1887), § 927.

For other forms of indictments for having counterfeit bank notes in possession see Gabe *v.* State, 6 Ark. 519; Clark *v.* Com., 16 B. Mon. (Ky.) 211; State *v.* Bonney, 34 Me. 223; State *v.* Symonds, 36 Me. 128; Brown *v.* Com., 8 Mass. 59; State *v.* Randall, 2 Aik. (Vt.) 89.

For Having in Possession Torn Bills. — For an indictment see Com. *v.* Hayward, 10 Mass. 34.

Use of Certain Words — "*Feloniously.*" In an indictment for having in possession counterfeit bank notes with intent to utter or pass the same as genuine it is not necessary to charge that the offense was committed feloniously, infamously or criminally; if the offense is charged in the words of the statute it is sufficient. Quigley *v.* People, 3 Ill. 301.

"*At Same Time.*" — Where a statute makes it an offense to have in posses-

sion "at any one time any number not less than ten" similar counterfeit bank bills, knowing them to be counterfeit and with intent to utter the same, an indictment founded thereon which alleged that defendant "had in his custody and possession ten similar false, forged and counterfeit bank bills," on a certain day, was held insufficient for the reason that a material part of the offense consisted in possessing ten similar counterfeit bills "at one and the same time," and should have been so alleged. Edwards *v.* Com., 19 Pick. (Mass.) 124; State *v.* Bonney, 34 Me. 223.

"*In the Similitude of.*" — Where an indictment alleged the defendant had "in his custody and possession, at the same time, ten similar false, forged and counterfeit bank bills," etc., it was held that the allegation was insufficient for the reason the word "similar" is not equivalent to the language of the statute, "in the similitude of," and cannot be substituted for it. State *v.* McKenzie, 42 Me. 392.

"*Bank Bill and Note.*" — An indictment which describes the forged instrument as a "bank bill *and* note," when the words of the statute are a "bank bill *or* note," is not defective. Stone *v.* State, 20 N. J. L. 404.

"*Commonly Called Bank Note.*" — Where an indictment uses the words "commonly called a bank note" in the description of the forged instrument, in addition to the description of the instrument given in the statute, they will be rejected as surplusage or considered as words of additional description. Stone *v.* State, 20 N. J. L. 404.

Copy of Note — *Generally.* — The indictment must set forth a copy of the counterfeit note or allege a sufficient reason for not doing so. Hooper *v.* State, 8 Humph. (Tenn.) 93; State *v.* Calendine, 8 Iowa 288; State *v.* Bonney, 34 Me. 383; McMillen *v.* State, 5 Ohio 269; Com. *v.* Houghton, 8 Mass. 107. See also Com. *v.* Carey, 2 Pick. (Mass.) 47; Bevington *v.* State, 2 Ohio St. 161; Fergus *v.* State, 6 Yerg. (Tenn.) 345; State *v.* Wheeler, 35 Vt. 261.

Immaterial Variances. — In setting out a bill immaterial variances will not, however, be fatal. Thus, where a bill or note introduced in evidence was lettered "C" and the copy set out omitted this letter. Quigley *v.* People, 3 Ill. 301. And so where the copy of the bill purported to be signed by "P. E. Spinner" and the name actually signed was "F. E. Spinner." Com. *v.* Hall, 97 Mass. 571.

Excuse for Not Setting Out. — Where an indictment charged that the defendant "feloniously did have in his possession *forty* forged, false and counterfeit *five* dollar bank notes issued by the *Market Bank*," and that the counterfeit notes were in possession of the defendant, and therefore a more particular description was to the jurors unknown, etc., it was held that the reason for not setting out the notes was sufficient and the indictment good. Armitage *v.* State, 13 Ind. 441.

Allegation as to Currency. — Where the statute uses the words "current in the state," or words to similar effect, the indictment should contain an allegation that the note, of which a counterfeit was in the possession of the accused, was at the time current in the state. State *v.* Shelton, 7 Humph. (Tenn.) 31.

Corporate Existence of Bank. — It is not necessary to aver the corporate existence of the bank. Quigley *v.* People, 3 Ill. 301; Owen *v.* State, 5 Sneed (Tenn.) 495; Fergus *v.* State, 6 Yerg. (Tenn.) 345.

In State *v.* Weller, 20 N. J. L. 521, it was held sufficient to charge in an indictment that the defendant had in his possession a counterfeit note, with intent to pass the same with intention to defraud a certain named bank, without averring that the bank was incorporated. In the opinion this case is distinguished from Stone *v.* State, 20 N. J. L. 401, in which it was held that in an indictment, under a separate section of the act, for having in possession an unfinished counterfeit note in the form of a note "made to be issued by an incorporated bank," an allegation of the incorporation of the bank is material.

Where an indictment for having in possession counterfeit bank bills alleges that the bank whose bills are counterfeited is an incorporated company in a particular place and state, it is equivalent to stating that the bank was established in such state. People *v.* Stewart, 4 Mich. 655, 5 Mich. 243.

Intent to Defraud — *Generally.* — The indictment should contain an allegation of intent to defraud. State *v.* Calendine, 8 Iowa 288; Stone *v.* State, 20 N. J. L. 404; Com. *v.* Davis, 11 Gray (Mass.) 8; Hooper *v.* State, 8 Humph. (Tenn.) 100; Fergus *v.* State, 6 Yerg. (Tenn.) 345. See also Townsend *v.* People, 4 Ill. 327; Clark *v.* Com., 16 B.

Form No. 6621.

(Precedent in U. S. *v.* Williams, 4 Biss. (U. S.) 302.)[1]

[(*Commencing as in Form No. 6591, and continuing down to* *)][2] unlawfully, feloniously and knowingly did then and there have and keep in his possession, and conceal, with intent then and there to

Mon. (Ky.) 206; Com. *v.* Carey, 2 Pick. (Mass.) 47; State *v.* Morton, 8 Wis. 352. But it is not necessary to allege an intent to defraud a particular person. State *v.* Calendine, 8 Iowa 288; Hooper *v.* State, 8 Humph. (Tenn.) 93; State *v.* Morton, 8 Wis. 352. See also Gabe *v.* State, 6 Ark. 524; Quigley *v.* People, 3 Ill. 301; Stone *v.* State, 20 N. J. L. 404; Fergus *v.* State, 6 Yerg. (Tenn.) 352.

The People. — In an indictment for having a counterfeit bank promissory note in possession it is insufficient to charge an intent "to defraud the people of the state of New Jersey," but it is sufficient to allege an intent to defraud the Commercial Bank of Baltimore, without averring that the bank was incorporated. State *v.* Weller, 20 N. J. L. 521; Stone *v.* State, 20 N. J. L. 404.

Illegal Banking Corporation. — Where an indictment for having counterfeit bank notes in possession alleged an intent to defraud a particular bank which had been incorporated under an act of the legislature which did not receive a sufficient number of votes to make it a law, it was held that there could not be a conviction on the indictment. De Bow *v.* People, 1 Den. (N. Y.) 9.

Wilful or Felonious Intent. — It is not necessary to charge a wilful or felonious intent to defraud. State *v.* Calendine, 8 Iowa 288.

Intent to Pass — *Generally.* — An allegation of intent to pass is generally necessary. Gabe *v.* State, 6 Ark. 519; Townsend *v.* People, 4 Ill. 326; Clark *v.* Com., 16 B. Mon. (Ky.) 206; Hopkins *v.* Com., 3 Met. (Mass.) 460; Com. *v.* Davis, 11 Gray (Mass.) 4; Com. *v.* Price, 10 Gray (Mass.) 472; Com. *v.* Cone, 2 Mass. 132. But this allegation is no longer required in *Tennessee.* Sizemore *v.* State, 3 Head (Tenn.) 27.

As True and Genuine. — Whether it will be necessary to allege an intent to pass the counterfeit bill as true and genuine depends upon the language of the statute under which the indictment is drawn. Thus it has been held under the *Massachusetts* statute that an indictment alleging that defendant had a counterfeit bill in his possession "with intent to pass the same" is sufficient without alleging an intent to pass "as true." Hopkins *v.* Com., 3 Met. (Mass.) 460. See also Com. *v.* Price, 10 Gray (Mass.) 472, 71 Am. Dec. 669; Com. *v.* Cone, 2 Mass. 132.

But under the *Michigan* statute the contrary view is held. People *v.* Stewart, 4 Mich. 655, 5 Mich. 243.

Place of Passing. — In an indictment for having counterfeit bills in possession with intent to put them in circulation it is not necessary to state that the intent was to pass them in the county where the indictment was found. Spence *v.* State, 8 Blackf. (Ind.) 282.

Upon an indictment charging that the defendant had a counterfeit bill at Boston, "with intent then and there to utter and pass the same," it was held that the words "then and there" were needless, and should be construed as if they had been inserted before the words "with intent," so that they refer to the intent to pass and not to the time and place of the intended passing; it is immaterial where the defendant intended to pass the bill. Com. *v.* Price, 10 Gray (Mass.) 472, 71 Am. Dec. 669. See also Clark *v.* Com., 16 B. Mon. (Ky.) 206; Com. *v.* Cone, 2 Mass. 132.

Scienter. — The indictment should allege that the defendant knew the bills in his possession were counterfeit. Owen *v.* State, 5 Sneed (Tenn.) 495. See also Townsend *v.* People, 4 Ill. 327; Buckley *v.* State, 2 Greene (Iowa) 162; Clark *v.* Com., 16 B. Mon. (Ky.) 206; Brown *v.* Com., 8 Mass. 67; Com. *v.* Carey, 2 Pick. (Mass.) 47; Fergus *v.* State, 6 Yerg. (Tenn.) 345; State *v.* Morton, 8 Wis. 352.

1. This indictment was based on sections 10 and 13 of the act of congress of June 30, 1864, which is now contained in U. S. Rev. Stat. (1878), §§ 5413, 5431.

2. The matter to be supplied within [ ] will not be found in the reported case.

pass, utter, and publish as true to some person or persons to the grand jurors aforesaid unknown, *one*[1] certain false, forged and counterfeit national bank[2] note; which said false, forged and counterfeit bank note is as follows, to wit (*Here was set out a copy of the note*),[3] with intent then and there thereby to defraud some person or persons to the grand jurors aforesaid unknown, he, the said *Charles Williams*, then and there well knowing the said national bank note to be false, forged and counterfeit, contrary to the form of the statute [(*concluding as in Form No. 6591*).][4]

Form No. 6622.

(Precedent in Tomlinson *v.* People, 5 Park. Cr. Rep. (N. Y. Supreme Ct.) 314.)

City and County of *New York*, ss:

The jurors of the People of the State of *New York*, in and for the body of the *city and* county of *New York*, upon their oath, present:

That *William Smith*, late of the *first* ward of the city of *New York*, in the county of *New York*, aforesaid, and *John Tomlinson*, late of the

1. **The number of notes** must be stated, and an averment that the defendant had in his possession "divers false, forged and counterfeit" notes is insufficient. U. S. *v.* Fisler, 4 Biss. (U. S.) 59.

2. **Name of Bank.** — The indictment need not aver that the counterfeit note purported to be a note of any designated national bank, if the instrument be copied into the indictment and by its terms purports to be such a note. U. S. *v.* Williams, 4 Biss. (U. S.) 302.

Incorporation of Bank. — It is not necessary that the indictment should aver that the bank was a legal corporation: the national courts will take judicial notice of the existence of all national banks. U. S. *v.* Williams, 4 Biss. (U. S.) 302.

3. **Copy of Note.** — The indictment must not only set out but must profess to set out an exact copy of the counterfeit note, or must state some valid reason for not doing so, and an indictment charging that the defendant "unlawfully and feloniously did have and keep in his possession, and conceal, with intent to pass, utter and publish as true, divers false, forged and counterfeit treasury notes, and each of them are in substance described as follows, that is to say," one of the supposed forged notes being pasted on the indictment at this point, is insufficient. U. S. *v.* Fisler, 4 Biss. (U. S.) 59. In this case the court expressed a doubt whether it is sufficient to paste the counterfeit note itself on the indictment as a part of it.

Failure to set out a copy is sufficiently excused by the following averment, to wit:

"And the grand jurors aforesaid, upon their oath aforesaid, do further present and say that the said false, forged and counterfeit notes and obligations so kept and had in the possession of the said *Martin D. Howell* as aforesaid are not, and each of them is not, more particularly described herein, and copies thereof, and the tenors thereof, respectively, and of each thereof, are and is not herein set forth, for the reason that the grand jurors aforesaid have no knowledge or information as to where, in whose possession, or under whose control the said false, forged and counterfeit notes and obligations, and each thereof, now are and is, and have and has been since the same were and was so kept and had in the possession of the said Martin D. Howell, as aforesaid." U. S. *v.* Howell, 64 Fed. Rep. 110.

Where an indictment charged that the defendant had in his possession counterfeit United States treasury notes, it was held unnecessary to aver that the counterfeits were made in the resemblance of genuine notes, and that the indictment need not in terms set forth the name of the counterfeit notes, as the court will determine what they are by the copies set forth in the indictment. U. S. *v.* Trout, 4 Biss. (U. S.) 105.

4. The matter to be supplied within [ ] will not be found in the reported case.

same place, on the *thirteenth* day of *August*, in the year of our Lord one thousand eight hundred and *sixty-one*, with force and arms at the ward, city and county aforesaid, feloniously had in their possession a certain forged and counterfeited negotiable promissory note, for the payment of money, to wit, the sum of *five* dollars, commonly called a bank note, purporting to have been issued by a certain corporation or company, called the *Judson Bank*, duly authorized for that purpose by the laws of the State of *New York*, a further description of which said last mentioned forged and counterfeited negotiable promissory note, for the payment of money, is to the jurors aforesaid unknown,[1] with intention to utter and pass the same as true, and to permit, cause and procure the same to be so uttered and passed, with the intent to injure and defraud one *Charles Meyer*, and divers other persons to the jurors aforesaid unknown, he, the said *William Smith* and *John Tomlinson*, then and there well knowing the said last mentioned forged and counterfeited promissory note, for the payment of money, to be forged and counterfeited as aforesaid, against the form of the statute in such case made and provided, and against the peace of the People of the State of *New York* and their dignity.

Nelson J. Waterbury, District Attorney.

b. Blank and Unfinished Bank Note.

Form No. 6623.

(Precedent in Com. *v.* Woods, 10 Gray (Mass.) 477.)[2]

[(*Commencing as in Form No. 6619, and continuing down to* *)][3] had in his custody and possession a certain false, forged and counterfeit promissory note[4] for the payment of money, of the tenor following, that is to say:[5]

1. Description of Note. — This indictment was objected to on the ground that it was insufficient in that it did not set forth a copy of the note or allege a reason for not so doing, but the court held that this was unnecessary. See further, on this point, note 3, p. 854, *supra*.

2. This indictment was properly framed, although the proof showed the possession of a falsely and fraudulently altered genuine bank note. See Mass. Pub. Stat. (1882), c. 204, § 5.

For other statutes relating to the possession of blank and unfinished forged or counterfeited bank notes see as follows:

Alabama. — Crim. Code (1886), § 3857.

Arizona. — Pen. Code (1887), § 745.

California. — Pen. Code (1897), § 475.

Colorado. — Mills' Anno. Stat. (1891), § 1261.

Connecticut. — Gen. Stat. (1888), § 1578.

Delaware. — Rev. Stat. (1893), p. 949, c. 129, §§2.

Idaho. — Rev. Stat. (1887), § 7033.

Montana. — Pen. Code (1895), § 845.

Nevada. — Gen. Stat. (1885), § 4642.

New Jersey. — Gen. Stat. (1895), p. 1081, § 177.

New York. — Pen. Code, § 511.

North Dakota. — Rev. Codes (1895), § 7420.

Ohio. — Bates' Anno. Stat. (1897), § 7104.

Tennessee. — Code (1896), § 6602.

Utah. — Rev. Stat. (1898), § 4348.

Wyoming. — Rev. Stat. (1887), § 927.

3. The words to be supplied within [ ] will not be found in the reported case.

4. The fact that the forged bank note in this case was described as a promissory note was held to be no variance.

5. Under the *New Jersey* statute, an indictment for having in possession an unfinished counterfeit note must allege that the bank was incorporated. Stone *v.* State, 20 N. J. L. 401.

"State of Rhode Island. The Liberty Bank will pay
Providence Aug. — 1854, to bearer ten dollars on demand.
C. R. Droun, Cashier. D. Evans, Prest."

unless upon said promissory note there is a date of the day in the month of *August*, eighteen hundred and *fifty-four*, which is to said jurors unknown; the said *Edward James* then and there knowing the same to be false, forged and counterfeit, with intent thereby then and there to injure and defraud [(*conclusion as in Form No. 6619*).][1]

c. Foreign Bank Note.

Form No. 6624.[2]

(*Commencing as in Form No. 6591, and continuing down to* *) unlawfully, feloniously and knowingly did have in his possession a certain false, forged and counterfeit bank note in the likeness and similitude of a bank note issued by a bank of the *United Kingdom of Great Britain and Ireland*, duly authorized by the laws of said *United Kingdom of Great Britain and Ireland*, to wit, the *Bank of England*, and intended by the law and usage of said *United Kingdom of Great Britain and Ireland* to circulate as money, the tenor of which said false, forged and counterfeit bank note is as follows, that is to say (*Here set out a copy of the note*), with intent of him, the said *John Doe*, to utter, pass and put off the same as true, he, the said *John Doe*, then and there well knowing the same to be false, forged and counterfeited, against the peace (*concluding as in Form No. 6591*).

V. MAKING INSTRUMENTS FOR COUNTERFEITING.[3]

1. The words to be supplied within [ ] will not be found in the reported case.

2. *United States.* — 23 Stat. at Large, c. 52, § 5.

3. **Requisites of Indictment — Generally.** — For the formal parts of an indictment in a particular jurisdiction consult the title INDICTMENTS.

For statutes relating to the offense of making instruments used in forging or counterfeiting paper money or coin see as follows:

Alabama.—Crim. Code (1886), § 3857.
Arizona.—Pen. Code (1887), § 750.
Arkansas. — Sand. & H. Dig. (1894), § 1599.
California. — Pen. Code (1897), § 480.
Colorado. — Mills' Anno. Stat. (1891), § 1266.
Connecticut.—Gen. Stat. (1888), § 1578.
Delaware. — Rev. Stat. (1893), p. 949, c. 129.
Florida. — Rev. Stat. (1892), §§ 2496, 2497.
Idaho. — Rev. Stat. (1887), § 7038.
Kansas. — Gen. Stat. (1889), §§ 2258, 2280, 2281.
Kentucky. — Stat. (1894), § 1192.
Maine. — Rev. Stat. (1883), c. 121, § 6.
Maryland. — Pub. Gen. Laws (1888), p. 471, § 37.
Massachusetts. — Pub. Stat. (1882), c. 204, § 17.
Michigan. — How. Anno. Stat. (1882), § 9230.
Missouri. — Rev. Stat. (1889), § 3636.
Montana. — Pen. Code (1895), § 850.
Nebraska.—Comp. Stat. (1897), § 6813.
Nevada. — Gen. Stat. (1885), § 4644.
New Hampshire. — Pub. Stat. (1891), c. 274, §§ 6, 10.
New Mexico. — Comp. Laws (1884), § 788, 796.
North Dakota. — Rev. Codes (1895), § 7420.
Ohio. — Bates' Anno. Stat. (1897), §§ 7099, 7103.
Oklahoma. — Stat. (1893), § 2346.
Oregon. — Hill's Anno. Laws (1892), §§ 1812, 1815.
Pennsylvania. — Pepp. & L. Dig. (1894), p. 1140, § 104; p. 1142, § 108.
Rhode Island. — Gen. Laws (1896), c. 280, §§ 5, 10.

Form No. 6625.[1]

(*Commencing as in Form No. 6591, and continuing down to* *) unlawfully and feloniously, and without authority from the Secretary of the Treasury of the United States or other proper officer, did make (or *willingly aid and assist in making* or *caused and procured to be made*) a certain die (or *hub* or *mould*) of steel (or *plaster* or any other substance), in the likeness and similitude, as to the design and inscription thereon, of a die (or *hub* or *mould*) designated for the coining and making of one of the genuine gold coins of the United States, coined at the mints of the United States, to wit, an *eagle*, against the peace (*concluding as in Form No. 6591*).

VI. HAVING INSTRUMENTS IN ONE'S POSSESSION.[2]

1. For Counterfeiting Coin.

a. Generally.

Tennessee. — Code (1896), §§ 6605, 6617, 6618.

Texas. — Pen. Code (1895), arts. 543, 562.

Utah. — Rev. Stat. (1898), § 4353.

Vermont. — Stat. (1894), §§ 4982, 4985.

Virginia. — Code (1887), § 3736.

Washington. — Pen. Code (1897), § 64.

West Virginia. — Code (1891), c. 146, § 4.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), §§ 4456, 4461.

Wyoming. — Rev. Stat. (1887), § 932.

United States. — 26 Stat. at Large, p. 742, c. 127, §§ 1, 2; Rev. Stat. (1878), § 5430.

For form of indictment for engraving a plate for counterfeiting a foreign bank note see U. S. *v.* Arjona, 120 U. S. 479.

Intent. — There must be an allegation of intent when required by the statute. People *v.* D'Argencour, 32 Hun (N. Y.) 178.

1. *United States.* — 26 Stat. at Large, p. 742, c. 127, § 1.

2. **Requisites of Indictment — Generally.** — For the formal parts of an indictment in a particular jurisdiction consult the title INDICTMENTS.

For statutes relating to the offense of having in one's possession instruments used in forging or counterfeiting paper money or coin see as follows:

Alabama. — Crim. Code (1886), § 3857.

Arizona. — Pen. Code (1887), § 750.

Arkansas. — Sand. & H. Dig. (1894), § 1599.

California. — Pen. Code (1897), § 480.

Colorado. — Mills' Anno. Stat. (1891), § 1266.

Connecticut. — Gen. Stat. (1888), § 1578.

Delaware. — Rev. Stat. (1893), p. 949, c. 129.

Georgia. — 3 Code (1895), § 241.

Idaho. — Rev. Stat. (1887), § 7038.

Illinois. — Starr & C. Anno. Stat. (1896), p. 1288, par. 230.

Indiana. — Horner's Stat. (1896), § 2212.

Iowa. — Code (1897), § 4867.

Kansas. — Gen. Stat. (1889), §§ 2258, 2280, 2281.

Kentucky. — Stat. (1894), § 1192.

Maine. — Rev. Stat. (1883), c. 121, § 6.

Massachusetts. — Pub. Stat. (1882), c. 204, §§ 9, 17.

Michigan. — How. Anno. Stat. (1882), §§ 9221, 9230.

Minnesota. — Stat. (1894), § 6692.

Mississippi. — Anno. Code (1892), § 1103.

Missouri. — Rev. Stat. (1889), § 3636.

Montana. — Pen. Code (1895), § 850.

Nebraska. — Comp. Stat. (1897), §§ 6813, 6815.

Nevada. — Gen. Stat. (1885), § 4644.

New Hampshire. — Pub. Stat. (1891), c. 274, §§ 6, 10.

New Jersey. — Gen. Stat. (1895), p. 1081, § 178.

New Mexico. — Comp. Laws (1884), §§ 788, 796.

New York. — Pen. Code, § 511.

North Dakota. — Rev. Codes (1895) § 7420.

Ohio. — Bates' Anno. Stat. (1897), §§ 7099, 7103.

Oklahoma. — Stat. (1893), § 2346.

Oregon. — Hill's Anno. Laws (1892), §§ 1812, 1815.

Pennsylvania. — Pepp. & L. Dig. (1894), p. 1140, § 104; p. 1142, § 108.

Rhode Island. — Gen. Laws (1896), c. 280, §§ 5, 10.

Tennessee. — Code (1896), § 6606.

Texas. — Pen. Code (1895), arts. 543, 562.

Utah. — Rev. Stat. (1898), § 4353.

Vermont. — Stat. (1894), §§ 4982, 4985.

Virginia. — Code (1887), § 3736.

Washington. — Pen. Code (1891), § 64.

West Virginia. — Code (1891), c. 146, § 4.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), §§ 4456, 4461.

Wyoming. — Rev. Stat. (1887), § 932.

United States. — 26 Stat. at Large, p. 742, c. 127, § 1; Rev. Stat. (1878), § 5430.

For other forms of indictments see State *v.* Collins, 3 Hawks (10 N. Car.) 191; Sutton *v.* State, 9 Ohio 133; Long *v.* State, 10 Tex. App. 194.

Defendant not Employed in Mint. — The indictment need not allege that the defendant was not employed in the mint of the United States. Harlan *v.* People, 1 Dougl. (Mich.) 207.

Description of Instrument. — The indictment must describe by name or otherwise the instrument which the defendant had in his possession. Chamberlain *v.* State, 5 Blackf. (Ind.) 573; Peoples *v.* State, 6 Blackf. (Ind.) 95.

Under the *Tennessee* statutes, it is not necessary to give in the indictment a particular description of the machine or instrument the defendant had in his possession, as by setting forth particularly the description of the coin it was designed to counterfeit, and an indictment charging that the defendant did feloniously and fraudulently, and without any lawful excuse, keep in his possession a machine, which said machine was then and there intended by the said defendant for the purpose of forging and counterfeiting the coin current by law and usage in the state of Tennessee and the United States, is sufficient. Bradford *v.* State, 3 Humph. (Tenn.) 370.

See insufficient description in Bell *v.* State, 10 Ark. 536; Peoples *v.* State, 6 Blackf. (Ind.) 95.

Intent to Use. — It is unnecessary to allege an intent to use the instrument for counterfeiting, as such does not constitute an ingredient of the offense. People *v.* White, 34 Cal. 183; Sasser *v.* State, 13 Ohio 453.

Allegation of Currency of Coin. — An indictment alleging that the defendants "feloniously and unlawfully, did have in their possession a certain tool, or other instrument, called a crucible, made of hard substance and material to the jurors aforesaid unknown; said crucible then and there being constructed and contrived for the purpose of melting, mixing, roasting, debasing, altering and counterfeiting other base metals, to wit, copper and zinc and tin, to the imitation and likeness of good, legal and pure silver; they, the said *Zadock* and *Baxter*, then and there having the said crucible in their possession, for the purpose of forging, altering and counterfeiting the current silver coin of this state and of the United States, called *half-dollars*; and then and there intending to employ and use the said crucible in and about the forming and altering and counterfeiting the said silver coin, called *half-dollars*; which forged, altered and counterfeited and base coin, so intended then and there to be forged, altered and counterfeited by them the said *Baxter* and *Zadock*, would then and there be of the similitude and likeness of the good current and legal silver coin coined at the United States mint, and the current coin of this state and of the United States, called *half-dollars*, contrary," etc., was held insufficient, the words "were current silver coins of this state and of the United States" in the indictment not being equivalent to the statutory language, "which shall be made current by the laws of this or the United States." State *v.* Bowman, 6 Vt. 594.

Incorporation of Bank. — In an indictment for having in possession instruments for counterfeiting bank notes it is not necessary to allege the incorporation of the bank, the fact of its incorporation not being an element of the crime. People *v.* McDonnell, 80 Cal. 285.

Scienter. — Under the *Ohio* statute (Bates' Anno. Stat. (1897), § 7099), an averment that the defendant secretly kept instruments for counterfeiting coin sufficiently shows a scienter. Sutton *v.* State, 9 Ohio 133.

Form No. 6626.

(Precedent in People *v.* White, 34 Cal. 183.)[1]

[In the *County* Court for the county *Sonoma*, state of *California*, the *sixth* day of *June*, A. D. 1866.

The People of the State of California against *William White.* } Indictment.

William White is accused by the grand jury of the county of *Sonoma*, state of *California*, by this indictment, of the crime of knowingly having in his possession instruments used in counterfeiting United States gold coin, committed as follows:][2]

The said *William White*, on the *fourteenth* day of *February*, A. D. 1866, at the county of *Sonoma*, did knowingly procure and have in his possession a certain mould, pattern, die, puncheon, tool, instrument, and apparatus, made of wood and iron, made use of in counterfeiting the gold and silver coin of the United States, now made current in this state, to wit: a gold coin called a *double eagle*, of the value of *twenty* dollars, and a silver coin called a *half dollar*, contrary to the form of the statute [in such case made and provided, and against the peace and dignity of the people of the state of *California*.

J. G. McCullough, District Attorney.][2]

b. Foreign Coin.

Form No. 6627.

(Precedent in Miller *v.* People, 3 Ill. 234.)[3]

State of *Illinois*, *Cook* County, ss.

The grand jurors chosen, selected, and sworn, in and for the

1. The defendant demurred to this indictment on the ground that the facts stated in the indictment did not constitute a public offense, and on the further ground that the indictment did not state that defendant had the instruments in his possession for the purpose or with the intent to use the same in counterfeiting the coin of the United States, or defrauding any person or body politic or corporate, but the demurrer was overruled and the judgment affirmed on appeal.

See Cal. Pen. Code (1897), § 480, and list of statutes cited *supra*, note 2, p. 857.

2. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

3. This indictment was attacked for the following reasons: 1. That it was insufficient in that it did not charge the offense to have been committed feloniously. 2. That the facts were not properly charged. 3. That, in the first count, the offense was not charged in the language of the code, nor in the language of the common law. 4. That, in the second count, the offense intended to be charged is not sufficiently set out either under the statute or at common law. 5. That the second count failed to state in what county the offense charged was committed, nor upon what authority the indictment was found. 6. That the indictment was uncertain, imperfect and insufficient in other respects. 7. That it did not state with sufficient precision or certainty any offense, either under the statute or at common law. The judgment of the lower court, overruling a motion in arrest of judgment founded upon the above objections, was affirmed.

county of *Cook*, in the name and by the authority of the people of the state of *Illinois*, upon their oaths present, that *John B. Miller*, late of said county, on the *first* day of *December*, in the year of our Lord one thousand eight hundred and *thirty-seven*, in the county aforesaid, one press for coinage, made of iron, otherwise called a "bogus press"; one edging tool, made of iron and steel, adapted and intended for the working of coin around the edges, with grainings, apparently resembling those on the edges of coin then and now current in the state aforesaid, to wit, *Mexican dollars*; one die, made of steel, in and upon which then and there were made and impressed the figure, resemblance and similitude of one of the sides, to wit, the eagle side of the coin then and now current within the state aforesaid, to wit, a *Mexican dollar*; one other die, made of steel, in and upon which then and there were made and impressed the figure, resemblance and similitude, to wit, the reverse of the eagle side of the coin and now current within the state of *Illinois*, called a *Mexican dollar*; two crucibles made of clay and sand, made use of in counterfeiting the coin then and now current within the state aforesaid, to wit, *Mexican dollars*, without lawful excuse; — then and there knowingly, [unlawfully and feloniously][1] had in his possession, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the same people of the state of *Illinois*.

And the same grand jurors, chosen, selected, and sworn, in and for the county aforesaid, in the name and by the authority aforesaid, upon their oaths aforesaid, do further present, that *John B. Miller*, late of said county, on the *first* day of *December*, in the year of our Lord one thousand eight hundred and *thirty-seven*, in the county aforesaid, one press for coinage, made of iron; one edging tool made of iron and steel, adapted and intended for the working of coin round the edges, with grainings, apparently resembling those on the edges of coin then and now current within the state aforesaid, to wit, *Mexican dollars*; one die, made of steel, in and upon which then and there were made and impressed the figure, resemblance and similitude of one of the sides, to wit, the eagle side of coin then and now current within the state aforesaid, to wit, *Mexican dollars*; one other die, made of steel, in and upon which then and there were made and impressed the figure, resemblance and similitude of one of the sides, to wit, the reverse of the eagle side of coin then and now current within the state of *Illinois*, called *Mexican dollars*; two crucibles, made of sand and clay, made use of in counterfeiting the coin then and now current within the state aforesaid, called *Mexican dollars*, then and there knowingly, unlawfully [and feloniously][1] had in his custody and possession, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the same people of the state of *Illinois*.

A. Huntington, State's Attorney.

1. The words enclosed by [ ] are not found in the reported case and the indictment was held sufficient without them. They have been added, however, because necessary under the present statute, which makes the offense a felony. See Starr & C. Anno. Stat. Ill. (1896), p. 1288, par. 230.

c. One Side Only.

Form No. 6628.

(Precedent in Com. *v.* Kent, 6 Met. (Mass.) 221.)[1]

[(*Commencing as in Form No. 6619, and continuing down to* *)][2] did knowingly have in his possession a certain mould, pattern, die, puncheon, tool and instrument, adapted and designed for coining and making one side of a counterfeit coin in the similitude of one side or half part of a certain *silver* coin, called a *half dollar*, to wit, that side or half part thereof which represents a spread eagle, and has the words "United States of America," "half dollar;" said coin, called a *half dollar*, being current by law and usage in this State and Commonwealth aforesaid, with intent to use and employ the same mould, pattern, die, puncheon, tool and instrument, and cause and permit the same to be used and employed, in coining and making such false and counterfeit coin as aforesaid, [(*concluding as in Form No. 6619*).][2]

2. For Counterfeiting Gold Dust.

Form No. 6629.

(Precedent in People *v.* Page, 1 Idaho 102.)[3]

[*The Territory of Idaho* against *John C. Page.*] In the *District* Court of the ——— Judicial District, in the County of *Ada*, *February* Term, A. D. 1867.

John C. Page is accused by the grand jury of the county of *Ada* of the crime of having and secretly keeping in his possession instruments for the counterfeiting of gold dust,[4] committed as follows:][5]

The said *John C. Page* on the *fifteenth* day of *November*, 1866, at the county of *Ada*, did knowingly and wilfully have in his possession and secretly did keep one furnace, three bottles acid, one mortar and pestle, two sieves, one pair tongs, one gold pan, one large file, one frying pan, one lot buckshot, one sack of spelter, one sack of sand, two crucibles, six iron bars, the same then and there being instruments for the purpose of counterfeiting uncoined gold, gold lumps and pieces commonly called gold dust, then and there currently passing in the territory of *Idaho*, [with intent to use the said instruments for the said purpose of counterfeiting uncoined gold, gold lumps and pieces commonly called gold dust,][6] contrary [to the form of the statute in such case made and provided, and against the peace and dignity of the *territory* of *Idaho*.][5]

1. This indictment was held to sufficiently charge an offense.

2. The matter to be supplied within [ ] will not be found in the reported case.

3. *Idaho.* — Rev. Stat. (1887), § 7038. Similar statutes exist as follows:
Arizona. — Pen. Code (1887), § 750.
California. — Pen. Code (1897), § 480.
Nevada. — Gen. Stat. (1885), § 4648.
Montana. — Pen. Code (1895), § 847.

4. Charging that the defendant is guilty of a "felony," instead of naming the real offense, that of "having and secretly keeping instruments for the counterfeiting of gold dust," is a gross error. People *v.* Page, 1 Idaho 102.

5. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

6. The precedent does not contain this allegation, and the indictment was held insufficient because it failed to allege that the instruments were had by the defendant for the purpose of counterfeiting. People *v.* Page, 1 Idaho 102.

COUNTY COMMISSIONERS.

See the GENERAL INDEX to this work.

COUPONS.

See the titles BILLS AND NOTES, vol. 3, p. 260; *BONDS AND UNDERTAKINGS (ACTIONS ON)*, vol. 3, p. 528.

COVENANT.[1]

I. IN ENGLAND, 862.
1. *At Common Law*, 862.
2. *Under Hilary Rules*, 864.
II. IN THE UNITED STATES, 864.

CROSS-REFERENCES.

For Forms of Declarations in Actions for Breach of Particular Covenants, see the title COVENANTS.
For Forms of Pleas in Actions of Covenant, see the various special titles in this work.
See also the GENERAL INDEX to this work.
For matters of Procedure, see the title COVENANTS, 5 ENCYCLOPÆDIA OF PLEADING AND PRACTICE, p. 342.

I. IN ENGLAND.

1. At Common Law.[2]

Form No. 6630.

(2 Chit. Pl. 241.)

Markham and Le Blanc.

Wednesday next after fifteen days of the Holy Trinity, in *Trinity* Term, *51 Geo. III.*

Middlesex, to wit. *John Doe* complains of *Richard Roe* being in

1. This title is intended to comprise only forms pertaining strictly to the common-law form of action, known as the action of covenant. For forms in actions for breaches of particular covenants see the title COVENANTS, *post*, p. 868.

2. The form of common-law declaration given in the text was that used in a declaration by bill in the king's bench. For the formal parts of declarations in other courts, and by and against particular persons, consult the title DECLARATIONS.

the custody of the marshal of the Marshalsea of our lord the now king, before the king himself, of a plea of breach of covenant. For that whereas, heretofore, to wit, on the *twenty-fifth* day of *October*, A. D. 18*10*,[1] at *Westminster*, in the county of *Middlesex* aforesaid, by a certain indenture then and there made between the said *John Doe* of the one part, and the said *Richard Roe* of the other part,[2] the counterpart[3] of which said indenture, sealed with the seal[4] of the said *Richard Roe* the said *John Doe* now brings here into court, the date whereof is the day and year aforesaid, the said *John Doe* did (*Here set out the substance of the covenant in the words to be found in the appropriate form under the particular title*).[5] As by the said indenture, reference being thereunto had, will (amongst other things) more fully and at large appear.[6] And although the said *John Doe*

1. **Date.** — A deed may be stated in pleading to have been made on a day different from its date, omitting the words "bearing date," etc. Hall *v.* Cazenove, 4 East 477. But it is most usual to insert the date. 2 Chit. Pl. 241, note *d*.

2. **Addition of Parties.** — It is not necessary or advisable to state the addition of the parties. 2 Chit. Pl. 241, note *f*.

3. **Profert** — *Generally.* — A profert, or an excuse for the want of it, must in general be stated or the declaration will be bad on special demurrer. Stat. 4 Ann., c. 16; Read *v.* Brookman, 3 T. R. 151. And where profert is stated, and the deed cannot be produced, the plaintiff will be nonsuited on the plea of *non est factum*. Smith *v.* Woodward, 4 East 585. As to proferts in general, see 1 Chit. Pl. 349 *et seq.*; 1 Saund. 9, note 1.

Both Parts Originals. — If both parts of the deed be originals, that is, signed by all the contracting parties, profert should be made in the following words, to wit, "one part of which said indenture," etc. 2 Chit. Pl. 241, note *g*.

4. **Seal.** — The declaration must state that the contract was under seal. 2 Ld. Raym. 1336, 1536.

5. **Covenant, How Set Out.** — The words of the covenant are in general to be set out verbatim. 2 Chit. Pl. 242, note *k*; 1 Saund. Pl. 392. But no unnecessary covenant or other irrelevant parts of the deed should be stated. 1 Saund. 233, note 2; 2 Saund. 366, note 1. For the statement of any superfluous matter will be censured by the court. Dundass *v.* Weymouth, 2 Cowp. 665; Price *v.* Fletcher, 2 Cowp. 727; Bristow *v.* Wright, 2 Dougl. 665; 1 Saund. Pl. 393.

Thus in an action on a lease, if the description of the premises be very long, say, "certain tenements, with the appurtenances particularly mentioned and described in the said indenture, situate," etc., and in order to avoid variance it is advisable not to state the abuttals, or any other very particular description. 1 Saund. 233, note 2; 2 Saund. 366, note 1; Pitt *v.* Green, 9 East 188. If, however, personal property have been demised, together with land, etc., the above concise statement will not suffice; and when the action is for not repairing buildings, ditches, etc., it is most usual to state all such premises. 2 Chit. Pl. 242, note *i*.

And any exception, or condition, or matter qualifying the covenant should be stated, or an omission would be fatal on *non est factum*. Howell *v.* Richards, 11 East 633. But there is a distinction between a proviso and an exception. A proviso is properly the statement of something extrinsic of the subject matter of the covenant which shall go in discharge of that covenant by way of defeasance. An exception is the taking out of the covenant some part of the subject matter thereof. A plaintiff need, therefore, never state a proviso. 1 Saund. Pl. 393.

Consideration. — No consideration need be stated unless a covenant operating under the statute of uses be pleaded. 1 Saund. Pl. 392. And the averment that the defendant "for the considerations in the indenture mentioned," etc., is sufficient. Homer *v.* Ashford, 3 Bing. 322, 11 E. C. L. 121. Where the plaintiff states any part of the consideration, he must state the whole, and failure to do so is a fatal variance. Swallow *v.* Beaumont, 1 Chit. Rep. 518, 18 E. C. L. 153.

6. **Reference to Indenture.** — The reference to the indenture is not necessary. 2 Chit. Pl. 243, note *m*.

hath always, from the time of making the said indenture, hitherto well and truly performed, fulfilled, and kept all things in the said indenture contained on his part and behalf, to be performed, fulfilled, and kept, according to the tenor and effect, true intent and meaning of the said indenture, to wit, at *Westminster* aforesaid.[1] Yet protesting that the said *Richard Roe* hath not performed, fulfilled, or kept anything in the said indenture contained on his part and behalf, to be performed, fulfilled, and kept, according to the tenor and effect, true intent and meaning thereof,[2] the said *John Doe* saith, that after the making of the said indenture (*Here set out the particular breach or breaches complained of*),[3] contrary to the tenor and effect, true intent and meaning of the said indenture, and of the said covenant of the said *Richard Roe* by him in that behalf, so made as aforesaid, to wit, at *Westminster* aforesaid. And so the said *John Doe* in fact saith,[4] that the said *Richard Roe*, although often requested so to do, hath not kept the said covenant so by him made as aforesaid, but hath broken the same, and to keep the same with the said *John Doe* hath hitherto wholly neglected and refused, and still doth neglect and refuse, to the damage of the said *John Doe* of £20,[5] and therefore he brings his suit, etc.

Pledges to prosecute { *John Den* and *Richard Fenn.*

2. Under Hilary Rules.

Form No. 6631.

(Petersd. Prec. 7, 147.)

In the *King's Bench.*

Tenth day of *March*, 1834.

Middlesex. *John Doe*, by *Jeremiah Mason*, his attorney (or *in his own person*), complains of *Richard Roe*, who has been summoned to answer the plaintiff in an action of covenant. For that whereas heretofore, to wit, on the *first* day of *May*, in the year 1833,[6] by a certain indenture then made between the plaintiff of the one part,

1. **Performance by Plaintiff.** — This general averment of performance by the plaintiff is unnecessary. 1 Saund. 235, note 5; 2 Chit. Pl. 243, note *o*. But if there be a condition precedent, performance must be specially shown. 2 Chit. Pl. 243, note *o*; 1 Saund. Pl. 393.

2. **Protestation.** — There is no occasion for this protestation or allegation of the general nonperformance of covenants by the defendant; the declaration may proceed at once to the material averments and the particular breach for which the action is brought. 2 Chit. Pl. 243, note *p*.

3. **Statement of Breach.** — The breach may be in the negative of the covenant generally. Harris *v.* Mantle, 3 T. R. 307; Procter *v.* Burdet, 3 Mod. 69. Or according to the legal effect. 1 Saund. 235, note 6. As to the averments, and the statement of the breach in general, see 1 Chit. Pl. 336 *et seq.*

4. This statement is unnecessary, for there being a breach of covenant alleged before, it is holden unnecessary to make a repetition of it in the conclusion. 1 Saund. 235, note 7.

5. **Damages.** — In all declarations in covenant, a sum should be inserted sufficient to cover the real demand and interest to the time final of judgment. 2 Chit. Pl. 244, note *t*; 1 Saund. Pl. 393.

6. **Date.** — The date when the covenant purports to have been made, or actually was made, should in general be stated. Petersd. Prec. 4, note 2. But see *supra*, note 1, p. 863.

and the defendant of the other part, the counterpart[1] of which said indenture, sealed with the seal[2] of the defendant, the plaintiff now brings here into Court, the date whereof is the day and year aforesaid, the plaintiff (*Here set out the substance of the covenant in the words to be found in the appropriate form in the particular title*),[3] and although the plaintiff has always from the time of making the said indenture hitherto well and truly performed, fulfilled, and kept all things in the said indenture contained on his part and behalf to be performed, fulfilled, and kept according to the tenor and effect, true intent, and meaning of the said indenture;[4] Yet protesting[5] that the defendant has not performed, fulfilled, or kept anything in the said indenture contained on his part and behalf to be performed, fulfilled, and kept, according to the tenor and effect, true intent and meaning thereof; And the plaintiff says, that, after the making the said indenture, (*Here set out the particular breach or breaches complained of*),[6] contrary to the tenor and effect, true intent, and meaning of the said indenture, and of the said covenant of the defendant by him in that behalf so made as aforesaid; And the plaintiff in fact says, that the defendant, although often requested so to do, has not kept the said covenant so by him made as aforesaid, but has broken the same, and to keep the same with the plaintiff has hitherto wholly neglected and refused, and still does neglect and refuse. To the damage of the plaintiff of £20;[7] and therefore he brings his suit, etc.

II. IN THE UNITED STATES.[8]

Form No. 6632.

State of *West Virginia*, } ss. In the *Circuit* Court thereof.
County of *Preston*. }

John Doe complains of *Richard Roe* of a plea of covenant broken;[9] for this, to wit, that heretofore, to wit, on the *first* day of *June*, 1897, by a certain indenture made between the said defendant of the first part and the said plaintiff of the second part,[10] which said indenture, sealed[11] with the seal of the said defendant, is to the court now here

1. **Profert.** — See *supra*, note 3, p. 863.

2. **Seal.** — The declaration must state that the contract was under seal. 2 Ld. Raym. 1336, 1536.

3. **Covenant, How Set Out.** — See *supra*, note 5, p. 863.

4. **Performance by Plaintiff.** — See *supra*, note 1, p. 864.

5. **Protestation.** — See *supra*, note 2, p. 864.

6. **Statement of Breach.** — See *supra*, note 3, p 864.

7. **Damages.** — See *supra*, note 5, p. 864.

8. For the formal parts of a declaration in any common-law state consult the title DECLARATIONS.

9. In *New Hampshire*, *Virginia* and *West Virginia* the words "plea of covenant broken" are used. In the other common-law states it is customary to use the words "plea of breach of covenant."

10. **With Whom Covenant was Made.** — It must appear, in the declaration, with whom the covenant was made. Keatly *v.* McLaugherty, 4 Mo. 221; Perkins *v.* Reeds, 8 Mo. 33.

11. **Seal.**—The declaration must show that the instrument upon which the action is founded is a sealed instrument. Wineman *v.* Hughson, 44 Ill. App. 22; Manning *v.* Perkins, 86 Me. 419; Pierson *v.* Pierson, 6 N. J. L. 168; Bilderback *v.* Pouner, 7 N. J. L. 64. And it is not sufficient to allege that the parties made their covenant, the word "cove-

shown,[1] the date whereof is the day and year aforesaid, the said defendant, for a certain valuable consideration therein mentioned,[2] did (*Here set out the substance of the covenant in the words to be found in the appropriate form in the particular title*),[3] as from the said deed, reference being had thereto, will appear. And the said plaintiff in fact saith that, from the time of the execution of said deed, he hath at all times kept and performed all and singular the covenants on his part to be kept and performed, according to the tenor and effect, true intent and meaning of the said deed;[4] yet the said defendant, since the making of said deed, has not performed and kept said covenants in the said deed contained, to be on his part kept and performed, as by the said deed is of him required, and particularly in this, that (*Here set out the particular breach or breaches complained of*).[5]

nant" not importing a sealed instrument. Hays *v.* Lasater, 3 Ark. 565. Nor does the declaration sufficiently show that the parties to the covenant sealed it, although it is set out *in hæc verba* and contains the words "witness our hands and seals." Hays *v.* Lasater, 3 Ark. 565. But where, in describing the instrument, words of art, such as deed, indenture, etc., are used, such words import the seal. Wineman *v.* Hughson, 44 Ill. App. 22.

The declaration should show that the agreement on which the action is founded was originally sealed by the defendant, and remained under seal at the time of declaring, or accounting for the omission of such averment. It is not sufficient to say "And for the faithful performance of the said covenant and agreement the said parties did thereunto set their hands and affix their seals." Smith *v.* Emery, 12 N. J. L. 53.

See also *supra*, note 4, p. 863.

1. Profert. — In an action of covenant, the declaration should contain a profert in curia of the agreement set forth or an excuse for the omission of it. And the words of reference "as by the said covenant and agreement, reference being thereunto had, may more fully appear," inserted in a declaration, after a statement of the contents of the instrument, are no profert, nor are they sufficient to supply the want. Smith *v.* Emery, 12 N. J. L. 53.

See also *supra*, note 3, p. 863.

2. Consideration. — It is not necessary to aver or prove a consideration. Buckmaster *v.* Grundy, 2 Ill. 310; Jones *v.* Thomas, 21 Gratt. (Va.) 96. See *supra*, note 5, p. 863.

3. Covenant, How Set Out. — A covenant should be pleaded according to its form in the deed, leaving its effect to be ascertained afterward. Peck *v.* Houghtaling, 35 Mich. 127. But it is not necessary to set out the whole deed, but only those covenants which contain mutual stipulations and conditions which are essential to the plaintiff's cause of action. Killian *v.* Herndon, 4 Rich. L. (S. Car.) 196; Hughes *v.* Houlton, 5 Blackf. (Ind.) 180.

In a declaration on a covenant, it should be set out without any intermediate inducement, but if averments are made which may be treated as mere surplusage they will not vitiate the declaration. Jones *v.* Thomas, 21 Gratt. (Va.) 96.

4. Performance by Plaintiff. — Where covenants are mutual and dependent, the declaration must aver that the plaintiff was able, ready and willing to perform on his part. Dunlap *v.* Chicago, etc., R. Co., 151 Ill. 409; Bourland *v.* Sickles, 26 Ill. 497; Davis *v.* Wiley, 4 Ill. 234; Hunter *v.* Miller, 6 B. Mon. (Ky.) 612; Keatly *v.* McLaugherty, 4 Mo. 221; Potts *v.* Point Pleasant Land Co., 49 N. J. L. 411; Arnold *v.* Cole, 42 W. Va. 663.

5. Breaches, How Stated. — Breaches of a covenant must be specified. English *v.* Horner, 3 N. J. L. 382; Ridgell *v.* Dale, 16 Ala. 36. But one good breach is sufficient. Gaster *v.* Ashley, 1 Ark. 325.

While in an action for breach of a covenant the covenant may be set out in its own words, the breach must be assigned in accordance with its meaning. Chicago, etc., R. Co. *v.* Hoyt, 37 Ill. App. 64. And a breach can be assigned in the words of the covenant only where those words mean the same, whether read with the context or without the rest of the instrument. Chicago, etc., R. Co. *v.* Hoyt, 44 Ill. App. 48. As where the covenant is to do, or forbear to do, a particular act. Carter *v.* Denman, 23 N. J. L. 260.

And so the said plaintiff says, that the said defendant, although often requested[1] so to do, has not kept the said covenant so by him made as aforesaid, but hath broken the same with the said plaintiff, hath hitherto wholly neglected and refused, and still doth neglect and refuse to keep the same,[2] to the damage of the said plaintiff of *one thousand* dollars.[3] And therefore he sues.

Jeremiah Mason, P. Q.

1. Request to Defendant. — Where a special request is not necessary to impose on the defendant the obligation to pay, nor to render him liable on his covenant, it is not necessary to be averred. Smith *v.* Emery, 12 N. J. L. 53.

2. That part of the declaration beginning "And so the said plaintiff says that the said defendant, although often requested so to do, hath not kept his said covenant, but hath broken the same," etc., is a merely formal allegation and may be omitted. 4 Min. Inst., pt. 2, p. 587; 3 Rob. Pr. 362 *et seq.*, 582 *et seq.*; and see *supra*, note 4, p. 864.

3. Damages. — See *supra*, note 5, p. 864.

COVENANTS.

For Forms in Actions for Breach of Particular Covenants, see the titles ANNUITIES, vol. 1, p. 789; *APPRENTICES*, vol. 2, p. 1; *BUILDERS AND ARCHITECTS*, vol. 4, p. 121; *CHARTER-PARTIES*, vol. 4, p. 759; *GOOD-WILL; LANDLORD AND TENANT; LEASES; PARTNERSHIP; PARTY WALLS; VENDOR AND PURCHASER*; *and also the GENERAL INDEX to this work.*

For Forms in Actions to Compel Specific Performance of Covenants, see the title SPECIFIC PERFORMANCE.

COVERTURE.

By Thomas E. O'Brien.

I. Plea, Answer or Affidavit of Defense, 868.

1. *Generally*, 869.
2. *Setting Up Exempted Liability*, 870.

II. Replication or Reply, 872.

1. *Denying Coverture*, 872.
2. *Denying Exempted Liability*, 873.

CROSS-REFERENCES.

For Forms of Pleas setting up Coverture in Abatement, see the title ABATEMENT, PLEAS IN, vol. 1, p. 21.

For Forms of Answers and Pleas setting up matter of defense by way of Confession and Avoidance, generally, consult the title CONFESSION AND AVOIDANCE, ante, p. 37, *and the GENERAL INDEX to this work.*

For matters of Procedure, see the title HUSBAND AND WIFE, 10 Encyclopædia of Pleading and Practice, p. 191.

I. Plea, Answer or Affidavit of Defense.[1]

1. Coverture, Who may Plead. — The plea of coverture is a personal privilege of a married woman, and of those who may derive their title through her, and it is for her and them only to set it up in defense. Newhart *v.* Peters, 80 N. Car. 166; Bennett *v.* Mattingly, 110 Ind. 197; Johnson *v.* Jouchert, 124 Ind. 105. Thus, an executor may plead coverture of his testatrix. Baker *v.* Garris, 108 N. Car. 218. And the children may plead the coverture of their mother. Ellis *v.* Baker, 116 Ind. 408. In this case a married woman had signed a note and executed a mortgage upon her separate estate as security for debts of her husband, and died intestate, leaving children. An answer to

1. Generally.

Form No. 6633.

(2 Chit. Pl. 472.)

In the *King's Bench* (or *Common Pleas* or *Exchequer*).
Trin. Term, *51 Geo. III.*

Jane Roe
ats.
John Doe.

an action to foreclose said mortgage, alleging that "the note in suit was the note of said *John K. Ellis*, and said *Clara A. Ellis* signed such note as his surety; that, on the *9th* day of *August*, 18*84*, said *Clara A. Ellis* was a married woman, the wife of defendant, *John K. Ellis*; that the real estate described in the complaint herein, as mortgaged to plaintiff, was, on said *9th* day of *August*, 18*84*, and had continued to be since, the sole and separate property of said *Clara A. Ellis*, except as hereinafter shown, and was a gift from her father, *Jesse K. Baker*; that, on the —— day of ——, 18*86*, said *Clara A. Ellis* died at *Martin* county, intestate, leaving as her heirs at law these infant defendants and their co-defendant, said *John K. Ellis*, when the title to the two-thirds part of such real estate was cast upon these infant defendants, and the only title or interest they have in said real estate is by such inheritance; and that repeatedly, before her death, said *Clara A. Ellis* declared to said *John K. Ellis* and others, that when an effort should be made to foreclose the mortgage now in suit she would set up her suretyship and ask to be released from such mortgage and note," was held to constitute a sufficient defense to the action, the court holding that the defendants were the privies of the deceased, both in blood and estate, and had the right to avail themselves of any defense which, if living, she might have pleaded, including the defense founded on coverture.

Coverture, How Pleaded — *In Abatement.* — Where the objection does not go to the liability of the defendant, but is merely that the husband ought to have been sued jointly with her, the plea should be in abatement. 1 Chit. Pl. (16th Am. ed.) 465. Thus, where, since entering into the contract or committing the tort, the defendant has married. 1 Chit. Pl. (16th Am. ed.) 465; Lovell *v.* Walker, 9 M. & W. 299; Sheppard *v.* Kindle, 3 Humph. (Tenn.) 80; Kennard *v.* Sax, 3 Oregon 263. And the same is true where the objection is made that the plaintiff sued alone when her husband should have been joined as a party plaintiff. James *v.* Stewart, 9 Ala. 855; Hayden *v.* Attleborough, 7 Gray (Mass.) 338; Morgan *v.* Cubitt, 3 Exch. 612; Milner *v.* Milnes, 3 T. R. 627; Caudell *v.* Shaw, 4 T. R. 361.

For forms of pleas in abatement in both classes of cases consult the title ABATEMENT, PLEAS IN, vol. 1, Forms Nos. 65 to 71.

In Bar. — Where, however, the defense goes to the root of the demand and destroys the cause of action, as where the coverture existed at the time the supposed contract was made, the plea should be in bar. Morris *v.* Lindsley, 45 N. J. L. 435; Kennard *v.* Sax, 3 Oregon 263; Steer *v.* Steer, 14 S. & R. (Pa.) 379; Roseberry *v.* Roseberry, 27 W. Va. 759.

To be available as a defense, coverture must be specially pleaded. Marion *v.* Regenstein, 98 Ala. 475; Long *v.* Dixon, 55 Ind. 352; Landers *v.* Douglas, 46 Ind. 522; Elson *v.* O'Dowd, 40 Ind. 300; McDaniel *v.* Carver, 40 Ind. 250; Van Metre *v.* Wolf, 27 Iowa 341; Von Schrader *v.* Taylor, 7 Mo. App. 361; Baker *v.* Garris, 108 N. Car. 218; Neville *v.* Pope, 95 N. Car. 346; Burnett *v.* Nicholson, 86 N. Car. 99; Vick *v.* Pope, 81 N. Car. 22; Caldwell *v.* Brown, 43 Tex. 216; Phelps *v.* Brackett, 24 Tex. 236.

Mere Plea of Coverture, When Not Sufficient. — When, by statute, a married woman is given absolute control over her separate property, and permitted to sue and be sued as a *feme sole*, there is a presumption that she had power to make the contract upon which the suit is brought, and a mere plea of coverture, without additional averments to show that the contract is one beyond her power to make, is insufficient. Britt *v.* Pitts, 111 Ala. 401; Strauss *v.* Glass,

And the said *Jane Roe* in person[1] comes and defends the wrong and injury, when, etc., and says that the said *John Doe* ought not to have or maintain his aforesaid action thereof against her, because she says that she, the said *Jane Roe*, before, and at the time of the making of the said several supposed promises and undertakings in the said declaration mentioned, was and still is the wife of one *Richard Roe*, to wit, at *Westminster* aforesaid, and this the said *Jane Roe* is ready to verify, wherefore she prays judgment if the said *John Doe* ought to have or maintain his aforesaid action thereof against her, etc.

Form No. 6634.

(Bullitt's Civ. Code Ky. (1895), p. 639.)

John Doe, plaintiff, against *Martha Roe*, defendant. } *Lee Circuit* Court. Answer of Defendant.

The defendant, *Martha Roe*, says that at the time of the making of the note sued on, she was (and yet is) a married woman, the wife of *Richard Roe*.

Oliver Ellsworth, Attorney.

(*Verification.*)[2]

2. Setting Up Exempted Liability.

Form No. 6635.[3]

State of *Indiana*, *Posey* County. } In the *Posey Circuit* Court. *October* Term, 1897.

John Doe against *Richard Roe and Julia Roe.* } Separate Answer of *Julia Roe.*

Julia Roe, defendant herein, for separate answer to plaintiff's complaint, says, that at the time of the execution of the said note and mortgage she was a married woman, the owner of the real estate described in the mortgage; that the said note was given for a debt then owing by her husband and co-defendant, *Richard Roe*, and that

108 Ala. 546; Wofford *v.* Baker, 80 Ala. 303; Miller *v.* Shields, 124 Ind. 166; Ferris *v.* Holmes, 8 Daly (N. Y.) 217. And the same is true in all cases where contracts are ordinarily enforceable against a married woman. Vansyckel *v.* Woolverton, 56 N. J. L. 8; Hinkson *v.* Williams, 41 N. J. L. 35.

For the formal parts of an answer or plea in a particular jurisdiction consult the titles ANSWERS IN CODE PLEADING, vol. 1, p. 799; and PLEAS. For the formal parts of an affidavit of defense consult the title AFFIDAVITS OF MERITS, vol. 1. p. 637.

1. **In Proper Person.**—At common law, if the defendant be still married, she must plead her coverture in proper person, and not by attorney. 2 Chit. Pl. 472, note *i*; 1 Chit. Pl. (16th Am. ed.) 444; Stephens Pl. 65; 2 Saund. 209*c*, note; Oulds *v.* Sansom, 3 Taunt. 261; Keddeslin *v.* Meyer, 2 Miles (Pa.) 295; Phillips *v.* Burr, 4 Duer (N. Y.) 113.

2. For the form of verification in a particular jurisdiction consult the title VERIFICATIONS.

3. This is in substance the answer in Allen *v.* Davis, 101 Ind. 187. In that case the answer was held to constitute a good defense and that a mortgage executed by a married woman to secure her husband's debt could not be binding on her.

she executed the said note and mortgage jointly with her said husband as his surety.[1]

Oliver Ellsworth, Attorney for Defendant.

(*Verification.*)[2]

Form No. 6636.[3]

John Doe against *Richard Roe and Martha Roe.* } In the Court *of Common Pleas*, No. *4*, of *Philadelphia* County. *March* Term, 1897, No. *101.*

City and County of *Philadelphia*, ss.

Martha Roe, one of the defendants, being duly sworn, for defense to the claim of plaintiffs in this suit, says, that at the time of the making of the promissory note on which this suit has been brought, this defendant was and still is the wife of *Richard Roe*, who has been joined with her in this suit, and that the consideration of the said note was not for necessaries furnished by said plaintiffs for the use of herself and family. That her said husband resided with this defendant at the time of the making of the said note, and still continues to live and reside with her. That the title to the property on which the defendant resides is not in her name, as is alleged in the affidavit filed by the plaintiff in this suit. This defendant further says that she has paid to said plaintiffs, on account of the said note, the sum of *two hundred and eighty* dollars, and that the said note was given by mistake to the plaintiffs for *two hundred* dollars above the true amount of their claim, and further says not.

Martha Roe.

Sworn to and subscribed before me this *first* day of *March*, 1897.

Norton Porter, Notary Public.

1. Contract of Suretyship Void as to Married Woman. — In some states it is provided by statute that married women shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner, and that such contract as to her shall be void. Horner's Stat. Ind. (1896), § 5119; Bright. Pur. Dig. Pa. (1894), p. 1299, § 24. But in an action upon a promissory note, executed by a married woman and secured by mortgage, executed by her jointly with her husband, there is no presumption that she acted as surety or guarantor and the burden is upon her to show that she is not liable. Miller *v.* Shields, 124 Ind. 166.

2. For the form of verification in a particular jurisdiction consult the title VERIFICATIONS.

3. This is in substance the affidavit in Imhoff *v.* Brown, 30 Pa. St. 504. The affidavit was deemed sufficient, the court holding that it is sufficient for a married woman sued on a promissory note to allege coverture in her affidavit of defense, and to state that the note was not given for necessaries, the *Pennsylvania* statute providing that "In all cases where debts may be contracted for necessaries, for the support and maintenance of the family of any married woman, it shall be lawful for the creditor, in such case, to institute suit against the husband and wife for the price of such necessaries, and after obtaining a judgment have an execution against the husband alone; and if no property of the said husband be found, the officer executing the said writ shall so return, and thereupon an alias execution may be issued, which may be levied upon and satisfied out of the separate property of the wife, secured to her under the provisions of the first section of this act: Provided, That judgment shall not be rendered against the wife, in such joint action, unless it shall have been proved that the debt sued for in such action was contracted by the wife, or incurred for articles necessary for the support of the family of the said husband and wife." Bright. Pur. Dig. Pa. (1894), p. 1302, § 42. A similar statute exists in *Texas*. Tex. Rev. Stat. (1895), arts. 1201, 2970.

II. REPLICATION OR REPLY.[1]

1. Denying Coverture.

Form No. 6637.

(2 Chit. Pl. 638.)

In the *King's Bench* (or *Common Pleas* or *Exchequer*).
Trin. Term, *57 Geo. III.*

John Doe agt. *Martha Roe.*

And the said *John Doe* saith that his said bill (or *the said writ*), by reason of anything by the said *Martha Roe* in her said plea above alleged, ought not to be quashed, because he says that at the time of exhibiting the said bill (or *at the time of issuing of the said writ*) against the said *Martha Roe*, she, the said *Martha Roe*, was not mar-

1. Requisites Generally. — Where, under special circumstances, a married woman is liable notwithstanding her coverture, the replication must state such special circumstances. 2 Chit. Pl. 638, note *a*; Arnold *v.* Engleman, 103 Ind. 512; Cupp *v.* Campbell, 103 Ind. 213; Murray *v.* Keyes, 35 Pa. St. 384; Mahon *v.* Gormley, 24 Pa. St. 80.

For the formal parts of a replication or reply in a particular jurisdiction consult the title REPLICATIONS.

Precedents.— In De Gaillon *v.* L'Aigle, 1 B. & P. 357, the replication, omitting formal parts, was as follows: "that before and at the time of making the said several promises and undertakings in the said declaration mentioned and from thence hitherto, the said *John Martin Harel L'Aigle* lived and resided in parts beyond the seas, out of this kingdom, to wit, at *Hamburgh*, and that during all that time the said *Victoire Harel L'Aigle* lived in this kingdom separate and apart from the said *John Martin Harel L'Aigle* and followed and carried on the trade and business of a merchant, as a single woman and a sole trader, to wit, at *Westminster*, etc., and that the plaintiff did not give any credit to the said *John Martin Harel L'Aigle*, but traded and dealt with the said *Victoire Harel* as a *feme sole* and on her sole credit; and that the said *Victoire Harel* made the said several promises and undertakings in the said declaration mentioned as such *feme sole* as aforesaid" Demurrer to this replication was overruled and judgment entered for the plaintiff. In this case the husband of defendant, who was an Englishwoman, was an alien and had never resided in England, and the decision seems to have turned upon that fact. But where the husband is an Englishman the right of the wife to sue and be sued as a *feme sole* seems to be limited to cases of civil death of the husband. See Robinson *v.* Reynolds, 1 Aiken (Vt.) 174, where the leading English cases are considered and discussed. See also note to Boggert *v.* Frier, 11 East 301.

In Britt *v.* Pitts, 111 Ala. 401, it was held that under section 2347 of the code of 1886, providing that for all torts committed by a married woman she must be sued alone, where A sued B in detinue to recover certain cotton and C interposed a claim to the property, filing a bond signed by plaintiff and defendant as sureties, the property being subsequently released to defendant, by whom it was sold and the proceeds converted, and later a judgment was rendered against the sureties on the bond, which judgment was paid by plaintiff, in an action brought against defendant to recover damages sustained by defendant's failure to deliver the cotton, a reply to an answer setting up the coverture at the time of signing the bond, "that the cause of action set forth in the complaint is for the tort alleged to have been committed by the defendant, and if she be a married woman as alleged in the plea she is liable for said tort and said plea is no answer to the action," was sufficient and that plaintiff was entitled to recover.

ried[1] to the said *Richard Roe*, in the said plea mentioned, in manner and form as the said *Martha Roe* hath above in her said plea in that behalf alleged, and this he, the said *John Doe*, prays may be inquired of by the country, etc.

2. Denying Exempted Liability.

Form No. 6638.[2]

State of *Indiana*, } In the *Posey Circuit* Court,
Posey County. } *October* Term, 1897.

John Doe
against
Richard Roe and Martha Roe. } Reply.

The plaintiff admits that defendant is a married woman, as in her answer alleged, but says that the consideration of the aforesaid notes was certain personal property purchased by the defendant, *Martha Roe*, for use in her own separate business, from *Francis Fern*, the payee named in the said notes.

Wherefore plaintiff demands judgment, as prayed for in his complaint.

Oliver Ellsworth, Attorney for Plaintiff.

1. If defendant had been married but her husband dead, the latter fact should be replied. 2 Chit. Pl. 638, note *a*.

2. This form is based upon the reply in Chandler *v.* Spencer, 109 Ind. 553. In that case the action was brought against husband and wife to recover on their promissory notes, executed by them, and which had been assigned to plaintiff. The wife, in a separate answer, alleged that she was a married woman when she executed the notes, and that she executed them as surety for her husband, and that no part of the consideration for which the notes were given was received by her. It was held that plaintiff's reply was sufficient without alleging that the property was delivered to, or received by, defendant.

See also substance of a sufficient reply in Arnold *v.* Engleman, 103 Ind. 512.

CREDITORS' SUITS.

By W. R. Buckminster.

I. To Subject Property Not Reachable by Execution, 874.
1. *In General*, 874.
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III. By Creditors of a Corporation, 910.
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CROSS-REFERENCES.

For Forms in Suits to Set Aside Fraudulent Conveyances, see the title FRAUDULENT CONVEYANCES.

For Forms in Proceedings to Subject Decedent's Estate to Payment of Debts in Default of Personal Property, see the title PROBATE AND ADMINISTRATION.

For Forms in Proceedings Supplementary to Execution, see the title SUPPLEMENTARY PROCEEDINGS.

For matters of Procedure, generally, see the title CREDITORS' BILLS, 5 Encyclopædia of Pleading and Practice, p. 388.

I. To Subject Property Not Reachable by Execution.[1]

1. In General.

1. Requisites of Bill or Complaint, Generally. — No particular form of bill or formal specific allegations are necessary to constitute the bill a good one, but facts must be stated from which, at least, the inference may be drawn, that the aid of a court of equity is required to give the judgment its legal and full effect. Dunham *v.* Cox, 10 N. J. Eq. 467.

For forms of bills in equity, generally, consult the title Bills in Equity, vol. 3, p. 417. For the formal parts of complaints or petitions, generally, con-

sult the title COMPLAINTS, vol. 4, p. 1019.

Bill with Double Aspect. — As to the permissibility of framing a bill with a double aspect, see 5 Encycl. of Pl. and Pr. 560.

Jurisdictional Facts. — It should appear from the bill that the court in which it is filed has jurisdiction of the action. 5 Encycl. of Pl. and Pr. 557. But in an action under Bullitt's Civ. Code Ky. (1895), § 439, to subject an interest in land it is not necessary to allege expressly that the land was situated in the county where the suit was brought when this fact is made plainly evident by the pleadings and exhibits. Bryant *v.* Bryant, (Ky. 1892) 20 S. W. Rep. 270.

Invitation to Other Creditors. — As to when it is necessary to state in whose behalf the bill is filed and when it must contain an invitation to other creditors to join, see 5 Encycl. of Pl. and Pr. 558.

Negation of Collusion with Debtor. — In the absence of some statute or rule of court requiring it, the complainant need not allege that the bill is not preferred and prosecuted by collusion, or for the purpose of protecting the property and effects of the debtor against the claims of other creditors. Hammond *v.* Hudson River Iron, etc., Co., 20 Barb. (N. Y.) 378. Such a rule exists in *Wisconsin*. Sanb. & B. Anno. Stat. Wis. (1889); § 3029, note. In *New York* also there was formerly such a rule. McElwain *v.* Willis, 3 Paige (N. Y.) 505. But this rule was superseded by the code. Quick *v.* Keeler, 2 Sandf. (N. Y.) 231. And even where the rule exists, no averment is necessary if the complaint states facts from which it is apparent that there is no collusion. Faber *v.* Matz, 86 Wis. 370.

Description of Indebtedness. — A debt need not be reduced to judgment in order to maintain a bill in equity under Mass. Pub. Stat. (1882), c. 151, § 2, cl. 11, and Stat. (1884), c. 285, to reach and apply in payment of a debt property of the debtor which cannot be attached or taken on execution at law, but in such case the bill should set out the cause of action as specifically as is required in an action at law. Sandford *v.* Wright, 164 Mass. 85. See also Elwell *v.* Johnson, 3 Hun (N. Y.) 558; Louis *v.* Belgard, (Supreme Ct.) 17 N. Y. Supp. 882. Where, however, a judgment has been recovered, it is not necessary to allege the indebtedness on which it was recovered. Tatum *v.* Rosenthal, 95 Cal. 129.

Exhaustion of Legal Remedies — *Generally.* — To entitle a judgment creditor to go into chancery, the bill must show that he has exhausted his legal remedies. Roper *v.* McCook, 7 Ala. 318; Newman *v.* Willetts, 52 Ill. 98; Webster *v.* Clark, 25 Me. 313; Voorhees *v.* Howard, 4 Keyes (N. Y.) 371; Rhodes *v.* Cousins, 6 Rand. (Va.) 188; Daskam *v.* Neff, 79 Wis. 161; Taylor *v.* Bowker, 111 U. S. 110, 6 Am. and Eng. Corp. Cas. 609. Or must allege facts excusing complainant's failure so to do. Corey *v.* Greene, 51 Me. 114.

The Judgment. — The bill should set forth a judgment. Taylor *v.* Bowker, 111 U. S. 110, 6 Am. and Eng. Corp. Cas. 609; Block *v.* Marks, 47 La. Ann. 107. And where a transcript of the judgment must be recorded in another county than that in which it is recovered in order to make the judgment a lien upon land belonging to the defendant in such other county, the bill must contain an averment that a transcript of the judgment was duly recorded. Barnes *v.* Beighly, 9 Colo. 475.

In pleading a right acquired under a judgment of an inferior court of limited jurisdiction, sufficient should be stated to show that such court had jurisdiction to render such judgment. Dix *v.* Briggs, 9 Paige (N. Y.) 595. See also Siegmund *v.* Ascher, 37 Ill. App. 122.

In reciting the judgment recovered, a variance of six cents assessed for costs is not a fatal variance. Baggott *v.* Eagleson, Hoffm. Ch. (N. Y.) 377. Nor will relief be denied on the ground that judgment was entered on a later date than that stated in the bill, if it appears that the later judgment entry was merely to correct the one relied on before, or does not appear that counsel did not have notice of the correction or were misled by the variance. Marshall First Nat. Bank *v.* Hosmer, 48 Mich. 200. See also Baggott *v.* Eagleson, Hoffm. Ch. (N. Y.) 377.

Where the bill is brought by one not a party to the judgment, the bill must allege complainant's ownership of the judgment in a proper manner, and an allegation of ownership of an execution issued thereon and returned unsatisfied is not sufficient. Richardson *v.* Gilbert, 21 Fla. 552. But the assignee of a judgment need not aver the consideration for the assignment. Gleason *v.* Gage, 7 Paige (N. Y.) 121. Nor that it was in writing. Jones *v.* Smith, 92

Ala. 455. In such case, however, an assignment of the whole judgment should be alleged if the complainant seeks the payment of the judgment including costs. Strange *v.* Longley, 3 Barb. Ch. (N. Y.) 650. And an averment that complainant recovered the judgment in his own name for the use of another, and further that the said judgment is now his property, is sufficient. Postlewait *v.* Howes, 3 Iowa 365.

The Execution. — The bill should allege that execution actually issued. Taylor *v.* Bowker, 111 U. S. 110, 6 Am. and Eng. Corp. Cas. 609; Roper *v.* McCook, 7 Ala. 318. And should state the time when the execution was returnable. Cassidy *v.* Meacham, 3 Paige (N. Y.) 311; Albright *v.* Herzog, 12 Ill. App. 557. Except where the execution is made by law returnable in a specified time, in which case the bill need not set out what time it was made returnable. Strange *v.* Longley, 3 Barb. Ch. (N. Y.) 650.

An allegation that on the same day the judgment was recovered a fi. fa. was "sued out and prosecuted," and that before delivery it was indorsed "and was then delivered to the said sheriff to be executed in due form of law," was held to be a sufficient averment of delivery to the sheriff before the return day. Conant *v.* Sparks, 3 Edw. Ch. (N. Y.) 104.

Where a creditor's bill is founded upon a judgment upon which an execution may be issued to any county, the complainant must show affirmatively in his bill that he has exhausted his remedy by issuing an execution to the county in which the defendant resided at the time that such execution was issued, or must state in his bill some sufficient legal excuse for issuing his execution to a different county. Reed *v.* Wheaton, 7 Paige (N. Y.) 663; Leggett *v.* Hopkins, 7 Paige (N. Y.) 149. And it should be specifically alleged that at the time of the issuance of the execution defendant was a resident of the county to which the execution issued. Preston *v.* Wilcox, 38 Mich. 578; Wheeler *v.* Heermans, 3 Sandf. Ch. (N. Y.) 597; Smith *v.* Fitch, Clarke Ch. (N. Y.) 265; Hope *v.* Brinckerhoff, 3 Edw. Ch. (N. Y.) 445. But in *Alabama* it is held that the bill need not contain a specific allegation that the execution was issued to the county in which the defendant had a fixed and known residence, and that it devolves upon the defendant to show that the execution was issued to an improper county. Brown *v.* Bates, 10 Ala. 432, *followed* in Nix *v.* Winter, 35 Ala. 309.

The bill need not specifically allege that the writ of fieri facias directed the amount of the judgment to be made out of the lands and tenements of the defendant, when an ordinary execution as prescribed by statute authorizes a levy on the debtor's lands, as it will be presumed, in the absence of proof to the contrary, that the execution was regular and conformed to the law. Brown *v.* Bates, 10 Ala. 432.

The Return. — The bill should allege that the execution was returned unsatisfied. Mixon *v.* Dunklin, 48 Ala. 455; Roper *v.* McCook, 7 Ala. 318; Newman *v.* Willetts, 52 Ill. 98; Taylor *v.* Bowker, 111 U. S. 110, 6 Am. and Eng. Corp. Cas. 609. And should allege an actual return of the execution before the filing of the bill, stating the time when it was made. Shea v. Dulin, 3 MacArthur (D. C.) 339; Albrigh *v.* Herzog, 12 Ill. App. 557; Preston *v.* Wilcox, 38 Mich. 578; Cassidy *v.* Meacham, 3 Paige (N. Y.) 311. And where it appears that the execution was returned on a day subsequent to the commencement of the suit, the bill will be dismissed, although the objection was not taken in the answer, and although the execution as exemplified was returnable and proved to have been returned and filed prior to the filing of the bill. Pardee *v.* De Cala, 7 Paige (N. Y.) 132. But see Long *v.* Page, 10 Humph. (Tenn.) 541, where it was held that an objection so taken came too late.

But the return need not be set forth *in hæc verba*. Daskam *v.* Neff, 79 Wis. 161. A statement that an execution had been issued on a judgment and "duly returned unsatisfied" is sufficient. Page *v.* Grant, 9 Oregon 116. And the return *nulla bona* is sufficient without stating that search was made for property by the officer. Suydam *v.* Beals, 4 McLean (U. S.) 12. But a return that defendant has "no goods" is insufficient under a statute allowing the bill where the judgment debtor has not personal or real property sufficient to satisfy the judgment. State Bank *v.* Oliver, 1 Disney (Ohio) 159.

An allegation that the sheriff returned that A and B had no goods, etc., was held to show a want of individual as well as joint goods. Conant *v.* Sparks, 3 Edw. Ch. (N. Y.) 104.

Insolvency of Debtor. — Where it is

alleged that an execution has been issued and returned unsatisfied, it need not be otherwise distinctly averred that the debtor has no other property than that out of which the creditor seeks payment. McElwain *v.* Willis, 9 Wend. (N. Y.) 559; Page *v.* Grant, 9 Oregon 116; Daskam *v.* Neff, 79 Wis. 161. But insolvency is frequently an excuse for exhausting legal remedies, and in such case the allegation as to insolvency should be clear and specific. 5 Encycl. of Pl. and Pr. 567. The debtor's insolvency need not be stated in terms when facts are alleged from which it may be deduced. Dunsback *v.* Collar, 95 Mich. 611; and see Turner *v.* Adams, 46 Mo. 95.

Description of Property in Alternative. — Under the *Alabama* act of 1844, which enacted "that whenever an execution against the property of a defendant shall have been issued on a judgment of law, and shall have been returned unsatisfied, * * * the party suing out such execution may file a bill in chancery against such defendant, and any other person or persons, to compel the discovery of any property, money, or thing in action, belonging to the defendant, and of any property, money, or thing in action, due to him, or held in trust for him," etc., it was held sufficient to allege in the bill the supposed interests of the defendant in property, etc., in the general terms of the statute, either positively or in the alternative. Brown *v.* Bates, 10 Ala. 432. So under Ala. Civ. Code (1886), § 3540. Floyd *v.* Floyd, 77 Ala. 353.

Intent. — The bill need not allege the concealment by defendant of property or effects to have been with the intention to delay or hinder the complainant, or other creditors, in the collection of their debts. Brown *v.* Bates, 10 Ala. 432; Floyd *v.* Floyd, 77 Ala. 353; Alden *v.* Gibson, 63 N. H. 12.

Fraud. — Under the *Alabama* act of 1844, the bill need not allege a fraud on the part of the defendant. Brown *v.* Bates, 10 Ala. 432. And so under Ala. Civ. Code (1886), § 3540. Floyd *v.* Floyd, 77 Ala. 353.

The Prayer. — As to what relief can be granted under the general prayer for other and further relief, see the title BILLS IN EQUITY, vol. 3, p. 417; 5 Encycl. of Pl. and Pr. 568.

For statutes relating to creditors' suits see as follows:

Alabama. — Civ. Code (1886), §§ 3540–3548; Acts (1888–9), p. 96, No. 114.

Arkansas. — Sand. & H. Dig. (1894), §§ 3129–3134.

Colorado. — Mills' Anno. Code (1896), § 251.

Georgia. — 2 Code (1895), §§ 2716–2722.

Illinois. — Starr & C. Anno. Stat. (1896), p. 593, par. 49.

Iowa. — Code (1897), §§ 4087–4090.

Kentucky. — Bullitt's Civ. Code (1895), § 430.

Maine. — Rev. Stat. (1882), c. 46, § 52.

Massachusetts. — Pub. Stat. (1882), c. 151, § 2, cl. 11; c. 106, § 64; Pub. Stat. (Supp. 1888), p. 124, c. 223; p. 214, c. 285.

Michigan. — How. Anno. Stat. (1882), §§ 6614–6618.

New Hampshire. — Pub. Stat. (1891), c. 205, § 7.

Ohio. — Bates' Anno. Stat. (1897), § 5464.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), §§ 3029 *et seq.*

The *Illinois* statute is adopted from the former *New York* statute and the construction of the latter is followed. Singer, etc., Stone Co. *v.* Wheeler, 6 Ill. App. 225.

Although the *Alabama* code uses the word "discovery" in all the sections relating to creditors' bills, yet it is not necessary that the bill shall ask a discovery, or conform to the requisites of a bill for discovery. Zelnicker *v.* Brigham, 74 Ala. 598.

To Subject Property Not Reachable by Execution — *Generally.* — The bill must allege that the debtor has assets or property which cannot be reached by execution, or which are covered up or kept out of the reach of creditors. Preston *v.* Colby, 117 Ill. 477. See also Crabb *v.* Hill, (Ky. 1895) 30 S. W. Rep. 415.

Allegations as to Debtor's Distributive Share. — Where it is sought to reach an interest of the debtor in the estate of his deceased father before a settlement of the administrator's account and an order of distribution, the bill should aver the value of the estate of the deceased over and above the amount of his debts, general expenses and expenses of administration, so that it may appear that the debtor has an interest in the assets in the hands of the administrator. Ginn *v.* Brown, 14 R. I. 524.

Indebtedness at Time of Fraudulent Concealment. — Where the bill proceeds upon the theory that a sale made by the judgment creditor created an in-

Form No. 6639.[1]

State of *Illinois*, } ss. *Circuit* Court of *Cook* County, *February* Term,
Cook County. } A. D. 1898.

To the Judges of said Court, in Chancery Sitting.

Your orator, *John Doe*, of *Chicago*, in the county of *Cook* and state of *Illinois*, respectfully represents unto your honors that at the *November* term, A. D. 1897, of the *Circuit* Court of said *Cook* county, to wit, on the *eighteenth* day of *November*, 1897, the same being one of the regular days of said term, your orator recovered a judgment against *Richard Roe*, one of the defendants hereinafter named, for the sum of *five thousand six hundred* dollars and *twenty-eight* cents, for the damages which he had sustained and the costs of suit, and charges of your orator by him about his suit in that behalf expended, which were adjudged to your orator in and by the said court, whereof the said *Richard Roe* was convicted, as by the record of the said judgment in the office of the clerk of said court, reference being thereto had, and to which, for greater certainty, your orator prays leave to refer, will more fully and at large appear.

And your orator further represents unto your honor, that the said judgment so recovered in manner aforesaid, remaining in full force and effect, and the costs, charges of suit, and damages aforesaid unpaid and unsatisfied, your orator on or about the *twentieth* day of *November*, in the year of our Lord one thousand eight hundred and *ninety-seven*, for the purpose of obtaining satisfaction of the said judgment, sued and prosecuted out of the said court a writ of fieri facias, directed to the sheriff of *Cook* county, that being the county in which said defendant resided at the time of the issuing of said writ, by which said writ the said sheriff was commanded, that of the goods, chattels, lands and tenements of the defendant *Richard Roe*, in his county, he cause to be made the sum of *five thousand six hundred* dollars and *twenty-eight* cents, which your orator in said *Circuit* Court recovered against the said defendant *Richard Roe*, and that he should have the money at the clerk's office of the said court, at *Chicago*, in said county, in *ninety* days from the date thereof, to satisfy the judgment so recovered by your orator as aforesaid, and that he should have then and there that writ.

And your orator further shows that the said writ of fieri facias, before the delivery thereof to the said sheriff, was duly indorsed, and was afterward, to wit, on or about the *twenty-first* day of *November*, in the year of our Lord one thousand eight hundred and *ninety-seven*, delivered to the said sheriff to be executed in due form of law.

And your orator further shows that the said sheriff of said county aforesaid, on the *eighteenth* day of *February*, in the year of our Lord one thousand eight hundred and *ninety-eight*, returned on the said writ to him, in that behalf directed and delivered as aforesaid, that after

debtedness to him which was fraudulently covered up and concealed, which really belonged to the judgment debtor and which constituted assets which were in equity liable for the payment of the complainant's judgment, it is immaterial that the bill fails to state that the complainants were creditors when the sale took place. Deimel *v.* Brown, 136 Ill. 586.

1. Consult note 1, p. 874, *supra*.

due search he had been unable to find within said county of *Cook* any goods, chattels, lands or tenements of the said *Richard Roe* whereof the amount of said judgment and execution or any part thereof could be made, as by the said writ of fieri facias, and the directions, and the return of the said sheriff indorsed thereon, as aforesaid, now on file in the office of the clerk of the said court, will more fully appear, and to which, or to a copy thereof, your orator prays leave to refer.

And your orator further shows that the said judgment still remains in full force and effect, not reversed, or satisfied, or otherwise vacated; and that the said *Richard Roe* has not paid the same to your orator, but has hitherto wholly neglected and refused so to do.

And your orator further shows that there is now actually and equitably due to your orator, upon the aforesaid judgment, the sum of *five thousand six hundred* dollars and *twenty-eight* cents, together with interest thereon from the *eighteenth* day of *November*, in the year of our Lord one thousand eight hundred and *ninety-seven*, over and above all claims of said defendant, by way of set-off, or otherwise.

And your orator further shows unto your honors that on or about the *first* day of *November* and before that time, in the year of our Lord one thousand eight hundred and *ninety-seven*, the said defendant *Richard Roe* was engaged in a mercantile business at the *Produce Exchange Building* in the city of *Chicago*, and that your orator is informed and believes that in the course of the said mercantile business of the said defendant *Richard Roe*, divers persons became indebted to him to a large amount, and that the said defendant last named, at the time of filing this your orator's bill of complaint, has debts due to him and for which he holds divers securities and evidences to a large amount, and has divers goods, wares and merchandise, and other articles of personal property which belong to him, or in which he in some way or manner is beneficially interested; and that he has equitable interests and things in action of some nature or kind, which might and ought to be applied to the payment of your orator's said judgment against him the said defendant *Richard Roe*.

And your orator also charges that the said defendant *Richard Roe* is owner of or in some way or manner beneficially interested in some real estate, in this or some other state; or some chattels real of some name or kind; or some contract or agreement relating to real estate; or the rents, issues and profits of some real estate; and also that the said defendant *Richard Roe* is owner of or in some way beneficially interested in the stock of some company, incorporated or unincorporated, or in the profits of some company, or copartnership; and also that he has in his possession, at the time of the filing of this your orator's bill of complaint, some money in coin or bank bills; or that he has money deposited in some bank or elsewhere, to his credit; or that he has money, or securities for the payment of money, held by some other person, in trust or otherwise, for his benefit.

And if the said defendant *Richard Roe* has made any sale, assignment or transfer of his property or effects, or any part thereof, your orator expressly charges that he believes such sale, assignment or transfer is merely colorable, and made with a view of protecting the

property or effects of said defendant *Richard Roe* so assigned, and placing the same beyond the reach of your orator's said judgment, and enabling the said defendant *Richard Roe* to control and enjoy the same, and the avails thereof, or to hinder or delay your orator in the collection of his debt now in judgment as aforesaid; and that so it would appear, if the said defendant *Richard Roe* would state and set forth when and to whom such sale, transfer or assignment was made, and what was the amount in value of the property or effects so sold, assigned or transferred, and what were the terms upon which said sale, transfer or assignment was made, and what disposition has been made of the property or effects so sold, assigned or transferred, and in whose possession the same now is, or what has been done with the avails thereof. And your orator claims a full and complete discovery of all such property, effects and things in action, belonging to the said defendant *Richard Roe* and of all trusts whereby any property, debts or effects are held for the use or benefit of the said defendant last named, and of every sale, assignment or transfer which the said defendant last named has made of his property, debts or other effects, and of the person or persons to whom such sale, assignment or transfer has been made; the amount and value of the property, debts or other effects so sold, assigned or transferred; and the trusts and other conditions upon which such sale, assignment or transfer was made, and all the facts and circumstances relating thereto; and particularly what is the situation of the property, debts or other effects sold, assigned or transferred, at the time of filing this your orator's bill of complaint.

And your orator further shows unto your honors, that he has reason to believe, and does believe, that the said defendant last named has property and other equitable interests, things in action or effects, of the value of more than *ten thousand* dollars, exclusive of all prior first claims thereon, and which your orator has been unable to reach by execution on said judgment, against the said defendant last named; and that this your orator's bill of complaint is not exhibited by collusion with the said defendant or with any other person, or for the purpose of protecting the property or effects of said defendant *Richard Roe* against the claims of other creditors, but for the sole purpose of compelling payment and satisfaction of the judgment so as aforesaid recovered by your orator against the defendant *Richard Roe.*

And your orator well hoped that the said defendant *Richard Roe* would have paid to your orator the amount due him on said judgment, or would have applied for that purpose any property, money, debts, or other equitable interest or things in action belonging to him, or in which he is in any way interested, as in equity and good conscience he ought to have done.

But now, so it is, may it please your honors, that the said defendant, combining and confederating together with divers other persons, to your orator unknown, but whose names, when discovered, he prays may be inserted herein, with proper and apt words to charge them, and contriving how to injure and defraud your orator in the premises, neglects and refuses to pay the amount so due to your ora-

tor on his said judgment, or to apply for that purpose any property, money, debts, or other equitable interest, or things in action belonging to the said defendant *Richard Roe*, and for reason thereof the said defendant sets up a variety of unfounded pretenses; all of which actings, doings, neglects and pretenses are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator in the premises.

In tender consideration whereof, and forasmuch as your orator is remediless in the premises, by the strict rules of the common law, and cannot have adequate relief, save in a court of equity, where matters of this and a similar nature are properly cognizable and relievable.

To the end, therefore, that the said defendant may, if he can, show why your orator should not have the relief hereby prayed, and may, upon his corporal oath, and according to the best and utmost of his knowledge, remembrance, information and belief, full, true, direct and perfect answer make to all and singular the matters and things hereinbefore stated and charged, and particularly to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written he is required to answer:

That is to say, the said defendant may fully set forth and discover, according to the best of his knowledge, remembrance, information and belief, the nature and situation, amount and value of all the property, interest and effects of the said defendant *Richard Roe*, including all things in action of whatever nature or kind, with all the particulars relating thereto, and that he may answer and state whether, at the time of filing this your orator's bill of complaint, he, the said defendant had not debts due to him to a considerable amount; and if so that he may state particularly the amount of such debts respectively, and from whom the same are due, and what security is held therefor; and also that he may state which and what amount of said debts are good and collectible, and what amount are bad or doubtful; and whether at the time of filing this your orator's bill of complaint he has not some property, real or personal, in law or equity, belonging to him, or held in trust for him, or in which he has some beneficial interest of some kind or description, and if so that he may state and set forth a full, true and particular account thereof, and the nature and value of his interest therein; and that he may also state whether he has not money of some kind in his possession or under his control, or deposited to his credit, or for his use, or in some way or manner held for his use and benefit; and if so, that he may state and set forth particularly the amount thereof, and how and by whom the same is held; and that he may also state whether he has any other equitable interest or thing in action, or other means belonging to him, or in which he is in any way interested, whereby he could pay any part of the amount so as aforesaid due to your orator upon said judgment against him, to your orator.

And if the said defendant has made any sale, assignment or transfer of his property and effects, or any part thereof, that then the said defendant may state and set forth generally, but not in items, what property or effects have been so sold, assigned or transferred, and

the value thereof, and particularly when and to whom, and for what purpose, and upon what terms and conditions, such sale, assignment or transfer was made, and what has been done under such sale, assignment or transfer, and what has been done with the property or effects so sold, assigned or transferred, and the avails thereof. And that the said defendant may specially state or set forth whether he has sold, assigned, transferred, or in any other manner disposed of the whole or any part of a lot of *twenty-five one thousand* dollar unregistered *four* per cent. bonds of the United States, whose further description is to your orator unknown, which were purchased by said defendant from *Richard Fen*, of *Chicago* aforesaid, on the *twelfth* day of *September*, in the year of our Lord one thousand eight hundred and *ninety-seven*; and if so, to whom he has sold, assigned, transferred, or otherwise disposed of said bonds, and for what purpose, and for what price, consideration or other thing, and what were the avails of such sale, assignment, transfer or disposal, both in amount and nature, and whether the avails aforesaid, if any, have been secreted or in any manner transferred or disposed of, and if so, how, and to whom, and for what purpose, and upon what consideration. And that the said defendant may be decreed to pay your orator the amount so as aforesaid due to him for principal and interest on his said judgment, together with your orator's costs and charges in this behalf sustained; and may be decreed to apply for that purpose any money or property, real or personal, in law or equity, debts, choses in action or equitable interests belonging to said defendant *Richard Roe*, or held in trust for him, or in which he in any way or manner is beneficially interested; and that the said defendant may be enjoined and restrained from selling, assigning, transferring, delivering, negotiating, discharging, receiving, collecting, incumbering, or in any way or manner disposing of, or intermeddling with any debts or demands due to him, or any bills, bonds, notes, drafts, checks, book accounts, mortgages, judgments, or other debts due to him, whether in his possession, or held by some other person in trust for him or to his use or benefit; and also from selling, assigning, transferring, or in any manner incumbering or disposing of, or intermeddling with any money in coin, bank bills, drafts or checks belonging to him, whether in his possession, or held by any person in trust for his use or benefit, or any stock or interest in any private or incorporated company, or any property, real or personal, things in action, or chattels real held by him, or by any other person for him, or in which he has any interest whatever, except when such trust has been created by, or the fund so held in trust has proceeded from, some person other than the said defendant *Richard Roe*.

And that the said defendant may also be in like manner prohibited from making any assignment of his property, and from confessing any judgment for the purpose of giving preference to any other creditor over your orator, and from doing any other act to enable other creditors to obtain his property. And that a receiver may be appointed, according to the course of practice in this court, and with the usual powers of receivers in like cases, of all the property, equi-

table interests, things in action and effects of the said defendant *Richard Roe.*

And that your orator may have such further or such other relief in the premises as the nature of his case shall require, and as shall be agreeable to equity and good conscience.

May it please your honors to grant unto your orator the people's writ of injunction, issuing out of and under the seal of this honorable court, to be directed to the said defendant *Richard Roe*, and to his counselors, attorneys, solicitors, trustees and agents, therein and thereby commanding and strictly enjoining the said defendant and the persons before mentioned, in manner aforesaid.

And may it please your honors to grant unto your orator the people's writ of summons, issuing out of and under the seal of this honorable court, to be directed to the said defendant *Richard Roe*, therein and thereby commanding him on a certain day and under a certain penalty, to be therein inserted, that he personally be and appear before this honorable court, on the first day of the next regular term thereof, to be held at the *court-house*, in the county of *Cook* aforesaid, the *second* day of *March next*, then and there to answer all and singular the premises, and to stand to and abide by and perform such order and decree therein as to your honors shall seem agreeable to equity and good conscience.

And your orator will ever pray, etc.

John Doe.

Mason & Webster, Complainant's Solicitors.

State of *Illinois*, } ss.
Cook County. }

On this *twenty-first* day of *February*, one thousand eight hundred and *ninety-eight*, personally came before me *John Doe*, who, being duly sworn, saith that he is the complainant and your orator in the above bill of complaint; that he has read the foregoing bill of complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters and things therein stated to be upon information and belief, and as to these matters he believes it to be true.

John Doe.

Subscribed and sworn to before me this *twenty-first* day of *February*, A. D. 1898. *Abraham Kent*, J. P.

2. Dower Interest Not Set Off.

Form No. 6640.[1]

To the Hon. the Justices of the *Superior* Court within and for the County of *Worcester.* Sitting in Equity.

1. This form is copied from the record in the case of McMahon *v.* Gray, 150 Mass. 289, in which case it was held that the creditor of a widow who is entitled to dower which has not been assigned to her, and who is in occupation of the lands of her deceased husband, under Mass. Pub. Stat. (1882), c. 124, § 13, may maintain a bill in equity under Mass. Pub. Stat. (1882), c. 151, § 2, cl. 11, as *amended* by Stat. (1884), c. 284, to reach and apply in payment of his debt her right to have her dower assigned to her out of such lands. See also *supra*, note 1, p. 874.

Between
Michael F. McMahon and John Burns, plaintiffs,
and
Catherine Gray, defendant.
All of the *City and* County of *Worcester*.

1. And the plaintiffs say that the defendant and *John F. Gray* made a promissory note, a copy of which is hereto annexed marked *A*, payable to the order of the plaintiffs. And the defendant owes the plaintiffs the amount of said note and interest thereon.

2. Said *Catherine Gray* is the wife of said *John F. Gray*, and, before her marriage with said *John F.*, was the widow of one *Timothy D. Leahy*, late of said *Worcester*, deceased; that said *Leahy* died seised in fee of the following described real estate situated in said *Worcester*. (*Here followed a description of the land.*)[1]

3. Said *Timothy D. Leahy* died intestate, leaving this defendant, *Catherine Gray*, as his widow.

Said *Catherine* was at the time of the death of said *Leahy*, and now is, entitled to dower in said real estate, and to have the same assigned to her, but the same has never been assigned to her, and no petition has ever been filed by any person entitled so to petition to have said dower interest of said *Catherine* assigned to her, and said *Catherine* has been ever since her said husband *Leahy's* death, and is now, in occupation of said estate.

4. The said dower interest of said defendant *Catherine* cannot be come at to be attached or taken on execution.

Wherefore said plaintiffs pray that said interest and right of said defendant *Catherine* to have dower assigned to her out of said real estate may be applied in payment of said plaintiffs' debt, and that a receiver may be appointed with authority to petition in said defendant *Catherine's* name to have said dower assigned and to receive the rents and profits thereof, and for other and further relief, and that she may be enjoined from conveying or disposing of her said right and interest, and that a subpœna may be issued to her to appear and answer hereto.

By their Attorneys,
Verry & Gaskill.

3. Judgment Standing in Favor of Debtor.

Form No. 6641.[2]

To the Honorable the Justices of the *Supreme Judicial* Court, sitting in Equity for the County of *Worcester*,

Complains *Welcome A. Thayer* of *Blackstone*, in said county, against

1. **The land was described** as follows, to wit:

"A certain tract of land situated on *Ward* street in said *Worcester*, being the *southerly* part of the parcel conveyed to *T. Arroquier* by *Mason H. Morse*, by deed dated *March 5*, 1869, and bounded and described as follows, to wit:

Westerly by *Ward* street *52* feet; *southerly* by land now or late of *John P. Pond 78* feet, more or less; *easterly* by land of *Mason H. Morse 41* feet; *northerly* by land now or formerly of said *Arroquier 61* feet, more or less, and the same conveyed to *Leahy* by said *Arroquier* by deed dated *April 12*, 1869, recorded with the *Worcester* County Deeds, Book *787*, Page 432."

2. This form is copied from the rec-

John M. Daniels of *Mendon*, in said county, and *Mahlon M. Daniels* of *Blackstone*, in said county, and shows that by the consideration of our justices of the *Superior* Court, holden at *Worcester* on the *tenth* day of *December*, A. D. 1872, he recovered judgment against the said *John M. Daniels* for the sum of *seven hundred and seven and thirty-seven one-hundredths* dollars debt or damage and *one hundred and three and twelve one-hundredths* dollars costs of suit, which judgment has been satisfied in part only, to wit, in the sum of *one hundred and eighteen and forty-eight one-hundredths* dollars, and that he, the said plaintiff, is a creditor of the said *John M. Daniels* in the sum of *six hundred and ninety-two and eleven one-hundredths* dollars and interest from the date of said judgment to the time of filing this bill.

And your orator further shows that said *John M. Daniels* has not any property which can be come at to be attached or taken in execution for the payment of said judgment debt.

And your orator further shows that said *Mahlon M. Daniels* is indebted to the said *John M. Daniels* in the sum of about *two hundred* dollars damage and costs of suit, to wit, in about the sum of *eighty* dollars debt or damage and *one hundred and twenty* dollars costs of suit, for which sums judgment has been rendered in our said *Superior* Court, but no execution has been issued on said judgment, which sums cannot be reached by your orator by the ordinary trustee process or by any process of the common law.

And your orator further shows that said *John M. Daniels* is about to take out execution on said judgment so recovered by him and to collect the same of the said *Mahlon M. Daniels* for his own use, and does not intend to apply the same to the payment of the plaintiff's demand.

All of which actings and doings are contrary to equity and tend to the manifest wrong and injury of your orator in the premises. In consideration whereof, and forasmuch as your orator can only have adequate relief in the premises in a court of equity, where matters of this nature are properly cognizable and relievable.

Wherefore your orator prays that a writ of subpœna may issue requiring said *John M. Daniels* to appear and answer hereto, but not under oath, which is waived, and that said *John M. Daniels*, his attorneys, agents, servants, etc., may be enjoined from taking out execution on said judgment against said *Mahlon M. Daniels*, and from collecting said judgment debt and cost for his own use; and that said *Mahlon M. Daniels* may be enjoined from paying said judgment debt and cost to the said *John M. Daniels*, or to any other person except on the order of this court, and may be decreed to pay said judgment debt and cost to the plaintiff in part satisfaction of the balance due the plaintiff as aforesaid from the said *John M. Daniels*, and that your

ord in the case of Thayer *v.* Daniels, 113 Mass. 129, in which case, however, the bill was dismissed, as the master to whom the case was referred found that the judgment had been assigned for valuable consideration before the filing of the bill, and that one Burgess, an attorney at law, had also a lien upon it for fees and disbursements for prosecuting the suit in which it was obtained to final judgment. For the present form of a bill in equity in *Massachusetts* see vol. 4, Form No. 4273.

See also *supra*, note 1, 874.

orator may have such other and further relief as to your honors shall seem meet.

Welcome A. Thayer.

Worcester, ss. *Feb. 18*, 1873.

Then personally appeared *Welcome A. Thayer* and made oath that the allegations aforesaid are true to the best of his knowledge and belief. Before me,

T. G. Kent, J. P.

T. G. Kent, Complainant's Solicitor.

4. Patent-right.

Form No. 6642.[1]

Commonwealth of *Massachusetts.*

Suffolk, ss. In Equity.

John C. Wilson
v.
Martin-Wilson Automatic Fire Alarm Co.

To the Honorable the Justices of the *Superior* Court within and for the County of *Suffolk.*

The complainant shows unto your honors that the respondent company owes him *one thousand* dollars for services as treasurer and electrician for the year 1886, and the respondent has admitted the complainant's claim, and has often promised to pay the same. And the complainant has made diligent search but has been unable to discover any goods or estate of the respondent which can be come at to be attached to secure the complainant's claim, all the goods and chattels of the respondent in this *commonwealth* having been attached for more than their value, to secure claims of other creditors of the respondent. But the respondent is the owner of certain letters patent of the United States for fire alarm apparatus, numbered as follows, viz., *156,560*; *266,706*; *272,893*; *329,468*; *329,469*; *329,470*; *341,114*; *341,115*; *342,114*; *360,968*; and certain inventions or improvements in such apparatus made by *Morris Martin*, and by him assigned to the respondent, he having made application for letters patent of the United States therefor.

The complainant further shows unto your honors that the respondent has, by vote, authorized the sale of said patent and patent-rights, and that its officers are about to sell the same at public auction in said *Boston.*

All which actings, doings, refusals and pretenses are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator in the premises.

In consideration whereof, and forasmuch as your orator is remediless at and by the strict rules of the common law, and cannot have

1. This form is copied from the record in the case of Wilson *v.* Martin-Wilson Automatic Fire Alarm Co., 151 Mass. 515, in which case it was held that a sale and conveyance of letters patent by a master might be ordered, under Mass. Stat. (1884), c. 285, § 1, to satisfy the debt. See also *supra*, note 1, p. 874.

adequate relief save in a court of equity, where matters of this and like nature are properly cognizable and relievable.

To the end, therefore, that the said defendant may, if it can, show why your orator should not have the relief hereby prayed, and may, according to the best and utmost of its knowledge, remembrance, information and belief, full, true, direct and perfect answer make to all and singular the matters aforesaid, but not upon oath or affirmation, the benefit whereof is expressly waived by your orator.

Your orator prays as follows: that his said claim may be established, and that a receiver may be appointed to take possession of said letters patent and patent-rights, and to sell the same and apply the proceeds to the satisfaction of your orator's claim.

May it please your honors to grant unto your orator, not only a writ of injunction issuing out of and under the seal of this honorable court, to be directed unto the said *Martin-Wilson Automatic Fire Alarm Company*, its officers, agents and servants, to restrain it and them, and each of them, from selling or interfering in any manner with letters patent of the United States numbered *156,560*; *266,706*; *272,893*; *329,468*; *329,469*; *329,470*; *341,114*; *341,115*; *342,114*; *360,968*; and inventions and patent-rights assigned to the respondent by *Morris Martin*, but also a writ or writs of subpœna, to be directed to the said *Martin-Wilson Automatic Fire Alarm Company*, thereby commanding it at a day certain, and under a certain penalty therein to be limited, personally to be and appear before this honorable court, and then and there full, true, direct and perfect answers make to all and singular the premises, and further to stand to, perform and abide such further order, direction and decree therein as to this honorable court shall seem meet.

John C. Wilson.

Frank T. Benner, Solicitor.
(*Verification as in Form No. 6641.*)

5. Property in Name of Another where Purchase Money was Furnished by Debtor.[1]

Form No. 6643.[2]

To the *Supreme Judicial* Court. In Equity.

Hiram W. Berry, of *Casco*, in the county of *Oxford* and state of *Maine*, administrator of the estate of *John Berry*, late of said *Casco*, deceased, complains against *Albion K. P. Berry* and *Lizzie T. Berry*, his wife, both of *Casco* in said county and state, and says:

1. That at the *September* term, A. D. 1875, of this court, to wit, on the *eighteenth* day of *September*, A. D. 1897, the same being one of the

1. For the substance of a bill to reach promissory notes belonging to the debtor, an insurance company, but held by another who is its agent, see Silloway *v.* Columbia Ins. Co., 8 Gray (Mass.) 199.

2. This bill is based upon the facts in the case of Berry *v.* Berry, 84 Me. 541, in which case a decree in favor of the plaintiff, rendered by the single justice who heard the cause in the court below, was affirmed on appeal. See also *supra*, note 1, p. 874.

regular days of said term, the said *John Berry* recovered a judgment against the said defendant, *Albion K. P. Berry*, for the sum of *six hundred and nine* dollars and *twelve* cents for the damages which he had sustained and the costs of suit and charges of plaintiff by him about his suit in that behalf expended, as by the record of the said judgment in the office of the clerk of said court, reference being thereto had, and to which for greater certainty plaintiff prays leave to refer, will more fully and at large appear.

2. That the said judgment recovered in manner aforesaid remaining in full force and effect, and the costs, charges of suit and damages aforesaid unpaid and unsatisfied, plaintiff, on the *twentieth* day of *September*, A. D. 1875, for the purpose of obtaining satisfaction of said judgment, sued and procured out of said court a writ of fieri facias directed to the sheriff of said county of *Oxford*, by which said writ said sheriff was commanded that of the goods, chattels, lands and tenements of the defendant, *Albion K. P. Berry*, in his county, he cause to be made the sum of *six hundred and nine* dollars and *twelve* cents, which plaintiff in said court recovered against said defendant, *Albion K. P. Berry*, and that he should have the money at the clerk's office of said court at *Casco*, in said county, in *thirty* days from the date thereof, to satisfy the judgment so recovered by plaintiff as aforesaid, and that he should have then and there that writ.

3. That said writ of fieri facias was afterward, to wit, on the *twenty-first* day of *September*, A. D. 1875, delivered to said sheriff to be executed in due form of law, and that said sheriff, on the *twenty-first* day of *October*, A. D. 1875, returned said writ to him in that behalf directed and delivered as aforesaid, that after due search he had been unable to find within said county of *Oxford* any goods, chattels, lands or tenements of the said *Albion K. P. Berry* whereof the said judgment and execution, or any part thereof, could be made, as by the said writ of fieri facias, and the return of the said sheriff indorsed thereon, as aforesaid, now on file in the office of the clerk of said court, reference being thereto had, and to which for greater certainty plaintiff prays leave to refer, will more fully and at large appear.

4. That afterward, to wit, on the *third* day of *January*, A. D. 1880, the said *John Berry* died intestate, and that at a term of the *Probate* Court held at *Casco*, within and for said county of *Oxford*, on the *second Monday* of *February*, A. D. 1880, the said *Hiram W. Berry* was duly and legally appointed administrator upon the goods and estate of the said *John Berry*, and thereupon accepted said trust and qualified by giving bond, as the law directs.

5. That said judgment so recovered by said *John Berry* as aforesaid still remains in full force and effect, not reversed or satisfied, or otherwise vacated, and that the said defendant, *Albion K. P. Berry*, has not paid same to the said *John Berry*, nor to plaintiff as administrator of the goods and estate of the said *John Berry*, but has hitherto wholly neglected and refused so to do.

6. That on the *third* day of *May*, A. D. 1883, the said *Albion K. P. Berry* contracted for and purchased a farm of *John J. Holman* of *Dixfield* in the county of *Oxford*, to wit: The farm on which the

said *Albion K. P. Berry* now resides with his family (*describing farm*), for the consideration of *twelve hundred* dollars, and then and there paid the said *John J. Holman* the sum of *nine hundred* dollars for the same farm with his own money, or caused and furnished the money to be so paid, and then and there caused the said real estate to be conveyed by said *John J. Holman* to said *Lizzie T. Berry*, who then was, ever since has been, and now is the lawful wife of said *Albion K. P. Berry*, with intent to cheat and defraud the said plaintiff in his said capacity of his said debt or judgment, and she, the said *Lizzie T. Berry*, well knowing the premises, but intending to aid her said husband in so cheating and defrauding the plaintiff, and then having no property of her own, gave her promissory note to said *John J. Holman* for the sum of *three hundred* dollars, and a mortgage of said real estate to secure the same, as the balance of the consideration of said purchase.

7. That on the *tenth* day of *September*, A. D. 1883, a second writ of execution was issued on said judgment, which was put into the hands of *Oscar F. Trask*, an officer duly qualified to serve the same, who afterward returned the same unto said court in no part satisfied, with his indorsement thereon that he was unable to find any goods or estate of the said debtor in his precinct wherewith to satisfy the same.

And whereas your petitioner has no remedy at law by which he can obtain the interest of said *Albion K. P. Berry* in said real estate to satisfy his judgment and execution, he prays that he may be heard in equity, and that the court will decree a conveyance of so much of said real estate as may be necessary for the payment of said execution and judgment, in case it shall be ascertained that said mortgage is paid, or decree that the right of redeeming the same real estate from said mortgage may be levied upon and sold at auction. And your orator prays for such other and further decrees as to the court may seem just and proper in the premises.

Hiram W. Berry.

Jeremiah Mason,
Attorney of Complainant in Equity.
(*Verification.*)[1]

Form No. 6644.[2]

Norfolk, ss.

Timothy Bresnihan
vs.
John Sheehan and Ellen Sheehan.
} *Supreme Judicial* Court.

Bill of Complaint.

To the Honorable the Justices of the *Supreme Judicial* Court, next to be holden at *Dedham*, within and for the County of *Norfolk*, sitting in Equity.

Respectfully represents to your honors *Timothy Bresnihan* of *Weymouth*, in said county.

1. For the form of verification of a bill in equity in *Maine* see the title BILLS IN EQUITY, Form No. 4271.

2. This form is copied from the record in the case of Bresnihan *v.* Sheehan, 125 Mass. 11, in which case it was

First — That one *John Sheehan*, of said *Weymouth*, is justly and truly indebted to him in the sum of *seven hundred and thirty* dollars for board furnished by him to said respondent and his minor son, *John Sheehan, Jr.*, according to the account hereto annexed, marked *A*.

Second — That, as your orator is informed and believes, said *John Sheehan*, previous to the contracting of said indebtedness, was for a long time constantly employed, and earned and received large sums of money.

Third — That while so employed and receiving regularly said moneys, said *John Sheehan* deposited all his wages with his wife, *Ellen Sheehan*, said other respondent, for safe keeping, after expending such part thereof as was needed for the family temporary expenditures; and in justice and equity to be applied to the payment of his indebtedness.

Fourth — That from said surplus, from time to time deposited in the *Savings Bank* by the said *Ellen* without the knowledge of her said husband, in her own name, a large sum, to wit: a *thousand* dollars, accumulated, which, without the knowledge or assent of the said *John Sheehan*, she used in the purchase of a certain piece of real estate, using these said funds to make part payment therefor, and in part other moneys borrowed by her on her sole credit, the same described in the deed hereto annexed, marked *B*, the record title of which the said *Ellen* took and held in her own name, and still holds.

Fifth — That as your orator is informed and believes, said *John Sheehan* has no other property than that so deposited with said *Ellen*, and after full and diligent inquiry, they aver that he has none that can be come at to be attached, or taken on execution in a suit at law, against said debtor.

Wherefore, inasmuch as your orator is ignorant whether the said *Ellen* still retains in her hands said moneys so deposited with her by said *John Sheehan*, and if so, in what form, or has used it for the purchase of said real estate, which as above averred upon information, your orator believes to be true; and if correctly informed, as he is advised that said estate was not purchased, or directly or indirectly paid by said debtor, having the record title conveyed to said *Ellen*, with intent to defeat, delay or defraud your orator or any other creditor, or on a trust for him, said debtor, express or implied, whereby he is entitled to a present conveyance from said *Ellen*.

And is also advised that he can only reach said debtor's property, and rights of property before referred to, by the aid of a court of equity, wherein matters of this nature are cognizable under and by virtue of *chapter 113, § 2, Gen. Stat.*

To the end, therefore, that said defendants may full, true, direct

held that if a wife, without her husband's knowledge or assent, deposits his wages, placed in her hands for safe keeping, in a savings bank, and uses the deposit with money of her own in the purchase of land, the title to which she takes and holds in her own name, the husband has an equitable interest in the land, to reach and apply which, in payment of his debt, a creditor of the husband may, under Gen. Stat. (1860), c. 113, § 2, c. 11, maintain a bill in equity against him and his wife. For the present form of the bill in *Massachusetts* see vol. 4, Form No. 4273.

See also *supra*, note 1, p. 874.

and perfect answer make to all and singular the charges and matters aforesaid, and more especially that they may discover and set forth whether the said *John Sheehan* did not deposit, from time to time, all his earnings and moneys with said *Ellen Sheehan*, as hereinbefore averred, and if so, to what amount; and will also discover and set forth whether the said *Ellen* now holds said funds as deposited, or what use or disposal was made of the same; also whether said parcel of real estate was not purchased as alleged, and is not now so held by said *Ellen*, answer under oath being hereby waived. And to the end that the property of said *John Sheehan* in the hands of said *Ellen Sheehan*, or so much thereof as is necessary, may be applied to the payment of the debt that your complainant proves due him from said *John Sheehan*; and that for this purpose the said respondent, *Ellen Sheehan*, may be required to transfer, assign, convey, and deliver up to some suitable person to be appointed by this honorable court to receive and sell the same, or so much of the estate and property of the said *John Sheehan* in her possession, as may suffice to satisfy the adjudged debt of your orator, and the costs of this suit.

And till such payment or satisfaction, that the said *Ellen Sheehan* may be enjoined from paying out, transferring, conveying or passing away any of the property of the said *John Sheehan* in her hands, or the property alleged to be purchased therewith, except in liquidation of your orator's said debt.

May it please your honors to grant unto your orator, not only the writ of injunction restraining the said defendants as aforesaid, but also a writ of subpœna, commanding the said defendants at a day certain to be and appear before this honorable court, and to stand to, perform and abide such order, direction and decree as your honors may make in the premises. *Timothy Bresnihan.*

By his Attorney — *W. E. Jewell.*

6. Royalty Payable Under a Publisher's Contract.

Form No. 6645.[1]

Commonwealth of *Massachusetts.*

Supreme Judicial Court.

Suffolk, ss. In Equity.

George W. T. Lord et als.

vs.

Bret Harte et als.

Bill of Complaint.

George W. T. Lord, *Samuel Lord*, *Jr.*, and *Thomas Varleer*, all of the state, county and city of *New York*, and doing business in said city as partners under the firm name of *Lord & Taylor*, bring this

1. This form is copied from the record in Lord *v.* Harte, 118 Mass. 271, in which case it was held that a creditor may maintain a bill in equity to reach and apply, to the payment of the debt, money due and afterward accruing to the debtor, from a contract of the latter with book publishers, by which they agree to pay to the debtor a royalty upon the price of each book sold by them, to account with him semi-annually, and to pay him the amounts then found to be due, if the amount due at the time of filing the bill is not sufficient to satisfy the debt.

See also *supra*, note 1, p. 874.

their bill against *Bret Harte*, of *Morristown* in the state of *New Jersey*, and *James R. Osgood*, *John S. Clark* and *Benjamin H. Ticknor*, all of *Boston* in said *commonwealth*, and doing business in said *Boston* under the firm name of *J. R. Osgood & Co.*, equitable trustees for said *Harte*; and thereupon your orators complain and say, —

First. That in the year A. D. 1874, they brought suit for certain causes of action against the said *Harte*, in the *Superior* Court of said city of *New York*, and by the consideration of the justices of said court recovered judgment against him for the sum of *eleven hundred fifty three and seventy-six one-hundredths* dollars, all of which is more fully shown in an exemplified copy of the judment roll of said court, to which your orators crave leave to refer, and which they will produce at the hearing in this cause.

Second. That said judgment remains wholly unpaid and unsatisfied at the filing of this bill, and that said *Harte* owes your orators the amount thereof with interest.

Third. And your orators further say, that the said *Harte* is an author of some reputation, and has written works in prose and poetry which have been collected and published in several volumes, and have a large and extended sale in the United States and elsewhere; that among the works so published are the following; to wit, —

(a) A volume of stories and sketches entitled "*The Luck of Roaring Camp.*" (b) A volume of similar characters entitled "*Mrs. Scagg's Husbands.*" (c) A volume of stories entitled "*Condensed Novels.*" (d and e) Two volumes of poems, the copyrights whereof under the laws of the United States are of value.

Fourth. And your orators further say, that the said works have been published and sold, and are now being published and offered for sale, in many different editions, by the defendants *Osgood*, *Clark* and *Ticknor*.

Fifth. And your orators are informed and believe, and therefore upon their said information and belief aver, that the sole right to publish and sell said works belongs to the said *Osgood*, *Clark* and *Ticknor*; that the copyrights thereof were taken in their name or assigned to them by or with the consent of the said *Harte*, in consideration of certain contracts between them, which contracts are now in existence and are substantially as follows; to wit, that in consideration of their becoming the owners of said copyrights the said *Osgood*, *Clark* and *Ticknor* shall publish and sell copies of the said works, as may be advantageous, during the continuance of said copyrights, and out of such sales shall pay to the said *Harte* the sum of *ten* per centum upon the retail price of each book, by way of royalty or compensation, for the authorship thereof; that in said contract it is provided that an account shall be stated between said *Osgood & Co.* and the said *Harte twice* each year; to wit, in the months of *May* and *November*, and upon said statements the amounts found to be due said *Harte* are then payable to him under the contracts.

Sixth. And your orators are further informed and believe, and therefore upon their said information and belief aver, that since the existence of said contracts the said *Harte* has received under them each year, as royalty upon the sale of his works, a large sum of

money, to wit, more than the amount of his debt to your orators; that the sale of said works continues to be large, and that the interest of the said *Harte* therein is likely to be valuable in the future.

Seventh. And your orators say that the interest of said *Harte* in the contracts above mentioned cannot be come at to be attached or taken on execution in a suit at law against said *Harte.*

And the plaintiffs further aver upon their information and belief, that the amount of money due upon a proper accounting (if anything) from *Osgood & Co.* to said *Bret Harte* at the time of filing their bill, or which shall have become due at the first accounting after the service of the bill, will not be sufficient to pay the indebtedness of said *Harte* to the plaintiffs.

To the end therefore that the defendants may, if they can, show why your orators should not have the relief hereby prayed, and may, waiving their several and respective oaths, full, true and perfect answers make to all and singular the premises, and more particularly that the said *Osgood*, *Clark* and *Ticknor* may full answer make to the several interrogatories hereinafter numbered and set forth, to wit,—

1. Whether they have published and offer for sale any of the works of the defendant *Harte*, and if so, what of said works and how many editions of the same they are now so offering?

2. Whether they own the copyrights of said works, and if they do, whether said copyrights were procured to be issued to them by said *Harte*?

3. Whether any contracts exist between them and said *Harte*, and to annex a copy of the same to their answer to this bill.

4. Whether anything is now due from them to said *Harte* under said contracts?

5. Whether the accounts between them and said *Harte* are, by their contracts, to be settled at any particular times, and if so, when.

And that the said *Osgood*, *Clark* and *Ticknor* may be ordered by this honorable court to account with your orators for such sums of money as may now be due or hereafter fall due said *Harte* under said contracts, until his debt to your orators, with the interest thereon and the costs of this proceeding, shall be fully paid and discharged; or that said *Osgood*, *Clark* and *Ticknor* may be ordered to pay the same into court, subject to the order of this honorable court; and that your orators may have such further and other relief in the premises as the nature of their case may require:

May it please your honors to grant unto your orators a writ of subpœna, to be directed unto the said *Bret Harte*, *James R. Osgood*, *John S. Clark* and *Benjamin H. Ticknor*, commanding them at a certain time, and under a certain penalty therein to be limited, personally to appear before this honorable court, and then and there full, true, direct and perfect answer to make to all and singular the premises; and further, to stand to, perform and abide such further order and decree therein as to this honorable court shall seem meet.

G. W. T. Lord,
S. Lord, Jr.,
Thomas Varleer,
by their Solicitor,
M. M. Weston.

7. Treasury Warrant.

Form No. 6646.[1]

Commonwealth of *Massachusetts.*

Suffolk, ss.

Superior Court.
Bill in Equity.

William McCann
vs.
Simon F. Randall and Jerome F. Manning.

Your complainant *William McCann* of *Portland*, state of *Maine*, shows unto your honors that *Simon F. Randall*, now of *Brooklyn*, state of *New York*, on the *eighteenth* day of *January*, A. D. 1869, at *Portland*, state of *Maine*, made his certain promissory note of that date whereby he promised on demand after date to pay to the order of *Wm. McCann, ten hundred and forty-seven* dollars for value received and duly stamped said note, and delivered the same to your orator, the said *William McCann*, whereby the said defendant became liable to pay the same according to the tenor of said note, a copy whereof is hereunto annexed: That the said defendant *Randall* has never paid the same or any part thereof, but the same, together with interest amounting to *two thousand and fifty-three* dollars and *sixteen* cents in all, is still due and payable to your orator, which complainant is entitled to have and recover from said defendant *Randall*; that said defendant *Randall* has in this state certain property, rights, title or interest legal or equitable which cannot be come at to be attached or taken on execution in a suit at law, against said debtor, to wit: a certain negotiable draft numbered (*B 14883*) on *Diplomatic Warrant No. 2232*, signed by *Q. N. Wyman*, payable to the order of said defendant *Simon F. Randall* at the Assist. Treasury at *Boston, Mass.*, for the sum of *two thousand six hundred and forty-six* dollars and *two* cents, dated *August 12*, A. D. 1884, registered *August 12*, A. D. 1884, issued under authority of the United States, and which your orator cannot more fully describe, deposited and in the possession of *Jerome F. Manning*, doing business at *131 Devonshire* street in said *Boston*; that said defendant has refused and still refuses to pay said claims or to apply said inattachable property thereto, all of which doings of said defendant *Randall* are contrary to equity and good conscience, and tend to the manifest injustice of your orator.

In consideration whereof and forasmuch as your complainant can only have adequate relief in a court of equity, where matters of this nature are properly cognizable and relievable, and to the end that the said *Jerome F. Manning* and the said *Simon F. Randall* may severally answer all and singular the premises, and that there may be a decree that said *Randall* pay said sum as aforesaid, and that so

1. This form is copied from the record in the case of McCann *v.* Randall, 147 Mass. 81, in which case it was held that a United States treasury draft, which was issued upon the award of the Court of Commissioners of Alabama Claims, payable to a nonresident and found here unindorsed in the custody of an agent, may be reached by a creditor of the payee by a bill in equity under Mass. Pub. Stat. (1882), c. 151, § 2, cl. 11.

Consult note 1, p. 874, *supra.*

much of the proceeds of said draft as are necessary therefor may be appropriated to the payment of said claims, and that on failure of said *Randall* to indorse said draft the same may be indorsed by some person appointed by this court therefor, and that said defendant *Manning* may be enjoined from negotiating, delivering up, or parting with the possession of said draft until the further order of this court, and that your complainant may have such other and further relief as the nature of this case may require and to your honors shall seem meet, may it please your honors to grant unto your complainant proper order of notice to be directed to said defendant *Randall*, and a writ of subpœna to be directed to said *Jerome F. Manning* of said *Boston*, commanding them and each of them on a certain day to appear before your honors and answer the premises and abide such order and decree as to your honors shall seem meet, and also a temporary writ of injunction to be directed to the said *Jerome F. Manning* restraining him from in any way negotiating or disposing of said draft until the further order of his court.

his
William × *McCann.*
mark

Witness to
William McCann's
Signature
Josiah H. Drummond, Jr.

State of *Maine*,
Cumberland, ss. *February 2*, 1885.

Then personally appeared the above named *William McCann* and made oath that he has read or heard read the above bill in equity and knows the contents thereof, and that the same is true except as to those matters stated on information and belief, and that as to those he believes them to be true.

Before me,
Josiah H. Drummond, Jr.,
Justice of the Peace.

8. Trust Property.

a. Devise in Trust.

Form No. 6647.[1]

Bill in Equity.

In the *Supreme* Court of the *District of Columbia*, the *twenty-third* day of *October*, 1896.

1. This form is based upon the facts in the case of Bryan *v.* May, 9 App. Cas. (D. C.) 383, in which case, however, the bill was defective in omitting to join Sarah Maria May, the executrix of the will, and co-trustee with defendant of the estate thereunder, as a party defendant, and for the further reason that while the bill showed that the monthly revenues of the estate amounted to twelve hundred dollars, two-thirds of which was for distribution among the children of the testator, there was no prayer for special relief in respect to this fund.

Consult note 1, p. 874, *supra*.

Charles C. Bryan, plaintiff,
v.
William May, and William May and Sarah Maria May, as executors and trustees under the will of John F. May, deceased, defendants. } No. *593.*

To the *Supreme* Court of the *District* of *Columbia*, holding an Equity Court.

The plaintiff states as follows:

1. He is a citizen of *Northport*, in the state of *New York*, and brings this suit in his own right.

2. The defendant *William May* is a citizen of the United States and a resident of the *District of Columbia*, and is sued in this action in his own right, and also as executor and trustee under the will of *John F. May*, deceased.

The defendant *Sarah Maria May* is a citizen of the United States and a resident of the *District of Columbia*, and is sued in this action as executrix, and as co-trustee with said *William May*, under the will of *John F. May*, deceased.

3. The plaintiff recovered a judgment against defendant *William May* on the *fifth* day of *June*, 1895, in the *Supreme* Court of the *District of Columbia*, for the sum of *three hundred and forty-five* dollars and *sixty-five* cents, with interest from the *second* day of *November*, 1893, which judgment remains unpaid, and upon which execution has been returned unsatisfied.

4. The defendant *William May* is an heir at law and devisee of *John F. May*, who died in the said district the *first* of *May*, 1891, seised and possessed of a large amount of valuable real estate, situated therein, and described as follows (*describing it*).

5. The said *John F. May*, at the time of his decease, as aforesaid, left a last will and testament and codicil, which said will and testament and codicil are hereto annexed and made a part of this bill and marked Exhibit *A*; that on the *fifth* day of *June*, 1891, said last will and testament and codicil of the said *John F. May*, deceased, were duly proved before the Hon. *John Marshall*, a justice of the *Supreme* Court of the *District of Columbia*, holding a special term of said court for probate business, and duly admitted to probate by said justice. A copy of said order of probate is hereto annexed and made a part of this bill and marked Exhibit *B*.

6. By the said will the said *John F. May* (*Here was set out the substance of the provisions of the will in question*).[1]

1. By the said will the testator devised and bequeathed all of his estate to his wife, Sarah Maria May, subject to the trusts subsequently provided, to have and hold, to collect rents, revenues, etc. He then gives her, absolutely, one-third of his personal estate, and for life one-third of all the rents and revenues of his estate, together with the house and lot where he resided. Expressing the wish to keep his estate "intact and undivided, in the belief of its increase in value, and especially to insure unto my wife and children a certain income during their lives," he directed "that no division of it shall be made while any of my children are living, and the rents, profits and issues of it, with the exception of the thirds of my wife, shall be applied to the payment of all just debts I may owe at the time of my death, and especially to the

7. The rents and revenues collected from said estate by defendant *William May* amount to at least *twelve hundred* dollars per month.

8. By the terms of said will, defendant *William May* has vested in him an equitable estate in fee subject to the trusts declared in said will.

9. On the *second* day of *May*, 1895, defendant *William May* having given a bond for costs in the Court *of Appeals*, on an appeal to the *Supreme* Court *of the United States*, upon which the *American Surety Company* became surety, induced one *Victorine M. Learned* to deposit with said company *twenty thousand* dollars of bonds to secure it against loss on said bond, and on the *second* of *May*, 1895, to save said *Victorine M. Learned* harmless, defendant *William May* conveyed to her his interest in the estate aforesaid.

10. Wherefore plaintiff prays that defendant *William May* be decreed to pay and satisfy the amount due on said judgment and the costs of this suit; and to apply for that purpose his interest or portion of the rents, profits, and incomes accruing to him under the will of said *John F. May*; and that should the aforesaid rents, profits and incomes be found insufficient or unavailable to satisfy said judgment, it may be decreed that all the right, title, and interest of said *William May* in the real estate devised to *Sarah Maria May* and *William May*, as trustees under the will of *John F. May*, or so much thereof as is necessary, may be applied in satisfaction of said judgment; and that for this purpose the said *William May* and his co-trustee, *Sarah Maria May*, may be required to transfer, assign, convey, and deliver up to some suitable person to be appointed by your honor to receive and sell the same, subject to the trusts created under the will of said *John F. May*, and subject further to the trust in favor of said *Victorine M. Learned*, or so much of the estate and property of the said *William May* as may suffice to satisfy the said judgment, and the costs of this suit. And until such payment or satisfaction, that the said *William May*, and his co-trustee, *Sarah Maria May*, may be enjoined from paying out, transferring, conveying or passing away any of the property of the said *William May*, except in satisfaction of said judgment.

11. And for process of subpœna directed to the said *William May*

canceling of any incumbrance or mortgage that may then exist on any part of my estate." When said debts shall have been paid, said rents, etc., shall be equally divided and paid to his children.

Nothing in said will shall prevent the sale by the trustee of any part of the estate if clearly manifest that the same shall be greatly for the benefit of his heirs. In event of sale, provision is made for investment of the proceeds. "Should either or any of the said children have married and died and left issue," their shares of the rents shall be used for the support of said issue, and any surplus shall be invested in bonds and turned over to them on attaining lawful age. The said wife is appointed executrix as well as trustee, and relieved from giving bond in either capacity. By the codicil to the said will, the testator appointed his son, the defendant William May, co-trustee with Sarah Maria May, and directed that he should take charge of the real estate (except the dwelling-house), manage the same, collect rents, pay taxes, make repairs, etc. For such service he was authorized to retain a commission of five per cent. of the money collected. He was required to render a monthly account of collections and disbursements to said Sarah Maria May, during her life, and after that to the heirs. Provision for his removal by action of the remaining devisees was made; and he was also excused from giving bond as trustee.

and *Sarah Maria May* commanding them on a certain day and under a certain penalty to be and appear in this court, then and there to answer the premises and to stand to and abide by such order and decree as may be made against him.

F. P. B. Sands,
Solicitor and of Counsel for Plaintiff.

(*Verification.*)[1]

Form No. 6648.[2]

Bill of Complaint.

To the Honorable Justices of the *Superior* Court within and for the County of *Bristol*:

Humbly complaining, represents *Cecilia C. Ricketson*, widow, of *New Bedford* within said county; that on the *thirtieth* day of *June*, 1882, she recovered judgment in the *Superior* Court of the *city and* county of *San Francisco* and state of *California*, against *George B. Merrill*, of said *city* of *San Francisco*, for the sum of $5,062.99, gold coin, and that by the laws of said state of *California*, said judgment bore interest from said *thirtieth* day of *June*, 1882, at the rate of *seven* per cent. per annum, and now amounts to the sum of $6,700; that no part of said judgment has ever been paid, and the said *George B. Merrill*, of said *city and* county of *San Francisco*, is indebted to your complainant in said sum of $6,700.

And your complainant further represents, that the said *George B. Merrill* has no property or estate which can be come at to be attached for the satisfaction of said judgment; but she avers that under and by virtue of the will of *Edward Merrill*, late of said *New Bedford* (a copy of which will is hereto annexed marked *A*), who was the father of said *George B. Merrill*, which said will has been duly probated in the *Probate* Court for the county of *Bristol*, *commonwealth* of *Massachusetts*, and whereof *Southward Potter, 2d*, of *New Bedford*, *Edward B. Merrill*, of *New York*, in the state of *New York*, and *James H. Myrick*, of *Boston*, in the county of *Suffolk*, are the executors and trustees, the said *George B. Merrill* has acquired certain property, rights, titles, and interests, legal or equitable, which cannot be come at to be attached or taken on execution in a suit at law against said *George B. Merrill*, but which in justice and equity, and according to the provisions of chapter 151 of the Public Statutes, ought to be applied to the payment and satisfaction of said judgment.

Wherefore your petitioner prays that a subpœna may be issued to the said *George B. Merrill*, and to the said *Southward Potter, 2d*, *Edward B. Merrill*, and *James H. Myrick*, as they are the executors and trustees under said will of *Edward Merrill*, late of *New Bedford*, deceased, directing them and each of them to appear before this hon-

1. As to the verification of a bill in the *District of Columbia*, see vol. 3, p. 433, note 7.

2. This form is copied from the record in the case of Ricketson *v.* Merrill, 148 Mass. 76, in which case it was held that a creditor's bill might be brought under Mass. Pub. Stat. (1882), c. 151, § 2, cl. 11, as *amended* by Mass. Stat. (1884), c. 285, and that the creditor was entitled to a decree appropriating from the proceeds in the executor's hands, or which might come to them for the debtor, whether from sales of land here or elsewhere, enough to pay the debt. Consult note 1, p. 874, *supra*.

orable court at a time to be fixed therein, and full, true and perfect answer make to the allegations in this bill, but not under oath, the benefit of which is hereby waived, or be defaulted.

And that your honors will order and decree that the said executors and trustees shall pay over to your petitioner whatever sum or sums of money now are or which shall at any time hereafter become payable to the said *George B. Merrill* under the provisions of said will, in satisfaction and payment of said judgment, until the same shall have been fully paid, together with all interest which has accrued or shall hereafter accrue thereon, and the costs of this proceeding.

And that the said *George B. Merrill* be adjudged a debtor of your petitioner in respect of the premises, and be ordered to execute and deliver to said executors and trustees a full discharge of all claims against them as such executors and trustees, under the provisions of said will, to the extent of said payments so ordered by the executors and trustees to be made to your petitioner.

Cecilia C. Ricketson,
by her attorneys,
Crapo, Clifford & Clifford.

b. Express Trust.

Form No. 6649.

(Précedent in Bank of Commerce *v.* Chambers, 96 Mo. 461.)[1]

[*Bank of Commerce*, plaintiff, against *B. Maziere Chambers and Julius S. Walsh*, defendants.] In the *St. Louis City Circuit* Court. To the *October* Term, 1887.

Plaintiff states][2] that on the *eighth* day of *April*, 1881, in a case numbered *55,867*, in the *circuit* court of the *city of St. Louis*, in the state of *Missouri*, being a case of it, the *Bank of Commerce*, as plaintiff, against *B. M. Chambers and Margaret F. Smith*, defendants, it recovered judgment against *Chambers* and *Smith*, for the sum of *five thousand one hundred and thirty-four* dollars and *thirty-five* cents ($5.134.35), and costs, which judgment was therein ordered to bear interest at the rate of *ten* (*10*) per cent. per annum from its date; that thereafter, to wit, on the *eighteenth* day of *May*, 1881, the plaintiff caused an execution to issue on said judgment, which execution

1. This bill was demurred to in the lower court on the grounds that the petition did not state facts sufficient to constitute a cause of action, and did not state facts sufficient to entitle plaintiff to equitable relief. The plaintiff declining to plead further, final judgment was entered dismissing the petition. The plaintiff appealed, and the supreme court, by unanimous decision, ordered the judgment reversed and cause remanded to the circuit court with directions to enter a decree for plaintiff, holding that a husband who releases his curtesy in his wife's estate, accepting in lieu thereof an income given him by her will, will be regarded as a purchaser of such income, and not a mere recipient of his wife's bounty, and the income will be subject to the claims of his creditors, notwithstanding the provisions of the will exempt it from such claims.

Consult note 1, p. 874, *supra*.

2. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

was numbered *150*, returnable to *June* term, 1881; that said execution was directed and delivered to the sheriff of the *city of St. Louis*, and was by him duly returned on the *sixth* day of *June*, 1881, *nulla bona*; that thereafter, to wit, on the *nineteenth* day of *October*, 1882, in another case, *56,939*, in the *circuit* court of the *city of St. Louis*, state of *Missouri*, being the case of it, the *Bank of Commerce*, as plaintiff, against *B. Maziere Chambers and R. Graham Frost*, as defendants, it recovered a judgment against *B. Maziere Chambers*, who is a defendant in the present suit, and *R. Graham Frost*, for the sum of *five thousand five hundred and fourteen* dollars and *thirty-seven* cents ($5,514.37), and costs, which judgment was therein ordered to bear interest at the rate of *ten* (*10*) per cent. per annum from date; that thereafter, on the *second* day of *January*, 1884, the plaintiff caused an execution to issue on said judgment, which execution was number *135*, returnable to *February* term, 1884; that said judgment was directed and delivered to the sheriff of the *city of St. Louis*, and by him duly returned, on the *fourteenth* day of *February*, 1884, *nulla bona*. And plaintiff further says that nothing has been paid on either of the above mentioned judgments; that none of the defendants in either said cases has any property or effects of any kind subject to execution and levy.

And plaintiff says that *Mrs. Marie C. Chambers*, the wife of defendant *B. Maziere Chambers*, died on the *ninth* day of *December*, 1883, in the county of *St. Louis*, state of *Missouri*; that she made a will which was duly probated in the *probate* court of *St. Louis* county, on the *twentieth* day of *December*, 1883; and a certified copy thereof was filed in the office of the recorder of deeds of the *city of St. Louis*, state of *Missouri*, in book *723*, page *81*, on the *twenty-fourth* day of *December*, 1883; that among other provisions immaterial to this case, the said testatrix gave the income of property worth *half a million* dollars ($500,000), which income is now *twenty thousand* dollars ($20,000) per annum, to the defendant *Walsh*, in trust for the defendant *Chambers*, during his natural life.

The language of the will on this point is as follows: (*Here was set out the section of the will in question.*)[1]

1. The section of the will quoted in the petition was as follows:

"*Seventh*. All the rest and residue of my estate, real, personal and mixed, whereof I shall die seised, entitled or possessed, I give, bequeath and devise to my brother *Julius S. Walsh*, in trust, that he manage, hold and dispose of the same during the natural life of my husband; that quarterly he pay the net rents, issues and profits arising therefrom into the proper hands of my husband alone, or such person or persons as he, my husband, by any order in writing may for that purpose appoint, and, after the death of my husband, to convey to such person or persons, for such estates and in such portions, as would by the laws of *Missouri*, then in force, be declared to be my rightful heirs had I survived him; provided, that such heirs be descendants of mine, they or the survivor of them shall have only a contingent estate in the property thus inherited, to become vested only on his or hers, the survivor, attaining majority, and upon the death of any one, the inheritance to be declared to the exclusion of my husband, my desire being that my estate should remain in my family, if it cannot among my descendants, and I give to my said trustee the power to sell or convert any part of the trust property and the proceeds thereof, to reinvest in such real or personal estate or in such securities

And plaintiff further says that defendant *Chambers* had an estate by the curtesy in the real estate of his deceased wife, from which, if he had retained it, he would have had an income of at least *fifteen thousand* dollars ($*15,000*) per annum, which said income would have been subject to seizure and sale upon execution by plaintiff, to satisfy its judgments hereinbefore set forth.

Plaintiff further states that, for the purpose of hindering, delaying and defrauding plaintiff, and for the purpose of securing to his own use an estate which he, said *Chambers*, believed to be secure from attack and seizure by plaintiff herein, he did, heretofore, to wit, on the *thirtieth* day of *December*, 1*883*, by deed, duly recorded in the office of the recorder of deeds of the *city of St. Louis*, state of *Missouri*, and in book number *714*, page *525* thereof, convey his said estate by the curtesy, as required by the will of his wife, to the defendant *Julius S. Walsh*, in consideration of the provision in his favor in the said will of his wife. And plaintiff further says that the defendant *Walsh* has accepted the position of trustee for defendant *Chambers*, under the will of the latter's wife, and by reason of the conveyance of the estate by the curtesy to him by defendant *Chambers*, he, said *Walsh*, pays over to said *Chambers*, quarterly, as such trustee, the income of the trust estate, to the amount of *five thousand* dollars ($*5,000*) per quarter.

And plaintiff further says that the deceased testatrix did not leave, and never had, any equitable separate estate; that she inherited the property she left from her father; that there are no debts proved against her estate, though it has been in process of administration since *December 23*, 1*883*, and that there are no debts in existence to be proved. And plaintiff further says it is

as to my said trustee may seem expedient and discreet; or to employ the same in the improvement of any portion of my real estate, giving also to my said trustee power to lease over for a term of years, not exceeding thirty, but in every instance of such sale, conversion, lease or improvement, the written consent of my husband thereto to be first had and obtained, and without such consent no exercise of powers herein conferred to be valid, my object, and my only object, and I have by the creation of this trust none other, than because of the affection I entertain for my husband, the tender love which has characterized our union with each other, the fear he may become embarassed, I may, of my own estate, always throughout his life, secure to him an ample independence forever, free from the claims and demands of any creditor he may now or hereafter have, and without any right to intervene, or sequester of the revenues of the trust for the payment of their claims or demands. And in the events of the death or resignation of my said trustee, or that by any cause he be incapacitated or disqualified for the performance of the duties of the trust, I authorize my husband by writing under his seal and signature, and duly acknowledged as in release of deeds, to name and appoint another trustee, who from the date of the filing of such instrument for record in the proper office in the said *city of St. Louis*, shall be subrogated in the lieu and stead of said *Julius S. Walsh*, the same as is herein orginally named, and of course to be subjected to the same trust, limitations, conditions, restrictions and provisions here contained. This power of appointment is a continuing one, to be exercised as often as necessity require. The provisions herein made for my husband are upon condition that within *six* months after the probate of my will, he by deed, duly executed and in the said *city of St. Louis* duly recorded, release any right, title or estate as tenant by the curtesy he may have."

wholly without remedy as to the collection of its two judgments above set out, unless this court order and decree that the defendant *Walsh* pay quarterly to plaintiff what, under the terms of the will, and by reason of the conveyance of said estate by the curtesy, he would otherwise pay to defendant *Chambers*, until the plaintiff's said judgment shall be satisfied.

Wherefore plaintiff prays that defendant *Chambers* be enjoined from receiving, and defendant *Walsh* be enjoined from paying him, any of the income provided for in the will of *Mrs. Marie C. Chambers*, until the plaintiff's judgments are satisfied; and that defendant *Walsh* be ordered to pay plaintiff, in part satisfaction of them, each quarter of a year, the income of the estate of which he is trustee for defendant *Chambers*, until they, said judgments, are fully satisfied; and that such further relief be granted plaintiff as to the court may seem proper.

[*Albert Arnstein*,
J. P. Maginn,
Attorneys for Plaintiff.][1]

c. Secret Trust.

Form No. 6650.[2]

To the Judge of the *Circuit* Court of the *Fifth* Judicial Circuit of the State of *Florida* in and for *Putnam* County, in Chancery sitting:

John Dunning and *James Palmer*, of the city *St. Augustine*, in the county of *St. Johns* and state of *Florida*, copartners, doing business in said city of *St. Augustine* under the firm name and style of *Dunning & Palmer*, and *F. S. Selover* and *John Doe*, of said city, county and state, doing business in said city of *St. Augustine* under the firm name of *F. S. Selover & Co.*, on behalf of themselves and all other unsatisfied creditors of *B. E. Carr & Co.*, who shall come in and contribute to the expense of this suit, bring this their bill against *Sophia R. Carr*, *John T. Carr* and *James W. Allen*, all of the city of *Palatka*, in the county of *Putnam* and state of *Florida*, lately copartners doing business in the city of *St. Augustine* aforesaid under the firm name and style of *B. E. Carr & Co.*, and *James Burt*, as trustee for said *Sophia R. Carr* of said city of *Palatka*, and *Caleb W. Loring*, of the city of *Boston* in the *commonwealth* of *Massachusetts*, both individually and as trustee for said *Sophia R. Carr*, and *George Burt*, of said city of *Palatka*.

And thereupon your orators complain and say that on the *sixth* day of *June*, A. D. 1873, your orators, *John Dunning* and *James Palmer*, under the name of *Dunning & Palmer*, recovered judgment against the defendants, *Sophia R. Carr*, *John T. Carr* and *James W. Allen*, under the firm name of *B. E. Carr & Co.*, in the *Circuit* Court of *Duval* county, *Florida*, for the sum of *twelve hundred and ninety-five* dollars and *thirty* cents. That on the *sixth* day of *June*, A. D. 1873,

1. The words enclosed by [ ] will not be found in the reported case, but have been added to complete the form.

2. This form is substantially the bill in the case of Loring *v.* Dunning, 16 Fla. 119, in which case a decree for complainants was affirmed on appeal. Consult note 1, p. 874, *supra*.

your orators, *F. S. Selover* and *John Doe*, under the name of *F. S. Selover & Co.*, recovered judgment against said defendants under said name of *B. E. Carr & Co.*, in the same court, for the sum of *four hundred and ninety-eight* dollars and *sixty-eight* cents. That both of said judgments were duly docketed in the county of *Putnam*, and that afterward the said judgments so recovered in manner aforesaid remaining in full force and effect and unpaid and unsatisfied, executions were duly issued upon both said judgments on the *ninth* day of *June*, A. D. 1873, and on said day were delivered to the sheriff of said county of *Putnam*, and afterward, on the *ninth* day of *July*, A. D. 1873, were duly returned to the clerk's office of said county of *Putnam* unsatisfied, with the return of said sheriff thereon that no property could be found belonging to said defendants, *B. E. Carr & Co.*, or to any one of said defendants subject to be levied upon and sold under said execution.

That neither of the defendants, *Sophia R. Carr*, *John T. Carr* and *James W. Allen*, are seised or possessed of any property in their own name liable to legal sale under said executions.

That prior to the recovery of said judgments the said defendants, under the firm name aforesaid, carried on the business of merchants and traders in the city of *St. Augustine*, in the county of *St. Johns* aforesaid, and that said judgments were recovered for goods, wares and merchandise sold and delivered to them. That by the terms of the articles of copartnership under which said defendants carried on the said business, the defendant *Sophia R. Carr* had the control and direction of the business of said firm, and that in the purchase of goods and management of the business of said firm she had, under said articles, a controlling interest and voice. That your orators sold and delivered the goods, wares and merchandise to the defendants upon the credit and financial responsibility of the defendant, *Sophia R. Carr*, and at the request of the said *Sophia R. Carr* as one of said firm.

That your orators had been informed and believed, prior to the sale of said goods, by the defendants and by the said *Sophia R. Carr*, that the said *Sophia R. Carr* had a large income from property held in trust for her general use and benefit, both in the state of *Florida* and in the *commonwealth* of *Massachusetts*, and that such property so held in trust, or the income thereof, or both, would be ample security for and liable and subject to the payment of any obligations or judgments against said defendant *Sophia R. Carr*; and reposing confidence in the credit of said *Sophia R. Carr*, arising from said trust estate, they sold and delivered said goods, wares and merchandise to the defendants.

That defendant *Sophia R. Carr* is the widow of one *Burrough E. Carr*, and that said *Burrough E. Carr* died intestate some time prior to the formation of said firm of *B. E. Carr & Co.*, and prior to the sale and delivery to defendants of said goods, wares and merchandise. That for several years subsequent to the death of said *Burrough E. Carr* the said *Sophia R. Carr* received her support and maintenance chiefly from the business and goods and merchandise of said firm of *B. E. Carr & Co.*, and not out of the trust estate hereafter set forth.

That the defendant *Caleb W. Loring* is a brother of the defendant *Sophia R. Carr*, and holds in trust in the *commonwealth* of *Massachusetts* for the said *Sophia R. Carr* a large amount of valuable real and personal property, and that the income thereof by way of rents and interest, or otherwise, is largely in excess of the necessary and proper expenditures for the support and maintenance of the said *Sophia R. Carr*. That the defendant *James Burt* is a trustee, as hereinafter stated, for the said *Sophia R. Carr*, and as such trustee is seised in fee, and has the possession of, a large quantity of valuable real estate in the city of *Palatka* aforesaid.

That on or about the *thirteenth* day of *March*, A. D. 1852, one *Robert R. Reed* and *Mary* his wife, and *Burrough E. Carr* and *Sophia* his wife, and *George Burt* and *Lucy* his wife, all of the city of *Palatka* aforesaid, sold and conveyed by deed in fee unto one *Isaac H. Bronson*, as the party of the second part, about *twelve hundred* acres of land situate in and about what is now the city of *Palatka*. That on the *twenty-second* day of *March*, A. D. 1852, as your orators are informed and believe, the said *Isaac H. Bronson* duly made a declaration of trust under the deed aforesaid in favor of the said *Sophia R. Carr* and *Lucy Burt*, whereby the said *Sophia* and *Lucy* were declared the *cestuis que trust* of the said property conveyed to *Isaac H. Bronson* as aforesaid, and the said *Isaac H. Bronson* promised and bound himself to manage and control said tract of land under certain restrictions, and to pay over to each of the said *cestuis que trust* or beneficiaries, or to their heirs and assigns, one-third of the net proceeds arising from said lands, either by sale or otherwise. That said declaration of trust has never been recorded in said *Putnam* county or elsewhere, to the knowledge of your orators, who have no knowledge of, and have no means of ascertaining the exact terms and provisions of said declaration of trust, except by discovery from the defendant.

That on or about the *twenty-sixth* day of *May*, A. D. 1855, the said *Burrough E. Carr*, *Sophia R. Carr*, *George Burt* and *Lucy Burt* executed an instrument in writing in the presence of witnesses wherein it is recited that a declaration of trust was declared by the said *Isaac H. Bronson*, on the *twenty-second* day of *March*, A. D. 1852, of the character hereinbefore stated, and wherein it is further recited that on the *fifteenth* day of *May*, A. D. 1855, the said *Burrough E. Carr* and *George Burt*, and the said *Isaac H. Bronson*, made and executed an agreement whereby it was agreed and provided that said *Isaac H. Bronson* should be and was, from and after the date thereof, released and discharged from the further execution of said trust, and from all liability on account thereof to said *cestui que trust*.

And your orators further complain and say that by the terms and effect of the aforesaid instrument bearing date the *twenty-sixth* day of *May*, A. D. 1855, the said *Burrough E. Carr* and *Sophia* his wife, and *George Burt* and *Lucy* his wife, appointed the defendant *James Burt* as the person to take the legal title to said real estate, and thereby direct and authorize and require the said *Isaac H. Bronson* to convey all the said real estate then undisposed of in fee to the said *James Burt*, who is to hold the property in trust, and to execute to the said parties to said instrument such declarations of trust as

might hereafter be agreed upon. That soon after the aforesaid instrument was executed the said *Isaac H. Bronson* did execute and deliver a deed of conveyance of said real estate to the defendant *James Burt*, whereby the legal title passed and vested absolutely in the said *James Burt*. That while it is notorious and generally known in said county of *Putnam* that the deed last aforesaid was executed and delivered, said deed has never been recorded in said county. That on the *third* day of *August*, A. D. 1858, the said *James Burt* did execute and deliver a declaration of trust in favor of said defendant *Sophia R. Carr*, whereby he agreed and bound himself to hold a certain portion of said real estate hereinafter specified in trust for the said *Sophia R. Carr*, her heirs and assigns. That in the said declaration of trust last mentioned it is duly recited that *James Burt* aforesaid, at the instance and request of the said *Burrough E. Carr* and *Sophia* his wife and *George Burt*, had conveyed absolutely in fee simple, by deed bearing date the *third* day of *August* aforesaid, one-half of the unsold part of said *Palatka* tract property then remaining in his hands to *George Burt*. That said lands held in trust by the said *James Burt* for the said *Sophia R. Carr*, her heirs and assigns, have been divided into city lots in the city of *Palatka*. That before the declaration of trust last aforesaid was made, the part of said trust property or real estate originally conveyed to said *Isaac H. Bronson* as aforesaid, which belonged to and was intended for the said *Lucy Burt*, had been duly set apart to her; and that the said *Lucy Burt* departed this life several years ago, and that her heirs have no interest whatever in the aforesaid lots claimed as the portion of the defendant *Sophia R. Carr*.

That on or about the *tenth* day of *November*, A. D. 1870, the said *Sophia R. Carr*, *Maria J. Carr*, *Annie C. Gilbert* and *John T. Carr*, the widow and heirs of said *Burrough E. Carr*, made and executed a certain writing under seal to *Wilkinson Call*, *Esq.*, wherein it is recited that certain real estate in the city of *Palatka* aforesaid, meaning the real estate hereinbefore mentioned, was conveyed to *James Burt* by said *Burrough E. Carr* in his lifetime, and that said *James Burt* had made a declaration of trust of said property for the use and benefit of said *Sophia R. Carr*. That said declaration had not been recorded, and that said *Sophia R. Carr* desired said trust to be made of record and placed beyond a doubt, and to make the said *Wilkinson Call* trustee, and to make the trust to her irrevocable. That after such recital the said writing purports to be a power of attorney to the said *Call* to sell said real estate provided it can be sold for *twenty-four thousand* dollars, and to invest the proceeds in bonds of the United States, the bonds to be held by said *Call* under his sole control and direction in trust for said *Sophia R. Carr*. That after the execution of said writing to said *Call*, the defendant *Sophia R. Carr* lost her confidence in said *Call*, and pretended to be alarmed for the safety of her property. That afterward, to wit, on or about the *twenty-ninth* day of *December*, A. D. 1871, she the said *Sophia R. Carr* and the said *Wilkinson Call* made and executed a certain deed or instrument under seal, to the defendant *Caleb W. Loring*, whereby the said *Sophia R. Carr* and the said *Caleb W. Loring* pretended that all the

interest of the said *Sophia R. Carr* in, to and of the said real estate was conveyed to the said *Loring*. That the consideration expressed in the deed last aforesaid is *seventeen hundred and sixty-seven* dollars and *seven* cents, and other good and valuable considerations, but your orators aver that the defendant *Caleb W. Loring* did not purchase said real estate in good faith for good and valuable and adequate consideration, and did not pay anything of value for said deed to him; that said deed is a mere pretense and device entered into between said *Sophia R. Carr* and said *Caleb W. Loring* for the double purpose of wresting from the said *Wilkinson Call* any authority or control which he then was supposed to have over the said property, and to protect the interest of the said *Sophia R. Carr* in said lands and lots aforesaid, and to place said property beyond the reach of your orators.

That said *Loring* was, before said pretended deed was made, a trustee for said *Sophia R. Carr*, and as such trustee from time to time did hand over money arising from said trust estate held by him to the said *Sophia R. Carr*; and that if any money was delivered to the said *Sophia* by the said *Loring* at the time said deed was made, it was the money of the said *Sophia*, or money of the said *Loring* advanced by the said *Sophia*, as a mere color or pretense, to be reimbursed out of said trust estate held by said *Loring*.

That the goods, wares and merchandise aforesaid were sold and delivered before the last aforesaid deed was given, and said *B. E. Carr & Co.* were then indebted for the same, and by such deed said *Sophia R. Carr* and said *Caleb W. Loring* hoped and intended to defraud your orators out of their demands. That said deed last mentioned is a mere colorable deed, and not real and *bona fide*; and that if it were otherwise, the said *Caleb W. Loring*, if he acquired any interest in said real estate, acquired the same with notice that *James Burt* aforesaid held the legal title thereto and property aforesaid, in trust as aforesaid. And your orators aver that the said *Caleb W. Loring* and the said *Sophia R. Carr* are now and have been for some time endeavoring to persuade the said *James Burt* to convey by deed in fee the said land and city lots to the said *Caleb W. Loring* for the purpose of obstructing your orators and other creditors in the recovery of their demands.

That said *Caleb W. Loring*, in his answer filed the *nineteenth* day of *March*, A. D. 1872, to a suit brought in said *Circuit* Court of *Putnam* county, *Florida*, by *James R. Van Brunt* and *Henry L. Slaight* against said *Sophia R. Carr*, *James Burt* and *Caleb W. Loring*, admitted that the legal title to said land and lots was vested in the said *James Burt*. That the said real estate in *Palatka* aforesaid is estimated to be of the value of *twenty thousand* dollars, and that said *Sophia R. Carr* has and receives, and is entitled to receive from the property held in trust in the *commonwealth* of *Massachusetts* by the said *Caleb W. Loring*, an annual income of several thousand dollars, which is largely in excess of the amount necessary for her support and maintenance. And your orators aver that they have been informed, not only by the aforesaid defendant and declaration, but otherwise, and believe and allege to be the fact, that neither the said *James Burt* nor

the said *Loring* holds any of the trust property aforesaid upon the specific trust to apply the income for the support of the said *Sophia R. Carr*.

That said *Sophia R. Carr* promised to pay some of the creditors of the said firm of *B. E. Carr & Co.* out of the money arising from said trust estate in the *commonwealth* of *Massachusetts*, but now refuses so to do, and pretends and alleges that said trust estate is not subject to the payment of said creditors.

To the end, therefore, that the said *James Burt* and *Caleb W. Loring*, trustees as aforesaid, each pay over to your orators whatever sum or sums of money now are, or which shall at any time hereafter become, payable to the said *Sophia R. Carr* under the provisions of said trusts, in satisfaction and payment of said judgments, until the same have been fully satisfied, together with all interest which has accrued or shall hereafter accrue thereon, and the costs of this proceeding; and that the said *Sophia R. Carr* be adjudged a debtor of your orators in respect of the premises, and be ordered to execute and deliver to said trustees a full discharge of all claims against them as such trustees under the provisions of said trusts, to the extent of said payments so ordered by the trustees to be made to your orators, and that your orators may have such other and further relief in the premises as their case requires and to your honor seems meet. May it please your honor to grant unto your orators the state's writ of subpœna directed to the said *Sophia R. Carr*, *John T. Carr*, *James W. Allen*, *James Burt*, *George Burt* and *Caleb W. Loring*, commanding them and each of them at a certain time and under a certain penalty therein to be inserted personally to appear before your honor, and then and there to answer all and singular the premises, and to stand to and perform and abide such order and decree therein, as to your honor shall seem meet.

John Dunning.
James Palmer.
F. S. Selover
John Doe.

H. Bishop, Jr.,
Of Counsel for Complainants.
(*Verification.*)[1]

9. To Enjoin Transfer of Note and Foreclosure of Mortgage Held by Debtor and to Apply Same to Plaintiff's Claim.

Form No. 6651.[2]

Bristol, ss. *Supreme Judicial* Court, *April* Term, 1870.

Almon H. Tucker in Eq.
vs.
John McDonald et als.

1. As to the verification of a bill in equity in *Florida*, see vol. 3, p. 435, note 5.

2. This form is copied from the record in the case of Tucker *v.* McDonald, 105 Mass. 423, in which case it was held that a creditor may maintain his bill to reach and apply in payment of his debt property of the debtor which cannot be come at to be attached or taken on execution, although the debt is secured by mortgage.

Consult note 1, p. 874, *supra*.

Bill in Equity.

Respectfully shows *Almon H. Tucker* of *Attleborough* in said county, that on the *twenty-ninth* day of *June*, A. D. 1866, *John McDonald* of said *Attleborough*, and *John Turner*, then of said *Attleborough*, but now believed to be in *Philadelphia*, gave their promissory note, for value received, for the sum of *one thousand* dollars, payable to one *Edward McDonald* or order, in *two years* from its date; a copy of said note is as follows: (*Here was set out a copy of note.*)

And the plaintiff says that on the *twenty-fourth* day of *July*, A. D. 1868, said *Edward McDonald*, payee of said note, duly assigned and transferred said note to the plaintiff, and he now holds the same, there being due thereon the principal and interest from said *twenty-fourth* day of *July*, 1868.

And the plaintiff says that said *John McDonald* and *John Turner*, makers of said note, have no property known to him which can be come at to be attached or taken on execution in a suit at law against them; but he says that on the *fourteenth* day of *July*, A. D. 1866, said *John Turner*, one of said makers, being indebted to said *John McDonald*, the other maker, in the sum of *nine hundred* dollars, then gave him his negotiable promissory note for said *nine hundred* dollars, payable *one-third* in *one* year, and *two-thirds* in *three* years from same date, and at the same time gave him a mortgage on certain personal property therein mentioned to secure said note; a copy of said mortgage is hereto annexed, marked *A*, and made a part of this bill; and said *John McDonald* now owns and holds said *nine hundred* dollar note and mortgage as security for the payment of the last instalment of *six hundred* dollars, which will fall due thereon *July 14*, A. D. 1869.

And the plaintiff says that subsequently to the making of said *nine hundred* dollar note and mortgage, said *John Turner*, the maker thereof, sold and transferred to one *Robert Wolfenden*, of said *Attleborough*, all his remaining interest in the personal property, so mortgaged, and said *Wolfenden* took possession of the same and then agreed with said *Turner* to assume and pay said *six hundred* dollars, when the same should become due; and said *Wolfenden* is now ready and willing to pay the same to said *John McDonald*, or to any of his creditors to whom he may become liable in law or equity to pay the same.

Wherefore, inasmuch as the plaintiff has no plain, adequate and complete remedy at law for the collection of his *one thousand* dollar note, he prays that said *Robert Wolfenden* may be enjoined from paying the balance of said *nine hundred* dollar note to said *John McDonald*, or to his order, but may be ordered to pay the same, when due, to this plaintiff in partial payment of his *one thousand* dollar note; and that said *John McDonald* may be enjoined from assigning or transferring said *nine hundred* dollar note and mortgage to any other person, and from collecting or receiving payment of the same, and from taking any steps to foreclose said mortgage, or take possession of said mortgaged property, and from every act or thing to compel the payment thereof by said *Robert Wolfenden*, until the further order of this court, or some justice thereof; and that such other orders and decrees may be made as justice and equity require.

And that a subpœna may issue to said *John McDonald*, *John Turner* and *Robert Wolfenden* to appear and answer to this bill, the plaintiff hereby waiving the oath to said answers.

Almon H. Tucker.

Attleborough, July 2nd, 1869.
(*Verification as in Form No. 6641.*)

II. To Obtain Discovery of Property of Judgment Debtor.[1]

Form No. 6652.[2]

Supreme Court, *City and* County of *New York.*

William Hart, Jr., plaintiff,
against
Charles H. Albright and Joseph Steindler, defendants.

The complaint of the above named plaintiff shows to this court:

I. That on the *first* day of *May*, 1897, at the *city and* county of *New York*, in the *Supreme* Court in and for the *city and* county of *New York*, in this state, the plaintiff recovered a judgment, which was duly rendered by said court against the defendant for *one thousand* dollars.

II. That on said day said judgment was docketed in the office of the clerk of said county, and on the *sixth* day of *May*, 1898, a transcript thereof was filed, and the said judgment was docketed in the clerk's office of the *city and* county of *New York*, in this state.

III. That on the *eighth* day of *May*, 1898, an execution in due form was issued upon the said judgment against the personal and real property of the defendant, to the sheriff of said *city and* county of *New York*, in which county the defendant then resided.

IV. That the said execution has been duly returned by said sheriff wholly unsatisfied.

V. That a short time before the commencement of the action in which the judgment was obtained, and after the indebtedness upon which the said judgment was obtained had accrued, the said defendants were, and for several years previous thereto had been, engaged in mercantile business at No. *515 Broadway*, in the *city and* county of *New York*, and as plaintiff is informed and believes, various persons became indebted to them to a large amount, and that these said defendants had at the commencement of this action debts due them to a large amount, to wit, to an amount not less, as plaintiff is informed and believes, than the sum of *one thousand* dollars, a considerable portion of which are evidenced by charges on their books of account, which plaintiff is unable to see and

1. Consult note 1, p. 874, *supra*.

2. This form, except for the caption, is the complaint in the case of Hart *v.* Albright, 28 Abb. N. Cas. (N. Y. Super. Ct.) 74, in which case it was held, notwithstanding the relief afforded by the code to a judgment creditor by supplementary proceedings, his right to an action upon grounds which formerly would have sustained a creditor's bill to obtain discovery of property concealed, withheld and transferred in fraud of creditors is still preserved.

examine, and therefore unable to specify, and cannot learn and does not know the particular items or amounts of said indebtedness or the names of the several persons from whom the same are due, but is informed and believes that several of them owing defendants, in the aggregate, a sum of not less than *one thousand* dollars, reside in the *city and* county of *New York* and are solvent and able to pay the respective claims against them.

VI. Upon information and belief that at or before the commencement of the action in which said judgment was obtained, the said defendants conveyed and assigned to persons to the plaintiff unknown, and whose names the plaintiff is unable to learn, certain property debts and choses in action belonging to said defendants to a certain amount, to wit, to an amount not less than *five thousand* dollars, in fraud of their creditors and of the plaintiff; and that after satisfying all lawful claims of these assignees against the defendants there still remains over and above said claims and due and payable to said defendants a certain large amount, to wit, an amount not less than *one thousand* dollars.

Wherefore the plaintiff demands:

(1) That the said defendants be adjudged to apply to the amount of said judgment and interest thereon, together with the costs of this action, said property debts, things in action and equitable interests belonging to them or held in trust for them or in which they are in in any way or manner beneficially interested.

(2) That they are enjoined from selling, transferring or interfering with said property debts, things in action and equitable interests.

(3) That a receiver may be appointed of all said property, equitable interests, things in action and effects of the said defendants, and said defendants directed to execute to him an assignment thereof, and said receiver sell or otherwise dispose of the same and convert the same into money as soon as may be, and that said receiver apply so much of the proceeds thereof as may be necessary for that purpose to the payment of the plaintiff's said debt with interest and the costs of this action.

(4) And for such other and further relief as may be just.

Betts, Atterbury, Hyde & Betts,
Attorneys for Plaintiffs.

III. BY CREDITORS OF A CORPORATION.[1]

1. For Ratable Distribution of Assets.

Form No. 6653.

(Precedent in Baxter *v.* Moses, 77 Me. 466.)[2]

State of *Maine*, *Cumberland*, ss. *William H. Baxter*, of *Deering*, in the county of *Cumberland*, aforesaid, complains against: *Oliver Moses*,

1. Consult note 1, p. 874, *supra*. See also the title CORPORATIONS, *ante*, p. 523.

2. A demurrer to this bill was sustained on the ground that it contained no allegation of a return on the executions of *nulla bona*. This error, however, has been remedied by the insertion of such an allegation. See *infra*, note 1, p. 912.
Consult note 1, p. 874, *supra*.

Galen C. Moses, *John H. Kimball*, *Charles Russell* and *James D. Robinson*, of *Bath*, in the county of *Sagadahoc*, and *William P. Frye*, of *Lewiston*, in the county of *Androscoggin*, and *Edwin Plummer*, of *Lisbon*, in said county of *Androscoggin*, and the *Androscoggin Railroad Company*, a corporation duly chartered by law and doing business in said county of *Cumberland*, and represents and avers:

1. That prior to the *first* day of *January*, A. D. 1858, the said *Androscoggin Railroad Company* was duly chartered and organized under the laws of this state and operated a railroad, by it constructed under the provisions of their charter from a point near *Leeds Junction*, on the railroad, then known as the *Androscoggin and Kennebec Railroad*, in the county of *Androscoggin*, to the town of *Farmington*, in the county of *Franklin*.

2. That subsequent to said period of time, said *Androscoggin Railroad Company* contracted and operated an extension of said railroad, from said point on said *Androscoggin and Kennebec Railroad* to the town of *Brunswick*, in said county of *Cumberland*, and to the city of *Lewiston*, in said county of *Androscoggin*, and still operate the same through the said company or their lessees.

3. That upon said *first* day of *January*, A. D. 1858, the said *Androscoggin Railroad Company* duly issued its bonds, to the amount of *two hundred thousand* dollars, in several denominations, by the provisions of which the principal was payable at the office of the treasurer of said company, on the *first* day of *January*, A. D. 1870, in the stock of the company, at par, and the interest thereon was payable semi-annually, on the *first* day of *January* and *July*, in each and every year after said date of *January 1*, 1858, and annexed to said bonds coupons, to the amount of the several semiannual interest sums coming due thereon. Said bonds were payable to *S. H. Read*, or bearer, and issued under the seal of said company.

4. That said bonds remain unpaid and undischarged in principal and interest to the extent hereinafter described, to wit: (*Here were described the unpaid bonds and coupons annexed to each bond.*)

5. That your complainant is the legal owner of said bonds and coupons, and the amounts due upon them are due to him, the said complainant.

6. That said *Oliver Moses*, *Galen C. Moses*, *John H. Kimball*, *Charles Russell*, *James D. Robinson*, *William P. Frye* and *Edwin Plummer* are directors of said *Androscoggin Railroad Company*. That said *John H. Kimball* is president and said *Galen C. Moses* is treasurer of said company.

7. That said persons have held said offices and trusts for a long time heretofore, and as such trustees and officers have taken the income and profits of said railroad, and now hold large amounts of money on account of and belonging to said railroad company.

8. That said railroad company hold no other property than that so as aforesaid taken and held by said persons.

9. That said complainant is a creditor of said *Androscoggin Railroad Company*, beyond and beside the amount of said bonds and coupons, upon and to the amount of the following described claims, viz: (*Here followed a description of seven judgments.*)

[That said judgments so recovered in manner aforesaid remaining in full force and effect, and the costs, and charges of suit and damages aforesaid unpaid and unsatisfied, complainant, on the *first* day of *January*, A. D. 1*880*, for the purpose of obtaining satisfaction of said judgments, sued and prosecuted out of said court writs of fieri facias, directed to the sheriff of said *Cumberland* county, by which said writs the said sheriff was commanded that of the goods, chattels, lands and tenements of the said *Androscoggin Railroad Company* he cause to be made the sums of (*setting out the amounts to be made under each execution*), which complainant in said court recovered against said defendant, the *Androscoggin Railroad Company*; and that afterwards, to wit, on or about the *twenty-first* day of *January*, A. D. 1*880*, the sheriff of said county returned on the said writ to him in that behalf directed and delivered him as aforesaid, that after due search he had been unable to find within said county of *Cumberland* any goods, chattels, lands or tenements of the said *Androscoggin Railroad Company*, whereof the amount of said judgment and execution, or any part thereof, could be made, as by the said writs of fieri facias, and the returns of the said sheriff indorsed thereon as aforesaid, now on file in the office of the clerk of the said court, will more fully appear.][1]

That the said complainant has demanded of the said *Androscoggin Railroad Company*, and said directors and treasurer, at the office of the treasurer of said company, the payment of said bonds and coupons, according to the terms and conditions of said instrument, and offered to surrender said bonds and coupons as required by the terms therein recited, and the payment of the other claims held by your complainant herein before described, and payment of each and every and all of said bonds and coupons and other claims was by said company, directors and treasurer refused, and have never been paid or otherwise discharged to the time of the making of this complaint, but now remains in full force, and due to your complainant.

That said directors and treasurer have received large amounts of money belonging to said company, and have unlawfully and fraudulently distributed the same among themselves, and are still holding the same, to an amount more than sufficient to pay the claims of your complainant herein before described, and all other lawful claims against said company, in fraud of your complainant's rights in the premises; that he can not reach said funds, by attachment, or any process in the courts of law granted, or practiced, and is in danger of losing his whole claim and demand against said company by the fraudulent and unlawful acts and practices of said directors and treasurer, without such relief as your honors may grant him in equity.

And your complainant is informed and believes, and therefore charges, that the said directors and treasurer have received from the *Maine Central Railroad Company*, a corporation existing under the laws of this state, a large sum of money for the use and lease of said railroad of said *Androscoggin Railroad Company*, to wit: the sum of

1. The words and figures enclosed by [ ] have been added to correct the defect in the bill pointed out in the judgment.

two hundred and sixty-three thousand dollars and now hold the same; that the particular days and times when so received, and the particular individuals of said board of officers to whom said sum was paid, he is unable now to give information to the court, but does charge and inform the court that said sum was received by the directors of said *Androscoggin Railroad Company*, from said *Maine Central Railroad Company*, and is now held by said respondents.

And the complainant is informed and believes, and therefore charges, that said respondents received from the *Maine Central Railroad Company*, on account of a lease of said *Androscoggin Railroad*, executed A. D. 1871, to wit: on the *twenty-ninth* day of *June*, A. D. 1871, the sum of *thirty-three thousand thirty-three hundred and thirty-three* dollars and *thirty-three* cents, and scrip of said *Maine Central Railroad Company* to the amount and value of *one hundred and ten thousand* dollars, and *two thousand* shares of the capital stock of said *Maine Central Railroad Company* of the value of *one hundred and twenty thousand* dollars, and all of the value of *two hundred and sixty-three thousand three hundred and thirty-three* dollars and *thirty-three* cents, and that said directors have fraudulently and without lawful authority distributed the proceeds of the same among themselves, and now withhold the same from the creditors of said *Androscoggin Railroad Company*, and in fraud of their rights in the premises.

And your complainant avers that the said *Oliver Moses*, *Galen C. Moses*, *John H. Kimball*, *Charles Russell*, *James D. Robinson*, *William P. Frye* and *Edwin Plummer*, hold in their own names and under their control, nearly all the stock of the said *Androscoggin Railroad Company*, to wit, a much greater number than a majority in number of said shares, the exact number of which is to your complainant unknown, and that they control the action of said company in their own interests and fraudulently combine against the interests of the creditors of said company, to withhold all the property, so as aforesaid received, from the creditors of said company, and neglect and refuse to make any report or return of their doings and actings as said officers, and have so neglected for more than ten years last past, or to give any information of the financial condition of said company, although your complainant has sought such information through process of this court, and that he can not, by reason of their fraudulent and unlawful practices, obtain a satisfaction of his claims of the said company.

And your complainant further represents that ne brings this bill in behalf of himself and all other unsatisfied creditors of said *Androscoggin Railroad Company*, who shall come in and join in this bill, and by leave of court become parties thereto.

And now your complainant seeks relief in the premises of this court sitting in equity, and prays that said respondents, each and all of them severally, be required to make full answer upon their several oaths to all the matters herein alleged, and for general relief in the premises, as well as for the special relief hereinafter prayed for.

And for special relief he prays that said directors may be held to account for all money and property by them or either of them received for and on account of said *Androscoggin Railroad Company*, since the

twentieth day of *June*, A. D. 1871, and for all money and property belonging to said company, by them or either of them held on said *twentieth* day of *June*, A. D. 1871, to the end that the same may be turned over to a receiver for such disbursement to the creditors of the company as they are entitled to have in the payment and extinguishment of their claims and demands, and,

That your honors will appoint a receiver to receive and dispose such money and property and make such orders and decrees as shall be necessary to determine the manner and amount of disbursements to be made, and,

That your honors will appoint a master to determine the amount due such creditors as may become parties to this bill.

[And your complainant prays for such other and further decrees as to the court may seem just and proper in the premises.

William H. Baxter.

R P. Tapley, Attorney for Complainant in Equity.][1]

2. To Collect Unpaid Stock Subscriptions.[2]

Form No. 6654.

(Precedent in Haslett *v.* Wotherspoon, 1 Strobh. Eq. (S. Car.) 209.)[3]

State of *South Carolina*, } In Chancery.
Charleston District. }

To the Honorable the Chancellors of the said State:

Humbly complaining, show unto your honors, your orators, *John Haslett*, *Alexander Robinson* and *William Lloyd*, executors of the last will and testament of *John Haslett*, Esq., of the city of *Charleston*, deceased, for and on account of themselves, and all other creditors of the *Charleston New Theater Company*, who shall come in and contribute to the expense of this suit; that, heretofore, to wit, in the year 1835, a number of gentlemen in the city of *Charleston*, defendants in this suit, voluntarily associated themselves together as members of a joint stock company, for the purpose of building a theater in the said city, by means of funds to be raised by themselves; and at a meeting of the subscribers to this project, held on the *tenth* day of *March*, 1835, it was resolved, that a committee of *five* trustees should be elected amongst the said subscribers, to manage all matters connected with the building of the said theater, and generally to act for the interests of all concerned in furthering the objects of their association; whereupon, the following gentlemen were duly elected trustees, to wit: *Robert Wotherspoon*, *James Rose*, *Henry Gourdin*, *Richard W. Cogdell* and *William A. Carson*, Esqs., who forthwith proceeded to the discharge of the various duties devolved on them, as the managing committee of the said theater company; that the said trustees,

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. See also substance of a similar bill in Lane's Appeal, 105 Pa. St. 50.

3. The chancery practice has been abolished in *South Carolina* and the code practice substituted, but this form is inserted in its entirety owing to its value as a precedent of this particular class of bill in those states where the chancery practice still obtains.

on behalf of themselves and their associates, having contracted to purchase a lot of land as a site for the theater, it was resolved, at a meeting held by them, on the *twelfth* day of *March*, 1835, that they would immediately proceed to procure plans, and estimates for contracts, for building the said theater, according to a general plan then adopted by them; that in consequence of an invitation to that effect, proposals were soon after submitted to the said trustees, by *Messrs. Fogartie & Sutton*, bricklayers, for the brick-work necessary for the building of the said theater, for the sum of *fourteen thousand* dollars, and by *Messrs. Ephriam Curtis and Company*, carpenters, for the wood-work necessary thereto, for the sum of *thirteen thousand five hundred* dollars; which said proposals were accepted by the said trustees, on the *seventeenth* day of *February*, 1837, and were afterwards embodied in the shape of written agreements between the said trustees, for and on account of themselves and their associates, of the one part, and the said contractors, *Fogartie & Sutton*, and *Ephriam Curtis and Company*, respectively, of the other part; that the said contracts for building the said theater were faithfully performed, to the entire satisfaction of their employers, the trustees aforesaid, who from time to time paid large sums of money to the said *Fogartie & Sutton*, and *Ephriam Curtis and Company*, on their building contracts aforesaid, by the hands of *George W. Logan*, *Esq.*, who had been appointed by the said trustees, as the treasurer of the said theater company; that on the *twenty-seventh* day of *February*, 1838, *Ephriam Curtis*, of the firm of *Ephriam Curtis and Company*, for money then due them by the said theater company on their contract above mentioned, gave his draft to *Francis Lance*, *Esq.*, for the sum of *fifteen hundred* dollars, payable *thirty* days after date, on *George W. Logan*, treasurer as aforesaid, which said draft was duly accepted by the said *George W. Logan*, as the treasurer of the said theater company, but not paid at maturity, for want of funds; that on the *tenth* day of *March*, 1838, *Robert Wotherspoon*, *Esq.*, then chairman of the board of trustees, for the purpose of paying *Messrs. Fogartie & Sutton* a large sum of money then due them on their contract aforesaid, gave to the said *Fogartie & Sutton* his draft for the sum of *two thousand* dollars on *George W. Logan*, treasurer, payable *eight* days after date, and chargeable to the account of the said building contract of *Fogartie & Sutton*, which draft was also duly accepted, but not paid at maturity, for want of funds; that the said drafts are now the property of your orators, as executors of the last will of their testator, *John Haslett*, as part of the assets of his estate left by him at his decease.

Your orators further show unto your honors, that after the said contracts were entered into between the said trustees and the said contractors, *Fogartie & Sutton*, and *Ephriam Curtis and Company*, in fact, after the theater itself had been erected and ready for use, to wit, on the *seventeenth* day of *December*, 1837, the said trustees, *Robert Wotherspoon*, *James Rose*, *Henry Gourdin*, *Richard Cogdell* and *William A. Carson*, *Esqs.*, and their associates in the said theater company, were incorporated by the legislature of *South Carolina*, a body corporate, for the purpose of building and conducting a theater in the city of *Charleston*, by name and style of the *Charleston New*

Theater Company, with a then capital of *sixty thousand* dollars; that the charter so granted was duly accepted[1] at a meeting of the subscribers to the association aforesaid, held on the *twenty-eighth* day of *February*, 1838, in pursuance of a call to that effect in the several newspapers of *Charleston*, and that the said *Robert Wotherspoon*, *James Rose*, *Henry Gourdin*, *Richard W. Cogdell* and *William A. Carson*, *Esqs.*, were continued in the managing direction of the said corporation, under their former style of trustees, and were, from time to time, elected by the said company, as the trustees or directors thereof, until the company became utterly insolvent, and ceased to meet for the transaction of any business connected with the said theater.

Your orators further show unto your honors, that their testator, confiding in the solvency of the said incorporated company, which was held out to the world in their charter, with an actual and paid in capital of *sixty thousand* dollars at the time of their incorporation, brought an action at law against the said *Charleston New Theater Company*, on the drafts aforesaid, in which action a verdict was had for the plaintiff therein, and judgment entered up against the said theater company, on the *first* day of *February*, 1840, for the sum of *four thousand and sixteen* dollars and *ninety-five* cents, of which sum the amount of *fifteen hundred* dollars was afterwards, to wit, on the *twenty-first* day of *February*, 1841, paid to your orators' testator, in part satisfaction of the debt due on said judgment, by *George W. Logan*, *Esq.*, treasurer of the said company, by whom all previous payments had been made on the contracts aforesaid, out of which the said debt arose.

And your orators have been advised, that the confidence of their testator, that the said *Robert Wotherspoon*, *James Rose*, *Henry Gourdin*, *Richard W. Cogdell* and *William A. Carson*, and their associates in the said incorporated theater company, possessed at the time of their incorporation an actual capital of *sixty thousand* dollars, was well and truly founded on the plain intent and meaning of their charter, and was strengthened, also, by the fact, that the legislature has taken no precaution to provide for the paying in of the said capital, or any part thereof, prior to and before the said individuals should be allowed to exercise their corporate privileges, nor imposed any responsibility of a pecuniary kind on the members of the company, as the legislature had taken special care to provide in the case of other associations incorporated by the same act.

And your orators further show unto your honors, that the execution which issued on the judgment aforesaid, against the goods and

1. It was held in this case that a bill may be maintained by a creditor of a corporation which has not sufficient assets to satisfy all its creditors, against the individual corporators who will be held individually liable to make good the deficiency, including that which may arise from the insolvency of any of the corporators, to the extent of the capital professed to be paid in, as set forth in the charter; but where an association afterward becomes incorporated it must be alleged and proved that there has been some act or expression on the part of the individuals of the association to signify their acceptance of the charter in order to charge them in the character of corporators.

Consult note 1, p. 874, *supra*.

chattels and real estates of the *Charleston New Theater Company*, has been returned by the sheriff of *Charleston* District, unsatisfied; because he could find no property, real or personal, belonging to the said company, out of which the money due on the said execution could be made.

And your orators in fact show unto your honors, that the said theater company is hopelessly insolvent; and that they have no visible means of paying their debts, except their building, the *New Theater*, the fee simple of which, subject to the mortgages thereon, has been lately sold under an execution against the said company, for a small sum of money, without paying any part of your orator's debt; and that the said company has ceased to hold any meetings for the transaction of business, or the election of officers for several years past, and that the said company is, to all practical purposes, entirely dissolved by their own acts; possessing at present neither the ability nor the disposition to carry their original project into execution, and against whom a judgment in law, or a decree of this Honorable Court, would be of no more avail to your orators in obtaining payment of their debt, than would be a judgment against any admitted pauper.

As your orators further show unto your honors, that at the time the said *Robert Wotherspoon*, *James Rose*, *Henry Gourdin*, *Richard Cogdell*, *William A. Carson*, and their associates, were incorporated, the said theater association were actually indebted to a large amount for the building of the said theater, on the contracts aforesaid, made by their managing committee, the said trustees, who have, since the act of incorporation, assigned and transferred to the said incorporated company all the real estate which they held as trustees of the theater association aforesaid.

And your orators further show unto your honors, that they have been advised that no act of incorporation could relieve the said trustees and their associates from the payment of debts, which they owed for the construction of the said theater, on contracts made between the said trustees and the said *Fogartie & Sutton* and *Ephriam Curtis and Company*; and least of all, that no act of the said trustees and their associates can divest them, so far as the rights of your orators are concerned, of a liability which attaches to all and every member of the said theater association on their contracts made by the said trustees, as a committee in behalf of the said association; and although your orators have been advised that the said trustees are personally and individually liable on the contracts made by them for building the *New Theater*, yet your orators, actuated by a sense of justice which revolts at enforcing their claims only against those who have in good faith acted as the agents of others, who are equally liable with themselves, have been induced to forego any such remedy against the trustees merely, and to appeal to your honors for such relief against the said trustees and their associates, as the nature of the case requires, in justice and good faith to all parties concerned.

And your orators have accordingly, both by themselves and their agents, applied to and requested the said trustees and their associates, defendants in this cause, to pay them the several sums of

money due them on the contracts made by the said trustees with *Fogartie & Sutton*, and with *Ephraim Curtis and Company*, as above mentioned; and your orators well hoped that such, their just and reasonable requests, would have been complied with, as in justice and equity they ought to have been; but now so it is, may it please your honors, the said trustees and their associates, contriving how to injure and oppress your orators in the premises, absolutely refuse to comply with your orators' aforesaid reasonable request. And to countenance such their unjust conduct, they the said trust ees and their associates, pretend that they are not personally liable for any contracts or agreements made by the said trustees, for building the said theater, but that their liability is restricted to the payment of their individual subscriptions, which they have already paid in to the joint fund, and beyond which payment they never agreed or expected to be bound for any expenditures growing out of the building of the said theater; whereas your orators charge the contrary to be true, and that each and every member of the said theater association is liable in his own private estate for the entire debts incurred by them for building the said theater, on contracts entered into before their incorporation; and that as to subsequent creditors who trusted the *Charleston New Theater Company* on the faith of their charter, your orators charge that the stockholders of the said theater company are compellable in this honorable court, in favor of their creditors, to make up among themselves so much of their capital of *sixty thousand* dollars, as the said company has not actually expended in building and conducting a theater in *Charleston*, and to hold the same as a fund to which the said creditors may have recourse for the payment and satisfaction of their debts against the said company, which they had trusted on the full assurance of their possessing such an amount of capital actually paid in, before the granting and acceptance of their charter. All which actings, doings and refusals of the said trustees and their associates are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orators.

In consideration whereof, and forasmuch as your orators are without remedy in the premises at common law, and cannot have adequate relief except in the court of equity, where matters of this sort are properly cognizable and relievable, to the end, therefore, that the said trustees, *Robert Wotherspoon*, *James Rose*, *Henry Gourdin*, *Richard W. Cogdell* and *William A. Carson*, and their associates in the said theater company, who are impleaded in this Honorable Court, for and on account of themselves and other members of the said association, who are not made personally parties to this suit, by reason of the delay, vexation and difficulty that would inevitably result from any attempt to bring such numerous parties before the court, may, upon their several and respective corporal oaths, according to the best and utmost of their several and respective knowledge, remembrance and belief, full, true, perfect, and distinct answers make, to all and singular the matters aforesaid, and that as fully and particularly as if the same were here repeated, and they thereunto severally and respectively distinctly interrogated; and more especially, that the said trustees and their associates may, in manner

aforesaid, answer and set forth whether the said trustees did not, on or about the *twenty-seventh* day of *February*, 1837, or at some other time, enter into certain contracts with *Messrs. Fogartie & Sutton*, bricklayers, and *Messrs. Ephraim Curtis and Company*, carpenters, for the building of the *New Theater* in *Charleston*, as your orators have hereinbefore set forth; and whether the said trustees were not parties to the said contracts, for and on account of themselves and their associates, subscribers for building a theater in *Charleston*; and whether they did not from time to time, by their treasurer, *George W. Logan, Esq.*, pay large sums of money to the said *Fogartie & Sutton*, and *Ephraim Curtis and Company*, for and on account of the said building contracts; and whether the said drafts accepted by the said *Logan*, as aforesaid, were not for and on account of money due to the said contractors for their work, labor and materials used and employed in building the said theater, and furnished at the request of the said trustees, and whether the said drafts have ever been paid, except partially by a payment of *fifteen hundred* dollars, made by *George W. Logan, Esq.*, treasurer, on account of the said debt to your complainant's testator, on the *twenty-first* day of *February*, 1841; and whether your orators have not, by themselves and their agents, made such application and requests as are hereinbefore in that behalf mentioned, and whether the said trustees and their associates have not, each and all of them, refused to comply therewith, and why; and that the said trustees and the rest of the members of the said theater association may be compelled, by and under the decree and direction of this Honorable Court, to pay your orators whatever may be found due to them on the drafts aforesaid; and that, for and on account of such parties who may hereafter come in as aforesaid, and who are only creditors of the *Charleston New Theater Company* as a corporate body, the said defendants may account for the amount of capital that has been paid in by them, as stockholders thereof, and declare whether the same has been expended in building and conducting a theater in *Charleston*; and distinctly set forth what, in fact, was the amount of their capital at the time of their incorporation, and how the same has been invested; and whether any call has been made upon the stockholders, to make up among themselves, by assessment or contributions, the amount of *sixty thousand* dollars, or, at least, so much as, with the property of the company, may be sufficient to pay their debts; and that the said defendants, as stockholders of the said *Charleston New Theater Company*, may be directed, by and under the decree of this Honorable Court, by contributions and assessments among themselves, to make up the whole amount of their capital set forth in their charter, not expended in building and conducting a theater in *Charleston*, for the purpose of paying the debts of the said company, and to hold the same as a trust fund for the benefit of their creditors, who have, in good faith, trusted them, on the reasonable belief that they actually had, at the time of their incorporation, that amount of capital which their charter held them out to the world as possessing; and that your orators may have such other and further relief in the premises as to your honors shall seem meet, and the nature and justice of the case may require.

May it please your honors to grant unto your orators a writ of subpœna, to be directed to *Robert Wotherspoon, James Rose, Henry Gourdin, Richard Cogdell and William A. Carson, trustees and stockholders of the Charleston New Theater Company*; and also to *William Aiken, Daniel Blake, Ker Boyce, Thomas A. Coffin, John Crawford, John Fraser, Joseph E. Glover, James Hamilton, Wade Hampton, Leon Herckenrath, William C. Heyward, Moses D. Hyams, Joseph Lawton, Vincint Le Seigneur, David C. Levy, George W. Logan, Thomas O. Lowndes, Charles A. Magwood, N. Russell Middleton and Ralph J. Middleton, exccutors of Arthur Middleton, Henry A. Middleton, Oliver H. Middleton, Thomas Milliken, Otis Mills, Moses C. Mordecai, Reuben Moses, William Patton, James L. Pettigru, James Rose, Ralph S. Izard and Stephen D. Doar, executors of Thomas Pinckney, Robert Pringle, Lewis A. Pitray, William Ravenal, Samuel P. Ripley, Thomas J. Roger, Thaddeus Street, John Strohecker, Abraham Tobias, Elias Vanderhorst, Joshua J. Ward, Charles Warley and Aaron S. Willington*, members and stockholders in said company, commanding them at a certain day, and under a certain penalty, therein to be limited, personally to be and appear before your honors, in this Honorable Court, and then and there full, true, direct and perfect answer make to all and singular the premises, and further, to stand to, perform and abide such further order, direction and decree therein, as to your honors shall seem meet.

And your orators will ever pray, etc.

CRIME AGAINST NATURE.[1]

By B. A. Milburn.

I. With Human Being, 921.
1. *In General*, 921.
2. *Assault with Intent to Commit*, 925.
3. *Solicitation to Commit*, 926.
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II. Bestiality, 928.
1. *With Beast*, 928.
2. *With Bird*, 929.

CROSS-REFERENCES.

For the formal parts of Criminal Complaints, generally, see the title CRIMINAL COMPLAINTS.

For the formal parts of Indictments, generally, see the title INDICTMENTS.

For the formal parts of Informations, generally, see the title INFORMATIONS.

For matters of Substantive Law, see American and English Encyclopædia of Law (2d ed.), *title SODOMY.*

For matters of Procedure, see Encyclopædia of Pleading and Practice, *title SODOMY.*

I. With Human Being.

1. In General.[2]

1. The term "crime against nature" is used as a title for this article, somewhat arbitrarily, to include all acts of sexual intercourse against the order of nature, which are in violation of the common law, or which are denounced by statutes, committed by a human being either with another human being or with an animal, or otherwise. The words "sodomy" and "buggery" are used in the statutes and by text-writers as synonymous. Bestiality is a species of sodomy or buggery, being sexual intercourse by a human being with an animal, beast, or bird. See Am. & Eng. Encycl. of L., titles Bestiality; Buggery; Sodomy.

2. By Man with Woman. — In 2 Chit. Cr. L. 49, is given the following form: (*Commencing as in Form No. 6655, and continuing down to* *) "in a certain room in the workhouse, then situate in the parish aforesaid, in and upon one *Jane Mason*, spinster, then a virgin of *eleven* years, in the peace of God and our said lord the king, then and there being, did violently and feloniously make an assault, and then and there the said *Jane Mason*, in the room aforesaid, did wickedly, diabolically, feloniously, and against the order of nature, carnally know and a venereal affair in the fundament of the said *Jane Mason* then and there had; and her the said *Jane Mason*, then and there wickedly, diabolicaly, feloniously, and against the order of nature, in the said fundament of her the said *Jane Mason*, then and there did carnally know, and that sodomitical, detestable, and abominable sin called

Form No. 6655.

(Precedent in 2 Chit. Cr. Law, 48.)[1]

[*Middlesex.* The jurors for our lord the king upon their oath present,][2] that *James King*, late of [the parish of *St. Paul*, *Covent Garden*, in the county of *Middlesex*, yeoman,][2] not having the fear of God before his eyes, nor regarding the order of nature, but being moved and seduced by the instigation of the devil, on [the *twentieth* day of *February*, in the *sixth* year of the reign of our sovereign lord *George* the *Fourth*, by the grace of God, of the United Kingdom of Great Britain and Ireland, king, defender of the faith,][2] with force and arms at[3] [said parish of *St. Paul*, *Covent Garden*, in the county of *Middlesex* aforesaid,* in the dwelling-house of one *George Jones*,][2] in and upon one *Thomas Logan*,[4] a youth about the age of *seventeen* years, then and there being, feloniously,[5] did make an assault, and then and there feloniously, wickedly, diabolically, and against the order of nature,[6] had a venereal affair[7] with the said *Thomas Logan*, and then and there carnally knew the said *Thomas Logan*, [and] then and there feloniously, wickedly and diabolically, and against the order of nature, with the said *Thomas Logan*, did commit and perpetrate the detestable and abominable[8] crime of buggery[9] (not to be named among Christians), buggery (not to be named among Christians), then and there with the said *Jane Mason*, wickedly, diabolically, feloniously, and against the order of nature, committed and perpetrated, to the great displeasure of Almighty God" (*concluding as in Form No. 6655*).

Chitty cites as the source of this form Cro. C. C. (7th ed.) 230, and in support of the proposition that an indictment lies for this offense, Fortescue 91, 2 Chit. Cr. L. 49, note *z*.

1. This indictment, observes Chitty, is similar to that in Co. Ent. 351*b*, which was settled on great advice. 2 Chit. Cr. L. 48, note *s*.

2. The words in [ ] are inserted in order to make the form complete.

3. Description of Place. — In Co. Ent. 351b, it is stated to have been committed "to wit, in the dwelling-house of one ———, there." 2 Chit. Cr. L. 48, note *t*.

4. Description of Pathic. — In Co. Ent. 351b, he is described as a "male child." 2 Chit. Cr. L. 48, note *u*.

Description of Pathic as Human Being. — In People *v.* Moore, 103 Cal. 508, it was charged that the alleged crime was committed "in and upon the person of Carl Kohler," and it was held that this was a sufficient statement that it was committed with a human being, as distinguished from an animal.

5. Feloniously Did Assault. — In Co. Ent. 351*b*, the word "feloniously" is here omitted. 2 Chit. Cr. L. 48, note *w*.

6. Contra Naturæ Ordinem, etc. — The indictment must charge that the offender *contra naturæ ordinem rem. habuit veneream, et carnaliter cognovit.* 1 Russell on Crimes (9th ed.), p. 938, *citing* 1 Hawk. P. C., c. 4, § 2, and 3 Inst. 58, 59. But in Davis *v.* State, 3 Har. & J. (Md.) 154, Nicholson, J., said: "The crime of sodomy is too well known to be misunderstood, and too disgusting to be defined farther than by merely naming it. I think it unnecessary, therefore, to lay the *carnaliter cognovit* in the indictment."

7. Rem Habuit Veneream. — The omission of an allegation that the defendant "had a venereal affair," etc., although such an averment is usual, does not vitiate the indictment, as such allegation does not belong to the class of "particular words of art which are so appropriated by the law to express the precise idea which it entertains of the offense, that no other words, however synonymous they seem, are capable of doing it," nor is the use of the omitted words essential to make the statement of the offense certain to a certain intent in general. Lambertson *v.* People, 5 Park. Cr. Rep. (N. Y. Supreme Ct.) 200.

8. Abominable. — In Co. Ent. 351, the words "ab hominandum," meaning "inhuman" were used, but the word now usually used is "abominable." 2 Chit. Cr. L. 48, note *x*.

9. Necessity to Describe Offense as Buggery. — It has been said that it is not

to the great displeasure of Almighty God, to the great scandal of all human kind, against the form of the statute[1] [in such case made and provided,][2] and against the peace [of our lord the king, his crown and dignity.][2]

Form No. 6656.[3]

In the *District* Court of the *Second* Judicial District of the State of *Montana*, in and for *Silver Bow* County.

The State of Montana, Plaintiff,
versus
Napoleon Chandonnet, Defendant.

At a regular term of the *District* Court of the *Second* Judicial District of the State of *Montana*, in and for *Silver Bow* County, begun

sufficient to charge that the offender *contra naturæ ordinem rem habuit veneream, et carnaliter cognovit*; and that as the statute describes the offense by the term "buggery," the indictment should also charge *peccatumque illud sodomiticum Anglicè dictum* buggery *adtunc et ibidem nequiter, felonicè, diaboticè, ac contrà naturam, commisit, ac perpetravit.* 1 Russell on Crimes (9th ed.), p. 938, *citing* Fost. 424, who referred to Co. Ent. 351*b*, as a precedent settled by great advice. See also State *v.* Williams, 34 La. Ann. 87, holding that the indictment must include the additional qualification of the crime as "buggery." 2 Chit. Cr. L. 48, note *y*; 3 Inst. 59; and 1 East P. C. 480.

Sodomitical Practices. — In Reg. *v.* Rowed, 3 Q. B. 179, 43 E. C. L. 688, it was charged that the defendants committed with each other, divers "nasty, wicked, filthy, lewd, beastly, unnatural, and sodomitical practices," but it was not alleged what acts they committed. Patteson, J., said: "We cannot know by these general indictments what the charge is. From such words occurring in common parlance, we might, perhaps, infer it, but in a legal view we cannot."

1. Contra Formam Statuti. — In Davis *v.* State, 3 Har. & J. (Md.) 154, it was held that as the judgment of the court might be either at common law or under the act of assembly, the conclusion *contra formam statuti* was not improper.

2. The words in [ ] are inserted in order to make the form complete.

3. This form is taken verbatim from the record in the case of State *v.* Chandonette, 10 Mont. 280. The indictment was drawn under Mont. Pen. Code, tit. 9, c. 4, which provides punishment for "the infamous crime against nature committed with mankind, or any animal." The court said with reference to this indictment: "That pleading is the ordinary common-law indictment, which is approved by all the writers and precedents, and against the validity of which no authorities are cited or arguments made. It is our opinion that the indictment is good."

Other Precedents. — In Lambertson *v.* People, 5 Park. Cr. Rep. (N. Y. Supreme Ct.) 200, the indictment, omitting the formal parts, charged as follows: "That *George W. Lambertson*, now or late of the city of *Brooklyn*, in the county of *Kings* aforesaid, on the *fifteenth* day of *January*, in the year of our Lord one thousand eight hundred and *sixty*, at the city and in the county of *Kings* aforesaid, in and upon the body of *Peter Cohen*, in the peace of God and of the said people, then and there being with force and arms, did feloniously make an assault, and him, the said *Peter Cohen*, then and there feloniously, wickedly, diabolically, and against the order of nature, carnally knew, and then and there feloniously, wickedly and diabolically, and against the order of nature, with the said *Peter Cohen*, did commit and perpetrate the detestable and abominable crime of buggery, against the statute in such case made and provided, to the evil example of all others in like case offending, and against the peace," etc.

In Wright *v.* State, 35 Tex. Crim. Rep. 368, the indictment was sufficient and was as follows: "In the name and by the authority of the State of *Texas*: The grand jurors, good and lawful men, of the State of *Texas* and of the County of *McLennan*, duly and legally tried on oath by the judge of the *Fifty-fourth* Judicial District of *Texas*, hold-

and holden at the *Court House* of the said county, on the *sixth* day of *January*, A. D. 1890, and continued from day to day thereafter, by the adjournment of the said court, from day to day thereafter, until the *sixteenth* day of *April*, A. D. 1890, on which last mentioned day the Grand Jury of the said county, duly drawn, impaneled, sworn and charged to inquire into public offenses committed in the said county, upon their oaths do present and say: That one *Napoleon Chandonnet*, late of the county of *Silver Bow*, state of *Montana*, on or about the *first* day of *February*, A. D. 1890, at the county of *Silver Bow*, in the

ing session of the *District* Court in and for *McLennan* County, touching their qualifications as grand jurors, duly elected, impaneled, sworn and charged to diligently inquire into and true presentment make of all offenses against the penal laws of the State of *Texas*, committed within the body of the county aforesaid, in session in said county, upon their oaths in said *District* Court of said *McLennan* County, in open court present that on or about the *5th* day of *August*, in the year of our Lord eighteen hundred and *ninety-five*, and before the presentment hereof, with force and arms in the county and State aforesaid, *Rufus Wright* did then and there unlawfully and against the order of nature, have a venereal affair with a beast, to-wit: a *mule*, and carnally knew the said *mule*, and then and there and thereby did commit against the order of nature, the abominable and detestable crime of sodomy, against the peace and dignity of the State."

Under Particular Statutes — *Alabama.* — In Ala. Crim. Code (1886), p. 276, will be found a statutory form of an indictment for this offense.

Connecticut. — Gen. Stat. (1888), § 1522. An indictment under this statute, omitting the formal parts, should charge as follows: "that at the town of *Salisbury*, in the county of *Litchfield* aforesaid, *William A. Jones* did on the *first* day of *January*, in the year of our Lord one thousand eight hundred and *ninety-six*, wickedly and unlawfully and against the order of nature have carnal copulation with a man, to wit, *Robert Smith*, against the peace and contrary to the statutes in such case made and provided, the said *William A. Jones* not being forced to commit the aforesaid unnatural and unlawful act, and the said *William A. Jones* not being on the day aforesaid under fifteen years of age."

Massachusetts. — Pub. Stat. Supp. (1887), c. 436, § 1. An indictment under this statute, omitting the formal parts, should charge as follows: "that *William A. Jones*, late of *Northampton*, in the county of *Hampshire*, on the *first* day of *January*, in the year of our Lord one thousand eight hundred and *ninety-six*, at *Northampton* aforesaid, in the county of *Hampshire* aforesaid, did unlawfully, knowingly, and wilfully, commit an unnatural and lascivious act with another person, to wit, *Robert Smith*, against the peace," etc. An indictment charging that the defendant, at a time and place named, "did unlawfully, and feloniously commit a certain unnatural and lascivious act," with a person therein named, thus following the language of the statute without further description, is sufficient. Com. *v.* Dill, 160 Mass. 536, in which case the court declared that the indictment was sufficient without reference to the provision of section 2, and postponed "to some future time a consideration of the question how far the legislature may go in simplifying indictments."

Ohio. — Bates' Anno. Stat. (1897), §§ 7020–1. An indictment under this statute, omitting the formal parts, should charge as follows: "that *Alexander Bird*, late of said county, on the *eighth* day of *November*, 1890, at the county aforesaid, unlawfully did have carnal copulation with one *Fannie Smith*, in an opening of the body of the said *Fannie Smith* to-wit, her anus, which said opening was not one of her sexual parts, contrary to," etc.

Copulation in Mouth. — In the following states the statutes in express terms denounce the act of having carnal knowledge with another by penetrating the mouth:

North Dakota. — Rev. Codes (1895), § 7187.

An indictment under this section, omitting the formal parts, will be sufficient if it charges that: "said *Alexander Bird*, on the *first* day of *January*, 1896, in the city of *Fargo*, in this county, did feloniously, and carnally, know a male

state of *Montana*, did in and upon one *Patrick Harrington*, then and there being, wilfully, unlawfully and feloniously make an assault, and then and there feloniously, wickedly and against the order of nature had a venereal affair with the said *Patrick Harrington*, and then and there feloniously carnally knew him, the said *Patrick Harrington*, and then and there did feloniously, wickedly and against the order of nature with the said *Patrick Harrington* commit and perpetrate "the infamous crime against nature," not to be named among Christians. All of which is contrary to the form of the statute in such case made and provided and against the peace and dignity of the people of the state of *Montana*.

John T. Baldwin,
County Attorney of *Silver Bow* Co., *Mont.*

2. Assault with Intent to Commit.[1]

Form No. 6657.

(Precedent in 2 Chit. Cr. L. 50.)[2]

(*Commencing as in Form No. 6655, and continuing down to* *) in and upon one *John Howard*,[3] in the peace of God and our said lord the

person, to wit, *Charles Davidson*, with the mouth of him the said *Alexander Bird*, contrary to the form," etc.

Pennsylvania. — Pepp. & L. Dig. (1894), p. 1327, § 602.

In some other states the statutes are broad enough to cover this offense:

Georgia. — 3 Code Ga. (1895), § 382.

Illinois. — Starr & C. Anno. Stat. (1896), p. 1261, par. 119; Honselman *v.* People, 168 Ill. 172.

Massachusetts. — Pub. Stat. (Supp. 1887,) c. 436, § 1.

New York. — Pen. Code N. Y., § 303.

Ohio. — 2 Bates' Anno. Stat. (1897), § 7020-1.

Under Ordinary Statutes. — Penetration of the mouth is not sodomy within the ordinary statutes. Rex *v.* Jacobs, R. & R. C. C. 331; Prindle *v.* State, 31 Tex. Crim. Rep. 551.

1. Assault with Intent to Commit. — In some states the statutes, in terms, denounce an assault with intent to commit this offense.

Arizona. — Pen. Code (1887), § 342.

Georgia. — 3 Code (1895), § 386.

New Mexico. — Comp. Laws (1897), § 1353.

Pennsylvania. — Pepp. & L. Dig. (1894), p. 1328, § 603.

Rhode Island. — Gen. Laws (1896), c. 277, § 18.

For forms in prosecutions for assault with intent to commit crimes, generally, see the title ASSAULT, vol. 2, p. 228 *et seq.*

Attempt to Commit the Crime. — It has been said that upon an indictment for this offense the defendant may be convicted under 14 & 15 Vic., c. 100, § 9, of an attempt to commit the same. 1 Russell on Crimes (9th ed.), p. 939, *citing* 1 Hale 670, 3 Inst. 59, and 1 East P. C., c. 14, § 2. See also 3 Ga. Code (1895), § 386, denouncing the attempt to commit the offense.

Attempted intercourse with cadaver is prohibited in terms in

Minnesota. — Stat. (1894), § 6554.

New York. — Pen. Code, § 303.

2. Chitty refers to the forms in Cro. C. C. (7th ed.) 167, and in Cro. C. C. (8th ed.) 61; and advises that if it be apprehended that the two acts to complete the capital offense cannot be proved, the indictment should be drawn for an assault, and a count should be added charging the defendant with soliciting another to commit buggery with him. 2 Chit. Cr. L. 50, note *c*, *citing* 1 East P. C. 437; 8, 9, 480.

3. Age of the Person Assaulted. — Chitty observes that the precedent in Cro. C. C. (7th ed.) 167, and Stark. 387, here say, "an infant of the age of ten years," but that this is unnecessary. 2 Chit. Cr. L. 50, note *d*. See also Cro. C. C. (8th ed.) 61.

king, then and there being, did make an assault[1] with an intent, that most horrid, detestable, and sodomitical crime (among Christians not to be named), called buggery,[2] with the said *John Howard*, against the order of nature, then and there feloniously, wickedly, and devilishly, to commit and do, to the great displeasure of Almighty God, to the great damage of the said *John Howard*, and against the peace of our said lord the king, his crown and dignity.[3]

3. Solicitation to Commit.

Form No. 6658.

(Precedent in 2 Chit. Cr. L. 50.)[4]

(*Commencing as in Form No. 6655, and continuing to* *) the said *Charles Davidson*, being a person of a most wicked, lewd, and aban-

1. Actual Beating and Wounding. — The precedents in Cro. C. C. (7th ed.) 167, and Stark. 387, here state, "and him the said J. H., then and there did beat, wound, and ill treat, so that his life was greatly despaired of." But these words are not in Cro. C. C. (8th ed.) 61, and it is better, it would seem, to omit them when they do not accord with the facts. 2 Chit. Cr. L. 50, note *e*.

2. Description of the Crime. — In an indictment for an assault with intent to commit sodomy, or buggery, it would seem that as the crime intended to be committed is only an aggravation of the assault, it may be described with less particularity than in an indictment for the crime itself. Davis *v.* State, 3 Har. & J. (Md.) 154.

3. Addition of Count for Common Assault. — A count for a common assault may be added. 2 Chit. Cr. L. 50, note *f*, *citing* a note to Cro. C. C. (7th ed.) 167.

Other Precedents — *California*. — In People *v.* Williams, 59 Cal. 397, the indictment, omitting the formal parts, charged as follows: "The said *John E. Williams* on the *seventeenth* day of *March*, A. D. eighteen hundred and *eighty-one*, at the said *City and* County of *San Francisco*, did wilfully and unlawfully and feloniously make an assault upon *Harry George*, with intent to commit in and upon the person of the said *Harry George* the infamous crime against nature, contrary to the form, force and effect of the statute in such case made and provided, and against the peace," etc.

In this case the court said: "The acts constituting the offense are stated in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended."

Maryland. — In Davis *v.* State, 3 Har. & J. (Md.) 154, the indictment charged that the defendant "not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on, etc., with force and arms, at, etc., in and upon one *Walter Chase*, a youth of the age of *nineteen* years, in the peace of God and of the state of *Maryland*, then and there being, did make an assault, and him the said *Walter Chase*, then and there did beat, wound, and ill treat, with an intent that most horrid and detestable crime (among Christians not to be named) called sodomy, with him the said *Walter Chase*, and against the order of nature, then and there feloniously, wickedly, and devilishly, to commit and do, to the great displeasure of Almighty God, contrary to the Act of Assembly, in such case made and provided, and against the peace, government and dignity of the state."

This indictment contained a second count in all respects like the first count, which is given in the text, except that it was alleged that the defendant's intent was "then and there feloniously, etc., with him the said *Walter Chase*, against the order of nature to have a venereal affair, and with him the said *Walter Chase*, that sodomitical detestable and abominable sin (among Christians not to be named), called buggery, then and there feloniously, etc., against the order of nature to perpetrate and commit."

4. Solicitations. — The mere soliciting another to the commission of sodomy has been treated as an indictable offense. 1 Russell on Crimes (9th ed.), p.

doned mind and disposition, and wholly lost to all sense of decency, morality, and religion, and devising, and intending as much as in him lay, to vitiate and corrupt the morals of the said *Alexander Bird*, and to stir up and excite in his mind filthy, lewd, and unchaste desires and inclinations, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, did wickedly and unlawfully solicit and incite, and endeavor to persuade the said *Alexander Bird* to permit and suffer him the said *Charles Davidson*, then and there feloniously and wickedly to commit and do that detestable and abominable crime (among Christians not to be named), called buggery, with the said *Alexander Bird*, against the order of nature, to the great displeasure of Almighty God, to the great damage of the said *Alexander Bird*, and against the peace of our said lord the king, his crown and dignity.

4. Submission to Commission of.[1]

Form No. 6659.

Court *of General Sessions* of the *City and* County of *New York.*

The People of the State of New York against *Alexander Bird.*

The grand jury of the *city and* county of *New York*, by this indictment, accuse *Alexander Bird** of the crime of submitting to the commission of the detestable and abominable crime against nature, in and upon his person, committed as follows:

The said *Alexander Bird*, on the *sixteenth* day of *August*, 1897, at the

939, *citing* 2 Chit. Cr. L. 50, as containing a precedent for an indictment for such solicitation. Chitty framed this indictment on the principle of Rex *v.* Higgins, 2 East 5, 2 Chit. Cr. L. 50, note *g*.

Pennsylvania, it would seem, is the only state in which statutes in terms denounce the act of soliciting another to permit and suffer the act of sodomy, or buggery, to be committed with him, as distinguished from an assault with intent to commit such acts. Pepp. & L. Dig. (1894), p. 1328, § 603.

Enticement, Allurement, etc., to Commit Masturbation. — Burns' Anno. Stat. Ind. (1894), § 2092, provides that whoever entices, allures, instigates, or aids, any person under the age of twenty-one years to commit masturbation, or self-pollution, is guilty of sodomy.

An indictment framed under this statute, omitting the formal parts, should charge as follows: "that on the *18th* day of *January*, 1897, and in the county of *Rush* and State of *Indiana*, *William A. Jones* did unlawfully, feloniously, purposely, and with premeditated malice, entice (or *allure* or *instigate* or *aid*) *Robert Smith*, the said *Robert Smith* being then and there a person under the age of twenty-one years, to commit masturbation, contrary to the form of the statute in such case made and provided, and against the peace," etc.

1. Submission to carnal knowledge against the order of nature is denounced in terms in the following states:

New York. — Pen. Code, § 303.

North Dakota. — Rev. Codes (1895), § 7186.

Pennsylvania. — Pepp. & L. Dig. (1894), p. 1327, § 602, in terms denounces only submission to the act when committed by penetrating the mouth, but the statute impliedly covers submission to other acts.

The patient or pathic may be indicted as well as the perpetrator. Reg. *v.* Allen, 13 Jur. 108, 2 Car. & K. 869, 61 E. C. L. 869, 1 Den. C. C. 364, Temp. & M. 55. See also Reg. *v.* Jellyman, 8 C. & P. 604, 34 E. C. L. 547, holding that the pathic is an accomplice.

city of *New York*, in this county, did unlawfully, and feloniously, submit and consent that *Charles Davidson* should carnally know him, the said *Alexander Bird*, contrary to nature, to wit, in the anus of him, the said *Alexander Bird*, and the said *Charles Davidson*, with the consent and permission aforesaid, unlawfully and feloniously given him by the said *Alexander Bird*, did unlawfully and feloniously know him the said *Alexander Bird*, against the order of nature, to wit, in the anus, which submission to the aforesaid carnal knowledge, contrary to nature, was then and there done by the said *Alexander Bird*, against the form of the statute in such case made and provided, and against the peace of the people of the state of *New York* and their dignity.

Daniel Webster, District Attorney.

II. BESTIALITY.

1. With Beast.[1]

Form No. 6660.

(Precedent in 2 Chit. Cr. L. 49.)[2]

(*Commencement as in Form No. 6655, and continuing to* *) in a certain cowhouse there, with [an animal, to wit][3] a certain black cow,[4] then and

1. Animal or Beast. — In the following states the statute uses the word "animal:"

Arizona. — Pen. Code (1887), § 480.

California. — Pen. Code (1897), § 286.

Montana. — Pen. Code (1895), tit. 9, p. 4, § 496.

New Mexico. — Comp. Laws (1897), § 1352.

New York. — Pen. Code, § 303.

North Dakota. — Rev. Codes (1895), § 7186.

Utah. — 2 Comp. Laws (1888), § 4509.

Virginia. — Code (1887), § 3793, uses the term "brute animal."

West Virginia. — Code (1891), c. 149, § 12, uses the term "brute animal."

In the following states the statute uses the word "beast:"

Colorado. — Mills' Anno. Stat. (1891), § 1213.

Georgia. — 3 Code (1895), § 384.

Indiana. — Burns. Anno. Stat. (1894), § 2092.

Louisiana. — Voorhies' Rev. Laws (1884), p. 132, § 788.

Massachusetts. — Pub. Stat. (1882), c. 207, § 18.

Michigan. — How. Anno. Stat. (1882), § 9292.

Minnesota. — Stat. (1894), § 6554.

Missouri. — Rev. Stat. (1889), § 3796.

Nebraska. — Comp. Stat. (1897), § 6920.

Nevada. — Gen. Stat. (1885), § 4608.

New Jersey. — 1 Gen. Stat. (1895), p. 1057, § 38.

Oklahoma. — Stat. (1893), § 2186.

Oregon. — 1 Hills' Anno. Laws (1892), § 1874.

Pennsylvania. — Pepp. and L. Dig. (1894), p. 1327, § 602.

Rhode Island. — Gen. Laws (1896), c. 281, § 12.

South Carolina. — Crim. Stat. (1893), § 254.

Tennessee. — Code (1896), § 6764.

Wisconsin. — Sanb. and B. Anno. Stat. (1889), § 4591.

Wyoming. — Rev. Stat. (1887), § 884.

2. Chitty refers to the forms in Cro. C. A. 17, and in Cro. C. C. (8th ed.) 86, 2 Chit. Cr. L. 49, note *a*.

3. The words in [ ] are inserted; they are not found in the precedent.

4. Description of Animal as Bitch. — In Reg. *v.* Allen, 1 C. & K. 495, 47 E. C. L. 495, it was charged that the defendant "in and upon a certain animal called a bitch, unlawfully, and wickedly, did lay his hands," with intent feloniously to commit bestiality with the said animal, and then and there unlawfully, and wickedly, did attempt feloniously, etc., to know the said animal, and it was held that the description of the animal was sufficient,

there being, feloniously, wickedly, diabolically, and against the order of nature, had a certain venereal and carnal intercourse, and then and there feloniously, wickedly, diabolically, and against the order of nature, carnally knew the said cow; and then and there feloniously, wickedly, and diabolically, and against the order of nature, with the said cow,[1] did commit and perpetrate that detestable (*concluding as in Form No. 6655*).

2. With Bird.[2]

Form No. 6661.

(*Commencing as in Form No. 6659, and continuing to* *) of the detestable and abominable crime against nature, committed as follows:

The said *Alexander Bird*, on the *first* day of *January*, 1896, at the *city* of *New York*, in said county, then and there did, with force and arms, unlawfully, and feloniously, and against the order of nature, carnally know a bird, to wit, a *brown turkey hen*, in the anus of the said brown turkey hen, against the form (*concluding as in Form No. 6659*).

although the females of foxes and some other animals are called bitches as well as the female of the dog.

1. The words "with the said cow," which appear in the form given by Chitty, are omitted in Cro. C. A. 17, 2 Chit. Cr. L. 49, note *b*.

Another Precedent — *Texas*.— In Cross *v.* State, 17 Tex. App. 477, the indictment, omitting the formal parts, charged that the defendant "did then and there unlawfully and wilfully commit with a mare, same being a beast, the abominable and detestable crime against nature by then and there having carnal connection with said beast, and did then and there commit the crime of sodomy with said beast," etc.

Statutory Form —*Alabama*.— In Crim. Code (1886), p. 276, will be found a statutory indictment for this offense.

By a Woman. — See list of statutes cited *supra*, note 1, p. 928. The indictment, omitting the formal parts, may charge that "the said *Fannie Smith*, on the *first* day of *January*, 1896, at the *town* of *Huntington*, in this county, did then and there feloniously, unlawfully, and voluntarily submit to carnal knowledge of her the said *Fannie Smith*, being had in the genital organs of her the said *Fannie Smith*, by a *male black setter dog*, named *Bowzer*, against the peace," etc.

2. **Carnal Knowledge of Bird.** — In the following states, the statutes in terms denounce carnal knowledge of any bird by any person:

New York. — Pen. Code, § 303.

North Dakota. — Rev. Codes (1895), § 7186.

Under Ordinary Statutes. — Russell says: "An unnatural connection with an animal of the fowl kind is not sodomy, a fowl not coming under the name 'beast'; and it was agreed clearly not to be sodomy when the fowl was so small that its private parts would not admit those of a man, and were torn away in the attempt." 1 Russell on Crimes (9th ed.), p. 938, *citing* Rex *v.* Mulreaty, Hil. T. 1812, Ms., Bayley, J.

In Reg. *v.* Brown, 24 Q. B. Div. 357, however, it was held that it is a crime to attempt to commit an unnatural offense with a domestic fowl.

CRIMINAL COMPLAINTS.[1]

I. IN PRELIMINARY PROCEEDINGS, 930.

II. FOR OFFENSES TRIABLE IN JUSTICES' AND OTHER INFERIOR COURTS, 964.

1. *In Justices' Courts*, 964.
2. *In Other Inferior Courts*, 973.
   - *a. Chairman of Board of Trustees*, 973.
   - *b. City Court*, 974.
   - *c. County Court*, 975.
   - *d. Mayor's Court*, 977.
   - *e. Municipal Court*, 979.
   - *f. Police Court*, 979.
   - *g. Probate Court*, 984.

CROSS-REFERENCES.

For Forms of Criminal Complaints for Particular Offenses, consult the Specific Criminal Titles throughout this work.

For the Formal Parts of Indictments in the various Jurisdictions, consult the title INDICTMENTS.

For the Formal Parts of Informations in the various Jurisdictions, consult the title INFORMATIONS.

See also the GENERAL INDEX to this work.

I. IN PRELIMINARY PROCEEDINGS.[2]

Form No. 6662.[3]

The State of *Alabama*,
Dale County.

Personally appeared before me, *Abraham Kent*, a justice of the

1. Criminal complaints are variously designated as "complaints," "affidavits," or "informations" in the statutes of the various states. See *infra*, forms and statutory citations appended to the forms in this article.

2. Preliminary proceedings refer to the proceedings before justices of the peace, conservators of the peace, or like magistrates, for the examination of persons charged with crimes and the commitment of or holding to bail such persons to await the action of the grand jury or to be otherwise dealt with according to law in courts of competent jurisdiction. These proceedings should be distinguished from proceedings where the justice of the peace or other inferior court acts upon the complaint, affidavit, or information, and proceeds to try and punish the offender. For such latter proceedings see *infra*, this title, *Offenses Triable by Justices of the Peace and Other Inferior Courts*.

For forms relating to warrants of arrest issued upon criminal complaints consult the title WARRANTS OF ARREST.

For forms relating to the commitment and discharge of persons arrested under process issued upon criminal complaints consult the title COMMITMENT AND DISCHARGE, vol. 4, p. 926. See also the title BAIL AND RECOGNIZANCE, vol. 2, p. 1.

3. *Alabama*. — Crim. Code (1886), §§ 4255, 4256. These sections apply only

peace[1] in and for said county, one *Richard Roe*, who being duly sworn, on oath, says that before the making of this affidavit, to wit, on the *second* day of *January*, 1898, in said county, the offense of *arson in the first degree* was in the opinion of the complainant committed, and that one *John Doe* is guilty of the said commission of the said offense, against the peace and dignity of the state of *Alabama*.[2]

Richard Roe.[3]

Subscribed and sworn to before me this *fifth* day of *March*, 1898.

Abraham Kent, Justice of the Peace.

Form No. 6663.[4]

Territory of Arizona, plaintiff,
against
John Doe, defendant.

Territory of *Arizona*,
County of *Gila*. } ss.

Personally appeared before me,[5] *Abraham Kent*, a justice of the peace, of precinct, county of *Gila*, *territory* of *Arizona*, this *fifth* day of *March*, 1898, *Richard Roe*, of *Globe*, in the said county of *Gila*, who being duly sworn complains and says [that on the *second* day of *March*, in the year of our Lord one thousand eight hundred and *ninety-eight*, at and in the county of *Gila* and *territory* of *Arizona*, one *John Doe*, late of *Globe* in said county of *Gila* and *territory* of *Arizona* aforesaid, did commit the crime of *burglary in the first degree*, and that said *John Doe*, at the time and at the place last aforesaid committed said crime in the manner following, to wit: the said *John Doe*, at the time and place last aforesaid in the night-time of said day, did then and there feloniously, forcibly and burglariously break and enter the dwelling-house and building of one *Samuel Short*, there

to preliminary proceedings before committing magistrates, and not to criminal prosecutions before a justice of the peace or in a county court. Sale *v.* State, 68 Ala. 530.

For formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548 *et seq*.

Precedent of a complaint in bastardy proceedings may be found in Form No. 3934.

Technical accuracy is not required in preliminary proceedings. Brown *v.* State, 63 Ala. 97; Rhodes *v.* King, 52 Ala. 272. Consult these cases for instances of what is sufficient.

1. **Magistrates** before whom preliminary proceedings may be had are enumerated in the statutes. Ala. Crim. Code (1886), § 4680.

2. **Need not conclude** "against the peace and dignity of the state." Thomas *v.* State, 107 Ala. 61.

3. **Variance in Names.** — Where it was manifest from the complaint that "Hattie Patterson," who verified and subscribed the same, was identical with Hattie Patison, who appeared before the officer and made it, and that the difference in the spelling of the name resulted from mere clerical mistake, the error is immaterial. Reeves *v.* State, (Ala. 1898) 23 So. Rep. 28.

4. *Arizona*. — Pen. Code (1887), § 1258.
Nevada. — Gen. Stat. (1885), § 3985 *et seq*.
New Mexico. — Comp. Laws (1884), § 2448.

For the formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1. p. 548.

5. **Magistrates** to whom complaints may be made are enumerated in the statute.
Arizona. — Pen. Code (1887), § 1260.
Nevada. — Gen. Stat. (1885), § 3987.
New Mexico. — Comp. Laws (1884), § 2448.

situate, with intent to commit grand larceny, and did then and there feloniously and burglariously steal, take and carry away *fifty gallons of sherry wine*, the personal property of the said *Samuel Short*, and of the value of *three hundred dollars*,][1] contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the people of the *territory* of *Arizona*.

Wherefore complainant, the said *Richard Roe*, prays that a warrant may be issued for the arrest and apprehension of the said *John Doe*, and that he may be dealt with according to the law.

Richard Roe.[2]

Subscribed and sworn to before me this *fifth* day of *March*, 1*898*.

Abraham Kent, Justice of the Peace.

(*Deposition of informant or prosecutor annexed.*)[3]

Form No. 6664.[4]

State of *Arkansas*,
County of *Pulaski*, } ss. Affidavit for Warrant of Arrest.
Big Rock Township,

I, *Richard Roe*, do solemnly swear that *John Doe*, in said county of *Pulaski*, did on the *second* day of *January*, 1*898*, commit the crime of *rape*, and pray a warrant from *Abraham Kent*, justice of the peace for said county, to apprehend and bring said *John Doe* before said justice, to be dealt with according to law.

Richard Roe.

Sworn to and subscribed before me this *fifth* day of *March*, 1*898*.

Abraham Kent, Justice of the Peace.

1. Charging Part of Complaint. — The matter in [ ] is what is called the charging part, and must of necessity vary according to the particular offense sought to be charged. While it is not always necessary to use the same technicality and accuracy in a criminal complaint as in an indictment or information, it is, however, a safe rule to do so. For the charging part of an indictment or information for any particular offense consult the titles treating of that offense, such as ABANDONMENT OF CHILDREN; ABDUCTION OF WOMEN; ABORTION; AFFRAY; ARSON AND BURNING; ASSAULT; BADGES, ETC.; BARRATRY; BIGAMY, etc.

2. Signature by mark on the part of the complainant without attestation by a subscribing witness is sufficient where the certificate of the committing magistrate is to the effect that it was subscribed and sworn to by the complainant. State *v.* Depoister, 21 Nev. 107.

3. This deposition must set forth the facts stated by the prosecutor and his witness, tending to establish the commission of the offense and the guilt of the defendant.

Arizona. — Pen. Code (1887), § 1270.

California. — Pen. Code (1897), §§ 811, 812.

Idaho. — Rev. Stat. (1887), § 7516.

Nevada. — Gen. Stat. (1885), § 3988.

Oregon. — Hill's Anno. Laws (1892), § 1549.

Information and belief may support the deposition where the acts and circumstances on which the complaint is founded are given. People *v.* McIntosh, (Supreme Ct.) 5 N. Y. Crim. Rep. 38.

4. *Arkansas.* — Sand. & H. Dig. (1894), § 1963, makes it the duty of a magistrate to issue a warrant upon information given him "on oath," charging some person with the commission of a public offense. When the affidavit is made and the accused arrested, the affidavit is functus officio. It is not demurrable Martin *v.* State, 46 Ark. 38.

For the formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

Form No. 6665.[1]

The People of the State of California against *John Doe.* } Complaint for *Burglary in the First Degree.*

State of *California*, *Marin* County. } ss.

Before me, *Abraham Kent*, a justice of the peace[2] within and for the county of *Marin* in the state of *California*, this *fifth* day of *March*, 1898, personally appeared one *Richard Roe*, who being first duly sworn on oath says (*continuing and concluding as in Form No. 6663*).

Form No. 6666.[3]

State of *Colorado*, County of *Dolores*. } ss.

The complaint and information of *Richard Roe*, made before *Abraham Kent*, Esq., one of the justices of the peace[4] in and for the said county, on *fifth* day of *March*, A. D. 1898, being duly sworn on oath says that (*continuing and concluding as in Form No. 6663*).

Form No. 6667.[5]

State of *Connecticut*, *Hartford* County. } Town of *Hartford.*

To *Abraham Kent*, Esq., a justice of the peace[6] for *Hartford*

1. *California*. — Pen. Code (1897), § 806.

For the formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

For the sufficiency of the complaint under criminal proceedings see People *v.* Smith, 1 Cal. 9; People *v.* Velarde, 59 Cal. 457; *Ex p.* Dimmig, 74 Cal. 164; People *v* Staples, 91 Cal. 23. A complaint positive and direct in its allegation of every fact necessary to support the charge laid is a sufficient deposition within the meaning of Cal. Pen. Code, § 811 *et seq.* People *v.* Staples, 91 Cal. 23, *distinguishing Ex p.* Dimmig, 74 Cal. 164.

A mere affidavit in the form of an information, which only contains an expression of opinion of the affiant that a certain person is guilty of a crime, and which contains no evidence and is followed by no deposition stating any fact tending to show guilt, is insufficient as a criminal complaint upon which to issue a warrant of arrest. *Ex p.* Dimmig, 74 Cal. 164, where the complaint in question is set out in full.

2. **Magistrates** to whom the complaint may be made are enumerated in the statute. Cal. Pen. Code (1897), § 808.

The complaint may be sworn to before a justice of the peace. People *v.* Le Roy, 65 Cal. 613, although filed in a police court.

District judges, prior to the abolition of the district courts, were held to be magistrates vested with authority to hold accused persons to answer criminal charges. *Ex p.* Granice, 51 Cal. 375; *Ex p.* Walsh, 39 Cal. 705.

Need not conclude "against the form of the statute." *Ex p.* Mansfield, 106 Cal. 400.

3. *Colorado*.—Mills' Anno. Stat. (1891), §§ 1482–1484.

For formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

Amendment of complaint in preliminary proceedings may be made. People *v.* Mellor, 2 Colo. 708.

4. **Magistrates** to whom complaint and information made be made are enumerated in the statute. Mills' Anno. Stat. Colo. (1891), § 1482.

5. *Connecticut*. — Gen. Stat. (1888), §§ 693, 694; Laws (1895), p. 466.

For examples of the charging part in a *Connecticut* complaint see Forms Nos. 2411, 3935, 3936, 3951, 3963, 3967.

6. **To Whom Made.** — To the court having cognizance of the offense or to some justice of the peace in the town

county, in said town. Comes *Richard Roe*, a grand juror[1] in and for said town of *Hartford*, and on his oath of office complaint and information makes, that at said town of *Hartford*, on the *tenth* day of *March*, 1896, *John Doe*, of the town of *Hartford* in said county (*Here state the facts constituting the offense*),[2] contrary to the form of the statute in such case made and provided and against the peace. Wherefore, the grand juror aforesaid prays process, and that the said *John Doe* may be arrested and examined touching the allegations contained in this complaint and be thereon dealt with according to law.[3]

Dated at *Hartford* this *tenth* day of *March*, A. D. 1896.

Richard Roe, Grand Juror.

Form No. 6668.[4]

State of *Delaware*, }
Kent County. } ss.

Be it remembered that on this *fifth* day of *March*, A. D. 1898, personally came before me, *Abraham Kent*, a justice of the peace within and for the county of *Kent*, state of *Delaware*, *Richard Roe*, of *Dover* in said county, who, being by me duly sworn according to law, deposes and says (*continuing and concluding as in Form No. 6663*).

Form No. 6669.[5]

District of Columbia, to wit:

On this *fifth* day of *March*, A. D. one thousand eight hundred and

where the offense was committed. Conn. Gen. Stat. (1888), § 88.

1. By Whom Made.— The grand jurors of the several towns shall make due complaint of all crimes and misdemeanors that shall come to their knowledge except in towns where by law those duties are involved upon other officers exclusively. Conn. Gen. Stat. (1888), § 88.

Grand jurors may complain of violation of town and borough by-laws and regulations to a justice of the peace of the town. Conn. Gen. Stat. (1888), § 89.

2. Charging part of complaint, see *supra*, note 1, p. 932.

3. Need not conclude "against the peace and dignity of the state." State *v.* Miller, 24 Conn. 519; State *v.* Holmes, 28 Conn. 231.

"Contrary to the form of the statute" is not fatal to the validity of the grand juror's complaint, even though it charges a common-law offense. State *v.* Holmes, 28 Conn. 231.

4. *Delaware.* — Rev. Stat. (1893), p. 734, § 16, providing that when complaint is made in due form to a justice, alleging that an offense has been committed, the justice shall carefully examine the complainant, on oath or affirmation, and if he considers there is probable ground for the accusation he shall issue his warrant.

Where an offense is of an aggravated nature, or not within the limit of the justice's jurisdiction, the accused shall be committed or bound over to the proper court. Del. Rev. Stat. (1893), p. 732, §§ 8, 12.

For formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

5. *District of Columbia.* — Comp. Stat. (1894), p. 310, § 9, providing that any justice of the peace may, on complaint under oath, issue a warrant returnable to the police court against persons accused of crimes committed in the district. Section 8, however, provides that justices of the peace shall not exercise any jurisdiction over crimes and offenses, either for examination to commit or hold to bail or for final judgment.

For formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

ninety-eight, personally came before me, *Abraham Kent*, a justice of peace in and for the *District of Columbia*, one *Richard Roe*, who, being duly sworn according to law, doth declare and say that, on the *second* day of *January*, A. D. 1898, in the *district* aforesaid, *John Doe* did (*Here state facts constituting the offense*),[1] against the form of the statute in such case made and provided, and against the peace and government of the United States.

Richard Roe.

Sworn to and subscribed the *fifth* day of *March*, 1898.

Abraham Kent, J. P. (SEAL)

Form No. 6670.[2]

(Fla. Rev. Stat. (1892), p. 895.)

State of *Florida*,
Marion County,
First District.

Before the subscriber, a justice of the peace[3] in and for said county, personally came *Richard Roe*, who being duly sworn says, that one *John Doe*, on the *second* day of *March*, A. D. 1898, in the county and district aforesaid (*Here designate the nature of the offense, and describe the circumstances of its commission as particularly as can be done.*)[4]

Richard Roe.

Sworn to and subscribed before me this *fifth* day of *March*, 1898.

Abraham Kent, Justice of the Peace.

Form No. 6671.[5]

(3 Ga. Code (1895), p. 884.)

Georgia, *Bibb* County.[6]

Personally came *Richard Roe*, who on oath saith that to the best of his knowledge and belief[7] *John Doe* did, on the *second* day of *March*, in the year 1898, in the county aforesaid, commit the offense of *perjury*;[8] and this deponent makes this affidavit that a warrant may

1. **Charging part** of complaint, see *supra*, note 1, p. 932.

2. *Florida*. — Rev. Stat (1892), § 2870. For forms of complaint in this state see Forms Nos. 2412, 3937.

For formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

3. **Magistrates** before whom such complaints may be brought are enumerated in the statute. Fla. Rev. Stat. (1892), § 2869.

4. Consult Fla. Rev. Stat. (1892), § 2871.

Charging part of complaint, see *supra*, note 1, p. 932.

5. *Georgia*. — 3 Code (1895), § 883 *et seq.*

For formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

6. **County** in which the offense was committed must be stated. 3 Ga. Code (1895), § 883.

7. **To the Best of Affiant's Knowledge and Belief.** — It is only necessary that the offense be charged to the best of affiant's knowledge and belief. Thomas *v.* State, 91 Ga. 204.

8. **The offense** committed must be stated. 3 Ga. Code (1895), § 883.

The affidavit need not be more particular or specific than is necessary to uphold a warrant. Dickson *v.* State, 62 Ga. 583.

In Ray *v.* State, 15 Ga. 231, the affidavit is set out as follows:

"*Georgia*, *Houston* county:

Before me, *Wm. S. Moore*, a Justice of the Peace, personally came *Jesse Cooper*, of said county, who being duly sworn, saith on oath, that on the *fifth*

issue for his arrest.[1]

Richard Roe.

Sworn to and subscribed before me this *fifth* day of *March*, 1898.
Abraham Kent, J. P.[2]

Form No. 6672.[3]

The State of Idaho, plaintiff,[4] against *John Doe*, defendant.[5] } Complaint for *Burglary in the First Degree.*

Personally appeared before me, *Abraham Kent*, a justice of the peace[6] within and for the *Blank* precinct, county of *Shoshone*, state of *Idaho*, this *fifth* day of *March*, 1898, *Richard Roe*, of *Murray*, in the county of *Shoshone* aforesaid, who being duly sworn complains and says (*continuing and concluding as in Form No. 6663*).

Form No. 6673.[7]

State of *Illinois*, *Green* County. } ss. The complaint and information of *Richard Roe* of *Carrollton* in said county, made before

day of *February*, eighteen hundred and *fifty-three*, at *Perry* in said county of *Houston*, *George W. Ray, Jr.*, of said county, did make a violent assault upon the person of *William F. Taylor*, of said county, with a wooden board or piece of plank, which he, the said *George W.*, in his hands then and there, had and held, feloniously, wilfully and maliciously, did strike and inflict divers heavy blows, upon the arm and head of him, the said *William F. Taylor*, giving to the said *William F.* then and there with the board or piece of plank aforesaid, upon his head aforesaid, one or more mortal wounds, of which said striking and blows aforesaid, the said *Wm. F. Taylor* did soon after die.

his
Jesse × *Cooper.*
mark

Sworn to and subscribed before me, *Feb. 8th*, 1853.

Wm. S. Moore, J. P."

A mere verbal inaccuracy will not vitiate an affidavit where the meaning is clear. Dickson *v.* State, 62 Ga. 583.

1. Need not conclude "contrary to the form of the statute." Downing *v.* State, 66 Ga. 160.

2. Attestation. — An affidavit neither attested by an officer authorized to administer oaths nor sworn to in open court is void. Scroggins *v.* State, 55 Ga. 380.

Magistrates who may issue warrants of arrest are enumerated in the statute. 3 Ga. Code (1895), § 882.

A judge of the county court has the power of a justice of the peace to issue a warrant, upon affidavit made before him, and of making preliminary examinations thereunder, and committing or binding over the accused to the proper court, the affidavit being in the form prescribed in 3 Ga. Code (1895), § 884.

3. *Idaho.* — Rev. Stat. (1887), § 7509 *et seq.*, being identical with the provisions of the *California* Penal Code. See Form No. 6665, *supra*, and notes thereto.

For formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

4. In the name of the state of Idaho is the method of prosecuting criminal actions. Idaho Rev. Stat. (1887), § 7353.

5. "Defendant" is the designation of person prosecuted. Idaho Rev. Stat. (1887), § 7354.

6. Magistrates before whom complaint may be made are enumerated in Idaho Rev. Stat. (1887), § 7511.

7. *Illinois.* — Starr & C. Anno. Stat. (1896), p. 1376, par. 529.

Complaint under oath is necessary to the issuance of the warrant unless the offense had been committed *super visum*. Rafferty *v.* People, 69 Ill. 111.

For formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

For examples of criminal complaints in *Illinois* see Forms Nos. 2413, 4078, 4891.

Abraham Kent, Esq., one of the justices of the peace[1] in and for said county, on the *tenth* day of *March*, 1896, who being duly sworn, upon his oath says, that *John Doe*[2] of *Carrollton* in the said county,[3] on the *fifth* day of *March*, 1896[4]* did (*Here give a statement of the offense charged as being committed in words, figures and language according to the forms under the particular titles*),[5] and that the said *Richard Roe* has just and reasonable grounds to believe, and does believe, the said *John Doe* charged as aforesaid to be guilty thereof as herein set forth.[6] He therefore prays that the said *John Doe* may be arrested and dealt with according to law.

Richard Roe.

Subscribed and sworn to before me this the *thirteenth* day of *March*, A. D. 1896.

Abraham Kent, Justice of the Peace.

Form No. 6674.[7]

(Horner's Ind. Stat. (1896), § 1626.)

State of *Indiana*, }
County of *Posey*. } ss.[8]

1. **Magistrates** who may issue warrants of arrest are enumerated in the statute, Starr & C. Anno. Stat. Ill. (1896), p. 1376, § 528.

2. **If the name of the defendant is unknown** to the complainant or judge or justice of the peace, he may be designated by any name, description or circumstances by which he can be identified with reasonable certainty, and if on arrest he refuses to disclose his true name he may be tried and convicted by the name used in the warrant. Starr & C. Anno. Stat. Ill. (1896), p. 1377, par. 531; Willis *v.* People, 2 Ill. 399.

3. **The county** in which the crime was committed should be alleged. People *v.* Higgins, 15 Ill. 110; Noe *v.* People, 39 Ill. 96. But the particular town or locality need not be alleged. People *v.* Higgins, 15 Ill. 110.

If the name of the county is stated in the margin, but omitted in the complaint itself, verdict will cure the defect. Nichols *v.* People, 40 Ill. 395; Hanrahan *v.* People, 91 Ill. 142.

"**In the county aforesaid**" is sufficient without repeating the name of the county. Noe *v.* People, 39 Ill. 96.

4. **The day of the month** must be stated. Whitesides *v.* People, Breese (Ill.) 21.

5. **Charging part** of complaint, see *supra*, note 1, p. 932.

6. **That the complainant has just and reasonable grounds to believe** such person committed the offense must be stated. Starr & C. Anno. Stat. Ill. (1896), p. 1376, par 529.

Under a former and similar statute it was held that the affidavit must state that the accused committed the offense, and that the prosecuting witness suspects or has good reason to suspect that the accused is guilty of such offense. Housh *v.* People, 75 Ill. 487.

7. *Indiana.* — Horner's Stat. (1896), § 1625.

For formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

As to sufficiency of affidavit, see State *v.* Gachenheimer, 30 Ind. 63.

For examples of complaints in *Indiana* see Forms Nos. 2416, 3938.

See also State *v.* Cleveland, etc., R. Co., 137 Ind. 75, for an illustration of an affidavit which was held to have been properly quashed for insufficiency.

8. **Venue.** — In a criminal action, based on an affidavit of information, the affidavit sufficiently lays the venue, where the caption shows the venue to be in Perry county, in the state of Indiana, while in the body of the affidavit it is charged that the offense was committed "at said county." Hawkins *v.* State, 136 Ind. 630.

The affidavit must name with certainty the county and state in which the offense was committed. State *v.* Beebe, 83 Ind. 172.

Richard Roe[1] swears (*or affirms*, as the case may be) that on or about the *tenth* day of *March*, 1896, at said county, *John Doe*,[2] as affiant verily believes,[3] (*Here state the offense*).[4]

Richard Roe.

Subscribed and sworn to before me on this the *eleventh* day of *March*, 1896.[5]

Abraham Kent, Justice.[6] (SEAL)[7]

Form No. 6675.

The title of the action and the name of the court to which it is presented is not necessary in an affidavit in a criminal prosecution, although the indictment or information must contain the same. Hawkins *v.* State, 136 Ind. 630.

1. Affiant's name need not appear in the body or commencement of the affidavit when it appears that affiant signed the same and that he was properly sworn. Beller *v.* State, 90 Ind. 448.

2. Defendant's Name. — In Levy *v.* State, 6 Ind. 281, the information charged the defendant by his surname, alleging his christian name to be unknown. On motion to quash, it was held that defendant was sufficiently identified.

3. Made on information and belief may be sufficient. State *v.* Buxton, 31 Ind. 67; Deveny *v.* State, 47 Ind. 208; State *v.* Ellison, 14 Ind. 380; Franklin *v.* State, 85 Ind. 99; Toops *v.* State, 92 Ind. 13.

4. Charging part of complaint, see *supra*, note 1, p. 932.

Variance as to dates between the affidavit and information, held to be fatal, is discussed in Dyer *v.* State, 85 Ind. 525. Variance relating to dates, held to be immaterial as not prejudicing the substantial rights of the defendant, is discussed in Trout *v.* State, 107 Ind. 578; also in Rubush *v.* State, 112 Ind. 107.

5. The jurat would not be invalid if no date whatever was written in it, where the officer's act is sufficiently authenticated by the certificate on performance of the same. Ross *v.* State, 9 Ind. App. 35. In this case the year in which the affidavit was subscribed and sworn to is given as "189–." Such omission was clearly a clerical error which the judge might have corrected any time during the trial.

6. Made before a justice of the peace, his official character may be sufficiently designated by the abbreviations "J. P." Hawkins *v.* state, 136 Ind. 630.

In Hosea *v.* State, 47 Ind. 180, the jurat was in this form: "Subscribed and sworn to this *third* day of *September*, 1872. *A. S. Burr*, J. P."— and was held to be sufficient.

In Brooster *v.* State, 15 Ind. 190, the affidavit upon which the information was based purported to have been made in the county in which the case was tried below before one who signed his name as "J. C. Applegate" without designating his office. Upon motion to quash, it was held that the court below must be presumed to have been fully advised that J. C. Applegate was authorized to administer oaths.

The word "clerk" attached to the signature of the attesting officer will be presumed to indicate the official designation of the clerk of the circuit court. Hipes *v.* State, 73 Ind. 39; Mountjoy *v.* State, 78 Ind. 172; Choen *v.* State, 85 Ind. 209.

Before a Notary. — May be sworn to before a notary public. Hunter *v.* State, 102 Ind. 428.

7. Seal. — If an affidavit, made before a police judge, has no seal attached to the jurat, such omission, even if required, will not constitute a ground for arrest of judgment. Rosenstein *v.* State, 9 Ind. App. 290; Mountjoy *v.* State, 78 Ind. 172.

For the effect of the omission of the seal of the notary at the time of taking the affidavit and attaching the same after a motion in arrest is made, see Miller *v.* State, 122 Ind. 355.

A defective affidavit vitiates the information based thereon. State *v.* Beebe, 83 Ind. 171; Strader *v.* State, 92 Ind. 376; Brunson *v.* State, 97 Ind. 95; Engle *v.* State, 97 Ind. 122; State *v.* Downs, 7 Ind. 237.

8. *Iowa.* — Code (1897), § 5182, providing that a complaint in preliminary proceedings before a magistrate may be substantially in the form as in criminal actions triable before a justice of the peace. In section 5578, the form of the

(Iowa Code (1897), § 5578.)

[State of *Iowa*, *Harrison* County.[1] } ss.][2]

The State of Iowa against *John Doe*, defendant.[4] } Before Justice *Abraham Kent*.[3]

The defendant is accused of the crime (*Here name the offense*), for that the defendant on the *tenth* day of *March*, A. D. 1896, at the (*Here name the city, town or township*) in the county aforesaid (*Here state the act or omission constituting the offense as in the indictment*)[5] [contrary to the statute in such case made and provided and against the peace and dignity of the state of *Iowa*.

Richard Roe.

Subscribed by the above named *Richard Roe* in my presence and sworn to before me this the *eleventh* day of *March*, A. D. 1896.

Abraham Kent, Justice of the Peace.][6]

Form No. 6676.[7]

State of *Kansas*, *Cowley* County. } ss.

Richard Roe, being duly sworn, on oath says that on the *second* day of *March*, A. D. 1898, in the county of *Cowley* and state of *Kansas*,

information in actions triable before justices of the peace is given as set out in the text in Form No. 6675, except the words and figures in [ ].

For example of complaint in bastardy proceedings in this state see Form No. 3950.

For formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

A police officer may make the complaint. Santo *v.* State, 2 Iowa 165.

The term "magistrate" includes any judge of a superior, supreme or district court throughout the state, a justice of the peace, mayor of cities and towns, judges of police or other city courts, and police and other special justices in cities and towns within their respective counties. Iowa Code (1897), § 5097.

1. **Name of county** must be stated. Iowa Code (1897), § 5577.

2. Words in [ ] are not given in the statutory form.

3. **Name of the justice** must be given. Iowa Code (1897), § 5577.

4. **Names of the parties,** if the defendants be known, and if not, then such names as may be given them by the complainant, must be stated. Iowa Code (1897), § 5577.

5. **Statement of the acts constituting the offense** in ordinary and concise language, and the time and place of the commission of the offense, as near as may be, must be stated. Iowa Code (1897), § 5577.

The facts constituting the offense should be stated with as great precision as in an indictment. State *v.* Bitman, 13 Iowa 485; State *v.* Allen, 32 Iowa 491; State *v.* Butcher, 79 Iowa 110.

Merely stating the offense charged, though in the language of the statute itself, is insufficient. State *v.* Butcher, 79 Iowa 110.

Charging an assault upon the person of the informant, without naming the person, but which is subscribed and sworn to by him, has been held to be good. State *v.* McKinley, 82 Iowa 445.

Charging part of complaint, see *supra*, note 1, p. 932.

6. **Must be subscribed and sworn to,** and filed with the justice. Iowa Code (1897), § 5576.

If the informant subscribes and swears to the affidavit at the end of the information, it is sufficient. State *v.* Devine, 4 Iowa 443.

Filing of Complaint.—The justice must file the complaint, and mark the time of filing the same. Iowa Code (1897), § 5579.

7. *Kansas.* — 2 Gen. Stat (1897), p. 402, § 35.

Ohio. — Bates' Anno. Stat. (1897), §

John Doe did then and there unlawfully and feloniously [buy and receive *one hand saw*, of the value of *one* dollar and *fifty* cents, *one monkey wrench*, of the value of *fifty* cents, of the goods and chattels of one *David Miller*, then lately before feloniously stolen, taken and carried away, he the said *John Doe* then and there well knowing the said goods and chattels to have been feloniously stolen, taken and carried away as aforesaid],[1] contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of *Kansas*

Richard Roe.

Subscribed and sworn to before me this *fifth* day of *March*, A. D. 1*898*.

Abraham Kent, Justice of the Peace.[2]

Form No. 6677.[3]

Commonwealth of *Kentucky*, } Before *Abraham Kent*,[4] Justice of the
Franklin County. } Peace.

On this *tenth* day of *March*, A. D. 1*896*, personally came before me, *Abraham Kent*, a justice of the peace in and for said county, one *Richard Roe*, who being duly sworn according to law, deposes and says, that on the *fifth* day of *January*, 1*896*, at and in said *Franklin* county aforesaid, one *John Doe* did commit a felony[5] (or *the crime of*) to wit, (*Here the nature of the offense should be fully specified, and such a statement of the facts as will show probable cause for believing the*

7133 *et seq.* See *infra*, Form No. 6693, and notes thereto.

Oklahoma. — Stat. (1893), § 4958. See *infra*, Form No. 6694, and notes thereto.

Wyoming. — Stat. (1887), § 3181. See *infra*, Form No. 6707, and notes thereto.

For formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

Must be in Writing. — Prell *v.* McDonald, 7 Kan. 426.

1. The charging part of this complaint enclosed by [ ] is based upon the criminal complaint in State *v.* McLaughlin, 35 Kan. 650, which was held to be sufficient. See also *supra*, note 1, p. 932.

For other forms of criminal complaints in *Kansas*, see Bailey *v.* Dodge, 28 Kan. 78; State *v.* Wahl, 35 Kan. 608.

Describing the offense in the language of the statute is ordinarily sufficient in the complaint. State *v.* Armell, 8 Kan. 289; State *v.* Blakesley, 39 Kan. 153; State *v.* Craddock, 44 Kan. 489.

The same fullness of statement required in an information is not required in the preliminary papers. State *v.* Baker, 57 Kan. 541.

The precise time when the offense was committed need not be stated where it appears clearly to have been committed within the limitations prescribed by statute. State *v.* Barnett, 3 Kan. 250.

Imperfect statement, or a statement in very general terms in the complaint, may be cured by verdict, though it may have been taken advantage of before verdict. State *v.* Knowles, 34 Kan. 393.

Amendment of complaint, see State *v.* Hinkle, 27 Kan. 308; State *v.* Redford, 32 Kan. 198.

2. Magistrates before whom the complaint may be made are enumerated in the statute. 2 Kan. Gen. Stat. (1897), p. 402, § 35, p. 398, § 7.

3. *Kentucky.* — Bullitt's Crim. Code (1895), § 31.

For formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

4. Who are magistrates and police officers are enumerated in the statute. Bullitt's Crim. Code Ky. (1895), § 26.

5. As to the penalty for the issuing of a warrant in felony cases by any magistrate without first having filed in the office an affidavit fully specifying the nature of the offense, see Bullitt's Crim. Code Ky. (1895), § 31.

accused guilty of the offense charged.)[1]

Richard Roe.

Subscribed and sworn to before me by *Richard Roe* this the *tenth* day of *March*, A. D. 1896.

Abraham Kent, Justice of the Peace.

Form No. 6678.[2]

State of *Louisiana*, } In the *First* Justice's Court of the *Fourth*
Parish of *St. Landry*. } Ward.[3]

Richard Roe,[4] being duly sworn, deposes and says that on or about the *tenth* of *March*, 1896,[5] and in the parish of *St. Landry*,[5] one *John Doe*,[4] late of said parish, did (*Here set out the statement of facts constituting the offense*),[6] whereupon complainant prays that the said *John Doe* may be arrested and dealt with according to law.

Richard Roe.

Sworn to and subscribed before me this the *eleventh* day of *March*, 1896.

Abraham Kent, Justice of the Peace.

Form No. 6679.[7]

State of *Maine*.

Kennebec, ss.

To *Abraham Kent*, Esq., a trial justice within and for the county of *Kennebec*.[8]

Richard Roe, of *Gardiner*, in said county, on the *tenth* day of *March*, in the year of our Lord one thousand eight hundred and *ninety-six*, on behalf of said state, on oath,[9] complains that *John Doe*, of *Gardi-*

1. **Charging part** of complaint, see *supra*, note 1, p. 932.

2. *Louisiana*. — Rev. Laws (1897), § 1010.

For formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

3. **Committing magistrates** are justices of the peace, district and parish judges. La. Rev. Laws (1897), § 1010; La. Const., art. 126.

4. **Name of Offender.**—Complaint before a justice of the peace should specify the name and surname of the offender and also the person who may have sustained the injury, where the offense is of such a nature as to produce injury to the person or property. La. Rev. Laws (1897), § 1017.

5. **Time and Place.** — The complaint must specify the month, day and year and place when and where the offense complained of was committed. La. Rev. Laws (1897), § 1017.

6. **Charging part** of complaint, see *supra*, note 1, p. 932.

Surplusage. — The jurisdiction of a committing magistrate is not affected by the fact that in affidavits taken before him, wherein facts are charged to have been committed which constitute a crime, an error has been made in the statute as to the particular statute violated. The statement can be stricken out as surplusage. State *v.* Judge, 44 La. Ann. 1093.

7. *Maine*. — Rev. Stat. (1883), c. 132. Compare also form set out in Me. Rev. Stat. (1883), p. 315. See also Form No. 2409.

For formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

The complaint in preliminary proceedings before any magistrate authorized to issue processes is substantially the same in form as in offenses triable by trial justices. Me. Rev. Stat. (1883), c. 133, §§ 2, 13.

8. **The officers who may issue** criminal processes are enumerated in the statute. Me. Rev. Stat. (1883), c. 133, § 2.

9. **An officer**, when it is the duty to make complaints, may make them according to his knowledge and belief. Me. Rev. Stat. (1883), c. 133, § 3.

ner aforesaid, in said county, on the *fifth* day of *March*, 1896, at said *Gardiner*, in said county of *Kennebec*, did (*Here state the name of and facts constituting the offense*),[1] against the peace of said state, and contrary to the form of the statute in such case made and provided.[2]

Richard Roe.

Kennebec, ss. On the *tenth* day of *March*, 1896, said *Richard Roe* makes oath[3] that the above complaint by him subscribed is true.

Before me: *Abraham Kent*, Trial Justice.

Form No. 6680.[4]

Baltimore County, to wit:

The information of *Richard Roe*, of *Baltimore*, state of *Maryland*, who first being duly sworn according to law saith on oath this *tenth* day of *March*, 1896, before me *Abraham Kent*, one of the justices of the peace of the state of *Maryland* in and for said county, that one *John Doe*, of *Baltimore*, and state of *Maryland*, did, on the *fifth* day of *March*, 1896, at and in said county aforesaid (*Here state the facts constituting the offense*),[5] against the peace and dignity of the state of *Maryland*.

Richard Roe.

Sworn and subscribed to before me this *tenth* day of *March*, 1896.

Abraham Kent, Justice of the Peace.[6]

Form No. 6681.[7]

Commonwealth of *Massachusetts*.

To the Justices of the *Municipal* Court of the *Charlestown* District, holden in said district in the city of *Boston* for the transaction of criminal business, within and for the county of *Suffolk*.[8]

1. **Charging part** of complaint, see *supra*, note 1, p. 932.

2. **Technicalities** for which a complaint shall not be quashed or adjudged bad are enumerated in the statute. Me. Rev. Stat. (1883), c. 131, § 12.

When an intent to defraud is necessary to constitute an offense, it is sufficient to allege generally an intent to defraud. Me. Rev. Stat. (1883), c. 131, § 11.

3. **Affirmation.** — It is sufficient if the magistrate certify that the complainant affirmed the truth of the complaint without certifying that complainant was conscientiously scrupulous of taking an oath. State *v.* Adams, 78 Me. 486.

4. *Maryland.* — The statutes have said but little concerning the duties of justices of the peace in the suppression and punishment of crime; and we are left with the practice forms of *England*, which were used by *Maryland* as a colony, which have undergone few, if any, alterations since that period. Latrobe's Just. Pr. (8th ed.), § 1294. See 1 Chit. Cr. L. 31.

For formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

5. **Charging part** of complaint, see *supra*, note 1, p. 932.

6. **The complaint must be sworn to**; and the complainants are sworn, if Christians, on the Four Evangelies, if Jews, on the Old Testament, as follows: "You shall true answer make to such questions as shall be demanded of you. So help you God." 1 Chit. Cr. L. 31.

7. *Massachusetts.* — Pub. Stat. (1882), c. 212, § 14 *et seq.*

For formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

Certain defects of form which shall not vitiate complaints of this character are enumerated in Mass. Pub. Stat. (1882), c. 213, §§ 16, 17.

8. **Magistrates** who may issue criminal process are enumerated in the statute. Mass. Pub. Stat. (1882), c. 212, § 14; c. 154, § 43 (applying to municipal courts); c. 154, § 12 (applying to police and district courts).

Richard Roe,[1] of *Boston*, in the county of *Suffolk*, on behalf of the *commonwealth* of *Massachusetts*, on oath complains that *John Doe*,[2] of *Boston*, in the county of *Suffolk*, on the *second* day of *March*, in the year of our Lord one thousand eight hundred and *ninety-eight*, at the city of *Boston*, within the judicial district of said court, in the county of *Suffolk*,[3] with force and arms (*Here state the offense and facts con-*

For precedents of criminal complaints see Com. *v.* Rice, 9 Met. (Mass.) 253; Com. *v.* Robertson, 5 Cush. (Mass.) 438; Com. *v.* Lavonsair, 132 Mass. 1; Com. *v.* Smith, 141 Mass. 135; Com. *v.* Carroll, 145 Mass. 403; Com. *v.* McCarthy, 145 Mass. 575; Com. *v.* Plaisted, 148 Mass. 375.

Address — *Justice of the Peace.* — In Com. *v.* Melling, 14 Gray (Mass.) 388, the complaint was addressed to "*F. L. Porter*, a Justice of the Peace," etc., and the jurat was signed in like manner. The complaint was sustained against the objection that the description of the justice of the peace before whom it was made was not sufficient in merely giving the initials of his christian name.

In Com. *v.* Taber, 155 Mass. 5, the complaint was addressed to "*George G. Withington*, justice of the peace in and for the county of *Bristol*, and *commonwealth* of *Massachusetts*, designated and commissioned to issue warrants in criminal cases."

District Court. — A justice, or special justice, may receive a complaint when the court is not in session. Mass. Pub. Stat. (1888), c. 154, § 22, and his official character is sufficiently shown by the complaint which describes him as "special justice of the district court," and by the words "special justice" appended to his signature to the jurat. Com. *v.* Lynn, 154 Mass. 405.

Addressed to "*Charles Thompson*, Esquire, Associate Justice of the District Court of *Central Middlesex*, sitting in the absence of the justice," was held to be sufficient. Com. *v.* De Voe, 159 Mass. 101.

Municipal Court. — In Com. *v.* Certain Intoxicating Liquors, 97 Mass. 601, the complaint was addressed "To the justice of the Municipal Court of the city of *Boston*, holden at said *Boston* for the transaction of criminal business." It was held that the addition of the words "for the transaction of criminal business" was not a misdescription of the style of the municipal court.

Addressed to the "Municipal Court of the *Brighton* District of the city of *Boston*, holden in said *Brighton* District for the prosecution of criminal business within and for the county of *Suffolk*," is sufficient. Com. *v.* Hoar, 121 Mass. 375.

Police Court. — In Com. *v.* Brown, 158 Mass. 168, the complaint was addressed "To the Justice of the Police Court of *Chelsea*." This form was held to be sufficient and proper even though a special justice was sitting at the time that it was actually laid before him.

1. Complainant's name need not appear in the body of the complaint. Com. *v.* Eagan, 103 Mass. 71.

The complainant, having been properly described in the first count of the complaint, may be referred to as "said complainant" in subsequent counts. Com. *v.* Clapp, 16 Gray (Mass.) 237.

2. Name of Accused. — A complaint against "John Doe" containing several counts, the first of which gives his name in full, is sufficient though describing him in the subsequent counts as "the said John," and this notwithstanding the fact that the name of the complainant may also be John. Com. *v.* Hagarman, 10 Allen (Mass.) 401; Com. *v.* Clapp, 16 Gray (Mass.) 237.

Place of defendant's residence need not be stated where jurisdiction does not depend upon place of residence. Com. *v.* Taylor, 113 Mass. 1.

A person unknown may be referred to as such in a criminal complaint even though his name might have been ascertained. Com. *v.* Sherman, 13 Allen (Mass.) 248.

3. Statement of Place. — Charging the offense to have been committed "within the judicial district of said court," etc., sufficiently states the venue where the caption of the complaint is correct. Com. *v.* Hoar, 121 Mass. 375; Com. *v.* Clancy, 154 Mass. 128.

A statement that the offense was committed "at *Cambridge*, *Massachusetts*," is a sufficient statement that the offense was committed within the jurisdiction of the Third District Court of Eastern Middlesex. Com. *v.* Carroll, 145 Mass. 403.

The place having been properly designated in the first count of a com-

stituting it),[1] against the peace of said *commonwealth*, and the form of

plaint may be referred to in subsequent counts as "town and county aforesaid." Com. *v.* Clapp, 16 Gray (Mass.) 237.

In Com. *v.* Quin, 5 Gray (Mass.) 478, the complaint had no caption and no venue in the margin, but was in these words: "To the Justice of the *Police* Court within and for the city of *Salem* in the county of *Essex*. *John H. Newton*, constable of the city of *Salem*, in behalf of the *Commonwealth* of *Massachusetts*, on oath complains that *Patrick Quin* of *Salem* in said county, on the *sixteenth* day of *June*, A. D. 1855, at *Salem* aforesaid, did sell to one *John Wentworth* a certain quantity of intoxicating liquor, to wit, * * * in evil example to all others in like cases to offend, against good morals, against the peace of said commonwealth and the form of the statute in such case made and provided. He therefore prays said defendant may be apprehended and brought before said court, and held to answer to this complaint and further dealt with relative to the same according to law. *J. H. Newton.*

Essex, ss. The *nineteenth* day of *June*, in the year of our Lord one thousand eight hundred and *fifty-five*, the aforesaid complainant made oath to the truth of the foregoing complaint before said court. *Sam'l P. Andrews*, Clerk." The complaint was upheld as sufficiently showing that the offense was committed within the commonwealth of Massachusetts.

Statement of Time — *Generally.* — A complaint dated on the day on which the offense is alleged to have been committed is sufficient. Com. *v.* Bush, 112 Mass 280. But a complaint charging an offense to have been committed after the date of the complaint is not sufficient. Com. *v.* Doyle, 110 Mass. 103.

A complaint charging the commission of an offense on the first day of August, 1860, and "from day to day to the day of the date of receiving this complaint" sufficiently charges the offense during the whole time, where the complaint is certified by the magistrate to have been "received and sworn to on the *twenty-ninth* day of *August*, in the year of our Lord 1860." Com. *v.* Frates, 16 Gray (Mass.) 236.

For a clerical error with respect to the allegation of time in a complaint to a trial justice for keeping and maintaining a common nuisance see Com. *v.* Le Clair, 147 Mass. 539.

The letters "*A. D.*" preceding the words expressing the year are sufficiently certain, having acquired an established use in the English language. Com. *v.* Clark, 4 Cush. (Mass.) 596.

The letters "A. D." are not necessary where the date of the commission of the offense is stated in figures. Com. *v.* McLoon, 5 Gray (Mass.) 91.

Omission of the words "*of our Lord*," in a complaint charging an offense to have been committed "on the fourteenth day of December in the year one thousand eight hundred and fifty-eight," is immaterial. Com. *v.* Doran, 14 Gray (Mass.) 37; Com. *v.* Sullivan, 14 Gray (Mass.) 97.

Surplusage. — Where the complaint duly sets forth the time of the commission of the offense in words at length, the addition of the date at the end of the complaint, in figures, is mere surplusage. Com. *v.* Keefe, 7 Gray (Mass.) 332.

Use of Arabic numerals in designating the date of the commission of the offense is sufficient. Com. *v.* Smith, 153 Mass. 97; Com. *v.* Hagarman, 10 Allen (Mass.) 401.

Year Omitted. — In Com. *v.* Hutton, 5 Gray (Mass.) 89, the complaint to the police court of New Bedford, signed by Lewis G. Allen, alleged that the defendant, at New Bedford, "on the *third* day of *June* instant," etc., without mentioning the year. The complaint was held to be insufficient, notwithstanding at the end thereof was appended the following certificate, signed by the clerk of the police court: "*Bristol*, ss. Received and sworn to on the *fourth* day of *June*, A. D. 1855, before said court."

1. Charging Part. — In Com. *v.* Melling, 14 Gray (Mass.) 388, there was a complaint wherein "*Alice Langley* of *Newport*" charged the defendant with an unlawful sale of liquors "to said *Alice*." The complaint was upheld against the objection that in alleging the sale to "said *Alice*" it did not sufficiently designate to whom the sale was made.

That "complainant has probable cause to suspect" that the accused has committed an offense is not sufficient to sustain a conviction, though perhaps it

the statute in such case made and provided.[1]

Richard Roe.[2]

Suffolk, ss. Received and sworn to the *fifth* day of *March*, in the year of our Lord one thousand eight hundred and *ninety-eight*, before said court.

Charles S. Sullivan, Clerk.[3]

is valid for the purpose of a preliminary hearing for commitment to answer to an indictment in another court. Com. *v.* Phillips, 16 Pick. (Mass.) 211.

Character "&" may be used in a criminal complaint to express the conjunction "and." Com. *v.* Clark, 4 Cush. (Mass.) 596.

Felony or Feloniously. — It shall not be necessary to allege in any complaint that the offense charged is a felony or felonious, and done feloniously, nor shall a complaint be quashed or deemed invalid by reason of the omission of the words "felony," "felonious," or "feloniously." Mass. Pub. Stat. (1888), c. 210, § 2.

Referring to or Reciting Statutes. — A criminal complaint is fatally defective where the recitals of the title of a public statute therein are so made as to make it senseless. Com. *v.* A Man whose Name is Unknown. 6 Gray (Mass.) 489.

In Com. *v.* Washburn, 128 Mass. 421, it was held that a complaint which did not set forth facts necessary to constitute an offense, except by reference to a statute the year of which was erroneously given, would not support a conviction.

There is no variance in a complaint which charged that defendant "in and upon the body of *Jos. T. Battles*" did make an assault, and "him the said *Joseph T. Battles* did then and there beat, bruise and wound," etc., "and other wrongs to the said *Joseph T. Battles* then and there did," the court saying: "We think that it appears by the complaint itself that the name of the person assaulted was Joseph T. Battles, and that "Jos." is an abbreviation for "Joseph." Com. *v.* Smith, 153 Mass. 97.

1. Must conclude "against the form of the statute." Com. *v.* Gay, 5 Pick. (Mass.) 44.

Concluding "against the form of the statutes" may be good after verdict, although the proceeding be one under a single statute. Com. *v.* Hitchings, 5 Gray (Mass.) 482.

2. The complaint must be signed by the complainant and sworn to before the magistrate receiving it. Mass. Pub. Stat. (1888), c. 212, § 15.

May be signed by initials where it appears in the jurat who signed the complaint. Com. *v.* Quin, 5 Gray (Mass.) 478.

A complaint made by "*Samuel W. Richardson, City Marshal* of *Cambridge*," certified by the magistrate to whom it was addressed to have been "received and sworn to before said court," sufficiently showed that it was signed and sworn to by the complainant, although it was merely signed "*S. W. Richardson*." Com. *v.* Wallace, 14 Gray (Mass.) 382.

Signed by Mark. — Where the magistrate to whom the complaint was addressed certified that it was "taken and sworn to," it was sufficient, though complainant signed it by mark and there was no attesting witness to the mark. Com. *v.* Sullivan, 14 Gray (Mass.) 97.

Failure to date the complaint is not fatal where the jurat shows when a complaint was made. Com. *v.* Blake, 12 Allen (Mass.) 188; Com. *v.* McIvor, 117 Mass. 118.

3. Jurat — *Generally.* —The precision required in an indictment or complaint, which states the charge on which the defendant is to be tried, is not necessary in the jurat, which is a mere certificate of the magistrate that the requisite oath has been taken. Com. *v.* Keefe, 7 Gray (Mass.) 332.

The words "received and sworn to" are equivalent to an averment by the magistrate that the signature and oath were those of the complainant named in the complaint. Com. *v.* Wallace, 14 Gray (Mass.) 383; Com. *v.* Sullivan, 14 Gray (Mass.) 98; Com. *v.* Keefe, 7 Gray (Mass.) 332.

A magistrate's certificate that the complaint was "taken and sworn" before him is sufficient. Com. *v.* Bennett, 7 Allen (Mass.) 533.

The jurat may be signed either by a justice of the court or the clerk. Com. *v.* McGuire, 11 Gray (Mass.) 459.

Before Clerk — Surplusage. — The words "justice of the peace" are sur-

Form No. 6682.[1]

plusage where the clerk signs his name as "justice of the peace, clerk of said court" Com. *v.* Certain Intoxicating Liquors, 135 Mass. 519.

Before Clerk Pro Tempore. — The attestation of the papers by "*James B. Stacey*, clerk *pro tem.*" is *prima facie* sufficient without adding to his signature the cause of his appointment as clerk *pro tempore.* Com. *v.* Connell, 9 Allen (Mass.) 488; Com. *v.* Gay, 153 Mass. 211.

Before Justice of the Peace. — The description "justice of the peace authorized to issue warrants as aforesaid," appearing in the jurat referring back to a correct caption in a complaint, is sufficient. Com. *v.* Tabor, 155 Mass. 5; Com. *v.* Peto, 136 Mass. 155; Com. *v.* O'Hanlon, 155 Mass. 198.

Before Special Justice. — The certificate need not state whether a complaint was sworn to before the standing justice or a special justice, where it states that it was "sworn to before said court." Com. *v.* Wingate, 6 Gray (Mass.) 485.

It sufficiently appeared that the special justice was authorized to act in the case where the complaint to the police court of Chickopee was certified simply by "*George S. Taylor*, Special Justice," where the warrant issued thereon on the same day, and annexed to the complaint, was attested thus: "Witness, *George S. Taylor*, Esquire, Special Justice of this court, at said *Chickopee*, this *twenty-ninth* day of *July*, in the year of our Lord one thousand eight hundred and *fifty-eight*. *George S. Taylor*, Special Justice, 'the standing justice being absent from the town of *Chickopee* and unable to attend." Com. *v.* Fitzgerald, 14 Gray (Mass.) 14.

It is to be presumed that the magistrate acted within the authority given him by the statute, and that the court was not in session, where the complaint appears to have been properly received by the special justice. His official character is sufficiently shown by the complaint which described him as "special justice of the district court of *Hampshire*," and by the words "special justice" appended to his signature to the jurat. Com. *v.* Lynn, 154 Mass. 405.

In Com. *v.* Conner, 155 Mass. 134, the complaint was addressed to "the Justice of the *Second* District of the court of *Essex*, and purported have been "received and sworn to before said court." The jurat was signed "*William Smeath*, Special Justice of said Court." The record showed that the complaint was received when the court was in session, and no reason appearing for the special justice acting, it was held that the conviction in the superior court was improper and the complaint was dismissed.

Before Trial Justice. — The jurat annexed to the complaint was signed by "*Ichabod N. Luce*, Trial Justice." It was held that this signature involved his signature as justice of the peace and no separate designation of the inferior office was necessary. Com. *v.* Mosher, 134 Mass. 226.

Figures. — It is the uniform practice in jurats to state the year in figures. Com. *v.* Keefe, 7 Gray (Mass.) 332; Com. *v.* Hagarman, 10 Allen (Mass.) 401.

Initials and Abbreviations. — The fact that the initals of the christian name of the justice of the peace are given in the jurat is no ground for arresting judgment. Com. *v.* Melling, 14 Gray (Mass.) 388.

The abbreviation "*Geo.*" may be assumed to stand for "*George.*" Com. *v.* Taber, 155 Mass. 5.

Name of the state need not appear in jurat if it appears in the complaint. Com. *v.* Desmond, 103 Mass. 445.

Seal. — The complaint need not be under the seal of the court. Com. *v.* De Voe, 159 Mass. 101.

1. *Michigan.* — How. Anno. Stat. (1882), § 9454 *et seq.*

For examples of complaints in this state see Forms Nos. 2414, 3941, 3953, 5157.

For formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

Form — Need not be in Writing. — The law does not prescribe any form of the criminal complaint in preliminary proceedings. Turner *v.* People, 33 Mich. 369. The complaint need not be in writing. People *v.* Hare, 57 Mich. 505; People *v.* Lynch; 29 Mich. 278; People *v.* Bennett, 107 Mich. 430; People *v.* Berry, 107 Mich. 256; People *v.* Bechtel, 80 Mich. 623; People *v.* Clark, 33 Mich. 120; Turner *v.* People, 33 Mich. 369.

Stereotyped forms of complaints entirely printed, except as to names and dates, are certainly not such documents as ought to be presented under

State of *Michigan*,)
County of *Bay*.[1] } ss.

The complaint on oath and in writing of *Richard Roe*,[2] taken and made before me, *Abraham Kent*,[3] a justice of the peace of the city of *Bay City*, in said county, upon the *fifth* day of *March*, A. D. 1898, who being duly sworn says[4] that heretofore, to wit, on the *second* day of *March*, A. D. 1898, at the city of *Bay City*[5] in the county aforesaid, one *John Doe*, late of *Bay City*, in the county of *Bay* aforesaid,[6] [with force and arms in and upon one *Mary Carney*, a female child of the age of *ten* years and more, to wit, of the age of *fourteen* years, in the peace of the people of the state of *Michigan* then and there being, did make an assault with intent her, the said *Mary Carney*, by force and against her will, then and there feloniously to ravish and to carnally know, and other wrongs to her, the said *Mary Carney*, then and there did,][7] contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the state of *Michigan*.

Wherefore the said *Richard Roe* prays that the said *John Doe* may be apprehended and held to answer this complaint, and further dealt with in relation to the same as law and justice may require.

Richard Roe.

Taken, subscribed and sworn to before me the day and year first above written.

Abraham Kent, Justice of the Peace.

a constitutional provision requiring that no warrant should issue without probable cause, and were disapproved expressly by the court in Matter of Way, 41 Mich. 299.

1. **Omission of the name of county** from the venue in a complaint made to a justice of the peace in a suit for an offense beyond his jurisdiction to try, and which is alleged to have been committed in said city, will not affect the validity of the complaint. People *v.* Kahler, 93 Mich. 625.

2. **Any person** is entitled to make a criminal complaint. 1 Chit. Crim. L. 3.

3. **Magistrates** before whom the complaints may be made are enumerated in the statute. How. Anno. Stat. Mich. (1882), § 9454.

4. **Mere Belief is Insufficient.** — The complaint must set up the facts upon the knowledge of the complainant. People *v.* Heffron, 53 Mich. 527. See People *v.* Hare, 57 Mich. 505; Haskins *v.* Ralston, 69 Mich. 63; People *v.* McLean, 68 Mich. 481.

5. **Place of the commission** of the offense must be stated. People *v.* Gregory, 30 Mich. 371; People *v.* Millard, 53 Mich. 63.

6. **A misnomer does not result** from the misspelling of the name of the accused, provided it is *idem sonans*. People *v.* Tisdale, 1 Dougl. (Mich.) 59; People *v.* Mayworm, 5 Mich. 146.

Occupation, degree or residence of the accused need not be stated. How. Anno. Stat. Mich. (1882), § 9523.

7. **The charging part** of this complaint, indicated by the words and figures enclosed by [ ], is taken from the complaint in People *v.* Lynch, 29 Mich. 277, in which case the complaint was approved. See also *supra*, note 1, p. 932. For other precedents of complaints of this character see Turner *v.* People, 33 Mich. 363; People *v.* Lynch, 29 Mich. 277; Curnow *v.* Kessler, (Mich. 1896) 67 N. W. Rep. 982; People *v.* Bechtel, 80 Mich. 626. The facts and circumstances necessary to constitute the offense should be set forth with certainty. Turner *v.* People, 33 Mich. 363; Wheaton *v.* Beecher, 49 Mich. 353.

The words "the crime of" were omitted from the complaint. No objection was made during the trial to their omission. Had the attention of the court been called to the defect, it might have been amended, and for that reason it was held that after verdict the omission must be disregarded. People *v.* Sutherland, 104 Mich. 468, *citing* Merwin *v.* People, 26 Mich. 305.

Form No. 6683.[1]

State of *Minnesota*, }
County of *Chickasaw*. } ss.

Richard Roe, being first duly sworn[2] and examined on oath, makes complaint and says, that *John Doe* did, on the *tenth* day of *March*, A. D. 1896, at the town of *New Hampton*, in said county and state (*Here set forth the facts constituting the offense*),[3] contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of *Minnesota*, and prays that the said *John Doe* may be arrested and dealt with according to law.

Richard Roe.[4]

Subscribed and sworn to before me this *fifteenth* day of *March*, A. D. 1896.

Abraham Kent,[5] Justice of the Peace.

Form No. 6684.[6]

The State of *Mississippi*, }
Winston County. }

Before me, *Abraham Kent*,[7] a justice of the peace of the said county, *Richard Roe* makes oath that on or about the *tenth* day of *March*, A. D. 1898, in said county, *John Doe* did (*Here state the facts constituting the offense*),[8] against the peace and dignity of the state of *Mississippi*.

Richard Roe.

Sworn to and subscribed before me this *fifth* day of *March*, 1898.

Abraham Kent, J. P.

Statutory offenses should be described with certainty, and the omission of any ingredient of such an offense will be fatal. Napman *v.* People, 19 Mich. 355.

1. *Minnesota.* — Stat. (1894), § 7132 *et seq.*

The provision in the *Minnesota* statute relating to preliminary examinations of persons accused of crime will authorize a magistrate to hold the accused to await the action of the grand jury, even in a case where the evidence does not show that any higher crime has been committed than one over which the justice himself has jurisdiction, provided under the law the grand jury may find an indictment for the offense. State *v.* Sargent, (Minn. 1898) 73 N. W. Rep. 626.

For example of complaint in this state see Form No. 3954.

For formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

Must be reduced to writing by the magistrate receiving it. Minn. Stat. (1894), § 7133.

2. **Complainant shall be sworn** and examined on oath, and any witness provided by him. Minn. Stat. (1894), § 7133.

3. **Charging part** of complaint, see *supra*, note 1, p. 932.

4. **Must be signed** by complainant. Minn. Stat. (1894), § 7133.

5. **To Whom Complaint may be made.** — The judges of the several courts of record in vacation, as well as in term time, and all justices of the peace. Minn. Stat. (1894), § 7132.

6. *Mississippi.* — Anno. Code (1892), § 1460 *et seq.* For form of affidavit charging a felony see Miss. Anno. Code (1892), § 1491.

Must be in Writing. — Wilcox *v.* Williamson, 61 Miss. 310.

For formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

7. **Conservators of the peace** are enumerated in the statute. Miss. Anno. Code (1892), § 1460.

8. **May charge the accused** with having committed an offense or being suspected of an offense. Miss. Anno. Code (1892), § 1461.

Charging part of complaint, see *supra*, note 1, p. 932.

Form No. 6685.[1]

State of *Missouri*, } ss. Before *Abraham Kent*,[2] a Justice of the Peace
County of *Barton*. } in and for said county and state.

Richard Roe, first being duly sworn[3] according to law, deposes and says: That on the *tenth* day of *March*, in the year of our Lord one thousand eight hundred and *ninety-eight*, at and in the said county of *Barton* and state of *Missouri* aforesaid, one *John Doe*[4] did then and there commit a *felony*,[5] as follows, to wit, (*Here state fully and clearly the facts constituting the offense charged*),[6] contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state.

Richard Roe.

Sworn to and subscribed before me in the county aforesaid this *tenth* day of *March*, 1898.

Abraham Kent, Justice of the Peace.[7]

Form No. 6686.[8]

The State of Montana, plaintiff, against *John Doe*, defendant. } Complaint for *Burglary in the first degree.*

State of *Montana*, } ss.
County of *Missoula*. }

Upon this *fifth* day of *March*, A. D. 1898, before me, *Abraham Kent*, a justice of the peace[9] within and for the township of *Hell Gate*, in the county of *Missoula*, state of *Montana*, personally appeared *Richard Roe*, who upon being duly examined and sworn, upon oath deposes and says (*continuing and concluding as in Form No. 6663*).[10]

1. *Missouri.* — Rev. Stat. (1889), §§ 4009, 4021.

For formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

Should be in Writing. — Mo. Rev. Stat. (1889), § 4021.

The same technical accuracy is not required in a complaint as in an information. State *v.* Morse, 55 Mo. App. 332.

Not using the statutory words but words of equivalent import may be sufficient. State *v.* Morse, 55 Mo. App. 332.

2. **Magistrates** who may issue criminal processes are enumerated in the statute. Mo. Rev. Stat. (1889), § 4008.

3. **Must be on Oath.** Mo. Rev. Stat. (1889), § 4021.

4. **Name of the person accused** must be stated. Mo. Rev. Stat. (1889), § 4021.

5. **That a felony has been committed** must be stated. Mo. Rev. Stat. (1889), § 4021.

6. **Charging part** of complaint, see *supra*, note 1, p. 932.

7. **The oath need not be administered** by the magistrate to whom the complaint is presented. State *v.* Mullen, 52 Mo. 430. But the complaint must be verified. State *v.* Lewis, 70 Mo. App. 40.

8. *Montana.* — Pen. Code (1895), §§ 1372, 1590, *et seq.*

North Dakota. — Rev. Codes (1895), §§ 7881, 7886.

Utah. — Rev. Stat. (1898), §§ 4604, 4610.

9. **Magistrates** before whom complaint may be made are enumerated in the statute.

Montana. — Pen. Code (1895), § 1373.

North Dakota. — Rev. Codes (1895), §§ 7758, 7885.

Utah. — Rev. Stat. (1898), § 4608.

10. **Charging part** of complaint, see *supra*, note 1, p. 932.

Name of person accused, if known, must be stated.

Montana. — Pen. Code (1895), § 1590.

North Dakota. — Rev. Codes (1895), § 7886.

Utah. — Rev. Stat. (1898), § 4610.

County in which offense was committed must be stated.

Montana. — Pen. Code. (1895), § 1590.

Form No. 6687.[1]

The State of Nebraska }
against
John Doe. } Complaint for (*Here name the offense*).[2]

The State of *Nebraska*, }
County of *Colfax*. } ss.

The complaint and information of *Richard Roe*, of the county aforesaid, made in the name of the state of *Nebraska*, before me, the undersigned, a justice of the peace[3] within and for said county, this *fifth* day of *March*, A. D. 1898, who being duly sworn on his oath[4] says that *John Doe*,[5] on the *second* day of *March*, 1898, in the county of *Colfax* aforesaid then and there being, did then and there (*Here state the facts constituting the offense charged*),[6] contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the *state* of *Nebraska*.

Richard Roe.[7]

Subscribed in my presence and sworn to before me this *fifth* day of *March*, 1898. *Abraham Kent*, Justice of the Peace.[8]

North Dakota. — Rev. Codes, (1895), § 7886.

Utah. — Rev. Stat. (1898), § 4610.

General name of offense must be stated.

Montana. — Pen. Code (1895), § 1590.

North Dakota. — Rev. Codes (1895), § 7886.

Utah. — Rev. Stat. (1898), § 4610.

Name of person against whom, or against whose property, the offense was committed must be stated, if known.

Montana. — Pen. Code (1895), § 1590.

North Dakota. — Rev. Codes (1895), § 7886.

Utah. — Rev. Stat. (1898), § 4610.

Must be subscribed and sworn to by complainant.

Montana. — Pen. Code (1895), § 1590.

North Dakota. — Rev. Codes (1895), § 7886.

Utah. — Rev. Stat. (1898), § 4610.

1. *Nebraska.* — Comp. Stat. (1897), § 7010.

A complaint in writing signed by the complainant and sworn to before the clerk of the district court within his jurisdiction, and filed in the office of the justice of the peace, would be sufficient to require him to issue a warrant thereon. State *v.* Lauver, 26 Neb. 757.

For formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

For precedents of complaints of this character held to be sufficient see Vennum *v.* Huston, 38 Neb. 300; State *v.* Lauver, 26 Neb. 757; Haunstine *v.* State, 31 Neb. 112; Hill *v.* State, 42 Neb. 503.

Must be in Writing. — Neb. Comp. Stat. (1897), § 7010.

2. **The title** is no part of the complaint. White *v.* State, 28 Neb. 341.

3. **Magistrates** to whom complaints are made are enumerated in the statute. Neb. Comp. Stat. (1897), § 6972.

The complaint must be made before the proper magistrate in order to give jurisdiction to make a preliminary examination. White *v.* State, 28 Neb. 341.

4. **Must be upon Oath.** — Neb. Comp. Stat. (1897), § 7010; White *v.* State, 28 Neb. 341.

5. **Must charge some person** with the commission of an offense against the laws of the state. Neb. Comp. Stat. (1897), § 7010.

6. **Must charge explicitly** all that is essential to constitute the offense. Smith *v.* State, 21 Neb. 556.

In Brown *v.* State, 16 Neb. 659, a complaint charging the commission of a crime in positive terms was held not to be invalid because affiant added that he "verily believes defendant guilty."

As to the charging part of the complaint, see *Ex p.* Eads, 17 Neb. 146; Yates *v.* Kinney, 19 Neb. 283. See also *supra*, note 1, p. 932.

7. **Must be signed** by complainant. Neb. Comp. Stat. (1897), § 7010.

8. **Clerk of court** may administer oath. State *v.* Lauver, 26 Neb. 757.

Nevada. — The complaint in preliminary proceedings in criminal cases in this state is provided for under statutes having provisions identical with those in *Arizona*. See *supra*, Form No. 6663, and notes thereto.

Form No. 6688.[1]

To *Abraham Kent*, Justice of the Peace[2] for the County of *Hillsborough*:

Richard Roe of *Hillsborough* in the county of *Hillsborough*, complains that *John Doe*[3] of *Hillsborough* in the county aforesaid, on the *second* day of *March*, in the year of our Lord one thousand eight hundred and *ninety-eight*, at *Hillsborough* aforesaid, in the county of *Hillsborongh*, aforesaid, with force and arms (*Here state offense charged and the facts constituting the same*),[4] contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state.

Wherefore the said *Richard Roe* prays that the said *John Doe* may be held to answer this complaint, and that justice may be done in the premises.

Richard Roe.[5]

Hillsborough, ss. *March 5th*, 1898, personally appeared *Richard Roe*, and made oath that the above complaint by him subscribed is in his belief true.[6]

Before me, *Abraham Kent*, Justice of the Peace.

Form No. 6689.[7]

The State of *New Jersey*, }
County of *Bergen*. } ss.

Richard Roe, of the township of *Blank*, in the county of *Bergen* and state of *New Jersey*, upon his oath complains that on the *second* day of *March*, A. D. 1898, at said township of *Blank*, in the county and state aforesaid, *John Doe* did (*Here state facts constituting the offense charged*); wherefore the said *Richard Roe* prays that the said *John Doe* may be apprehended and held to answer to this complaint, and dealt with as law and justice may require.

Richard Roe.

Sworn and subscribed to this *fifth* day of *March*, 1898.

Before me, *Abraham Kent*, Justice of the Peace.[8]

1. *New Hampshire.* — Pub. Stat. (1891), c. 248 *et seq.*

2. **Must be addressed** to a justice of the peace or to a police court. N. H. Pub. Stat. (1891), c. 248, § 9.

3. **Name or description of accused** must be stated. N. H. Pub. Stat. (1891), c. 248, § 9.

4. **Name and description of offense** must be given. N. H. Pub. Stat. (1891), c. 248, § 9.

Charging part of complaint, see *supra*, note 1, p. 932.

Distinct and separate offenses must not be included in one count of the same complaint. State *v.* Fowler, 28 N. H. 184.

5. **Must be signed** by complainant. N. H. Pub. Stat. (1891), c. 248, § 9.

6. **Must be under Oath.** N. H. Pub. Stat. (1891), c. 248, § 9.

7. *New Jersey.* — Gen. Stat. (1895), p. 1119, § 1 *et seq.*; p. 1200, § 11 *et seq.*

Must be in Writing. — State *v.* Quigg, 13 N. J. L. 293.

8. **Magistrates** to whom the complaint may be made are enumerated in the statute. N. J. Gen. Stat. (1895), p. 1119, § 1.

Jurat. — In State *v.* Perth Amboy, 51 N. J. L. 406, it was held that the charter of the city, the violation of the ordinance of which constituted the ground of complaint, did not require the oath and attestation to the complaint to be made in writing prior to the arrest, and that consequently the jurat need not have been signed by the police magistrate until the return day of the summons.

New Mexico. — The complaint in writing in preliminary proceedings in

Form No. 6690.[1]

To *Abraham Kent*, one of the Justices of the Peace in and for the county of *Suffolk*, state of *New York*.[2]

Suffolk, ss.

Richard Roe, of the *town* of *Huntington*, in the county of *Suffolk*, state of *New York*, being duly sworn and examined, makes complaint and on oath[3] says: (*Continuing and concluding as in Form No. 6663.*)

Form No. 6691.[4]

this state is provided for by *New Mexico* Compiled Laws (1884), § 2448, and seems to be in all material respects similar to the complaint provided for in such proceedings under the *Arizona* statute. See *supra*, Form No. 6663, and notes thereto.

1. *New York.* — Cook's Code Crim. Proc. (1891), § 145 *et seq.* The statutory provisions in *New York* are identical with those in *Arizona*. Consult Form No. 6663, *supra*, and notes thereto.

For the formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

For example of such complaint in this state see Form No. 2394.

The same technicality and strictness is not called for with respect to the complaint as is necessary in the case of an indictment. People *v.* Robertson, 3 Wheel. Cr. Cas. (N. Y. Gen. Sess.) 180.

Need not be reduced to writing prior to the issuance of warrant. Payne *v.* Barnes, 5 Barb. (N. Y.) 465; Matter of Boswell, 34 How. Pr. (N. Y. Ct. Sess.) 347; Sleight *v.* Ogle, 4 E. D. Smith (N. Y.) 445. *Compare*, however, People *v.* Fuerst, 13 N. Y. Misc. Rep. (Queens County Ct Sess.) 304.

2. **Magistrates** to whom the complaint may be made are enumerated in the statute. Cook's Code Crim. Proc. (N. Y.), § 147.

3. **Made on information and belief,** whether by an officer or other person, is insufficient. Matter of Blum, 9 Misc. Rep. (N. Y. Supreme Ct.) 571. The information in this case concluded as follows: "Deponent further says that he makes this complaint upon information and belief as a police officer of the city of Brooklyn."

Precedent. — In Pratt *v.* Bogardus, 49 Barb. (N. Y.) 91, the complaint was as follows: "*Albany* County, ss: *Stephen D. Van Natta*, of the *town* of *Knox*, in the said county, being duly sworn and examined, makes complaint and says, that on or about the *first* day of *June*, 1864, at the *town* of *Knox*, aforesaid, *Ferrand T. Pratt* did designedly, and by false pretense, obtain from him one sulky, of the value of $30, by falsely stating and representing to him that his sulky was hard to ride in, and that he was going to *Albany* city, and that he would leave his sulky with him, the said *Stephen D. Van Natta*, and would return it the next week, whereas, in fact, he did not so return it, but took it to *Albany* and had the same shipped to *Fort Plain*, with intent to cheat and defraud the said *Stephen D. Van Natta*.

Stephen D. Van Natta.

Sworn and subscribed before me this *16th* day of *July*, 1864.

E. N. Bogardus,
Justice of the Peace."

It was held that this complaint was sufficient to call upon the justice to exercise his judgment in determining the propriety of issuing a warrant, and, having done so in good faith, to protect him with respect thereto.

4. *North Carolina.* — Code (1893), § 1133.

Complaint under oath is necessary to the issuance of the warrant unless the offense had been committed *super visum*. Welch *v.* Scott, 5 Ired. L. (27 N. Car.) 72.

For formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

For precedents of complaints before a justice see State *v.* Griffis, 117 N. Car. 709; State *v.* Taylor, 118 N. Car. 1262; State *v.* Norman, 110 N. Car. 485; Durham *v.* Jones, 119 N. Car. 268.

Complaint may be amended in the discretion of the justice. N. Car. Code (1883), § 908; State *v.* Norman, 110 N. Car. 484. And this discretionary power is not reviewable on appeal. State *v.* Taylor, 118 N. Car. 1262.

State of *North Carolina*, *Mecklenburg* County, *Dewese* Township. } Before *Abraham Kent*, a justice of the peace.[1]

The State of *North Carolina* against *John Doe*.

North Carolina, *Mecklenburg* County. } ss.

Richard Roe, of *Davidson*, in the county of *Mecklenburg*, state of *North Carolina*, being duly sworn on this *fifth* day of *March*, 1898, upon oath deposes and says: (*Continuing and concluding as in Form No. 6663.*)

Form No. 6692.[2]

The State of North Dakota, plaintiff, against *John Doe*, defendant. } Complaint for *Burglary in the First Degree.*

The State of *North Dakota*, County of *Cass*. } ss.

Upon this *fifth* day of *March*, A. D. 1898, before me, *Abraham Kent*, a justice of the peace[3] within and for the county of *Cass*, state of *North Dakota*, personally appeared *Richard Roe*, who being duly examined and sworn upon oath deposes and says: (*Continuing and concluding as in Form No. 6663.*)

Form No. 6693.[4]

(Bates' Anno. Stat. Ohio (1897), § 7134.)

The *State* of *Ohio*, *Vinton* County, ss.

1. Magistrates to whom the complaint may be made are enumerated in the statute. N. Car. Code (1883), § 1132.

Must conclude "against the form of the statute." State *v.* Lowder, 85 N. Car. 565.

2. *North Dakota.* — Rev. Codes (1895), §§ 7881, 7886, being similar to, if not identical with, the statutory provisions relating to criminal complaints in preliminary proceedings in *Montana*. See Form No. 6686, *supra*, and notes thereto.

For formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

For a precedent of a complaint of this character see State *v.* Barnes, 3 N. Dak. 131.

The same technicality and care necessary in framing indictments and informations is not necessary in drawing a complaint. State *v.* Barnes, 3 N. Dak. 131.

Under § 8, c. 71, Laws of 1890, where a criminal complaint, filed against the accused with an examining magistrate, after alleging time and place, designated the offense in general language, giving its name, and in addition thereto set out such of the facts and circumstances constituting the offense as fairly apprises a person of average intelligence of the nature of the accusation against him, it was held sufficient to authorize a state's attorney to file an information against the accused for the same offense. State *v.* Barnes, 3 N. Dak. 131.

3. Magistrates before whom criminal complaints may be made are enumerated in the statute. N. Dak. Rev. Codes (1895), §§ 7758, 7885.

4. *Ohio.* — Bates' Anno. Stat. (1897), § 7133 *et seq.*

Kansas. — 2 Gen. Stat. (1897), p. 402, § 35. See *supra*, Form No. 6676, and notes thereto.

Oklahoma. — Stat. (1893), § 4958. See *infra*, Form No. 6694, and notes thereto.

Before me, *Abraham Kent*,[1] [a justice of the peace in and for said county,][2] personally came *Richard Roe*, who being duly sworn according to law, deposes and says, that on or about the *second* day of *March*, 1898, at the county of *Vinton*, one *John Doe* (*Here describe the offense committed as nearly according to the nature thereof as the case will admit*).[3]

Richard Roe.

Sworn to and subscribed before me this *fifth* day of *March*, 1898.

Abraham Kent, Justice of the Peace.

Form No. 6694.[4]

Territory of *Oklahoma*, *Oklahoma* County, ss.

Richard Roe, being duly sworn, on oath says, that on the *second* day of *March*, A. D. 1898, in the county of *Oklahoma* and *territory* of *Oklahoma*, *John Doe* did (*continuing and concluding as in Form No. 6676*).

Form No. 6695.[5]

Before *Abraham Kent*, Justice of the Peace within and for *Blank* Precinct, *Multnomah* County, State of *Oregon*.[6]

The State of Oregon, plaintiff, against *John Doe*, defendant. } Complaint for *Burglary*.

John Doe is accused by *Richard Roe* by this complaint of the crime of (*continuing and concluding as in Form No. 6716, charging an offense not within the jurisdiction of the justice of the peace*).

Wyoming. — Rev. Stat. (1887), § 3181. See *infra*, Form No. 6707, and notes thereto.

For formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

For another form of an affidavit which may be varied to suit the nature of any particular case see Bates' Anno. Stat. Ohio (1897), § 7135.

For examples of complaints in this state see Forms Nos. 2415, 3945.

Complaint under oath is necessary to the issuance of the warrant unless the offense had been committed *super visum*. Eichenlaub *v.* State, 36 Ohio St. 142.

May be upon Affirmation.—Eichenlaub *v.* State, 36 Ohio St. 142.

1. **Magistrates** to whom complaints of this character may be made are enumerated in the statute. Bates' Anno. Stat. Ohio (1897), § 7106.

2. The words in [ ] do not appear in the form set out in the statute.

3. **Charging part** of complaint, see *supra*, note 1, p. 932.

4. *Oklahoma*. — Stat. (1893), § 4958, and notes thereto.

Kansas. — 2 Gen. Stat. (1897), p. 402, § 35. See *supra*, Form No. 6676, and notes thereto.

Ohio. — Bates' Anno. Stat. (1897), § 7133 *et seq.* See *supra*, Form No. 6693, and notes thereto.

Wyoming. — Rev. Stat. (1887), § 3181. See *infra*, Form No. 6707, and notes thereto.

For the formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

Magistrates to whom the complaint may be made are enumerated in the statutes. Okla. Stat. (1893), § 4957.

5. *Oregon*.—Hill's Anno. Laws (1892), §§ 1546, 1549, being similar to, if not identical with, the provisions relating to criminal complaints in preliminary proceedings in *Arizona*. See *supra*, Form No. 6663, and annotations thereto.

For the formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

6. **Magistrates** to whom complaints of this character may be made are enumerated in the statute. Hill's Anno. Laws Oregon (1892), § 1548.

Form No. 6696.[1]

Chester County, ss.

Personally appeared before me, one of the justices of the peace in and for the county aforesaid, this *fifth* day of *March*, in the year of our Lord one thousand eight hundred and *ninety-eight*, *Richard Roe*, of the township of *Blank*, in said county of *Chester*, and state of *Pennsylvania*, who being first duly sworn according to law on oath deposes and says that on the *second* day of *March*, in the year of our Lord one thousand eight hundred and *ninety-eight*, at the township of *Blank* aforesaid, in the county and state aforesaid, *John Doe* did (*Here state the facts constituting the offense charged*),[2] [contrary to the act of assembly in such case made and provided.][3]

Richard Roe.

Sworn and subscribed to before me this *fifth* day of *March*, 1898.

Abraham Kent, Justice of the Peace.

Form No. 6697.[4]

(R. I. Gen. Laws (1896), c. 102, § 22.)

To *John Marshall*, Esquire, justice (or *clerk*, as the case may be) of the *district* court of the *sixth* judicial district,[5] *Richard Roe*, chief of the police (or *special constable*, or other person, as the case may be) of the town of *North Providence*, on oath complains in the name and behalf of the state, that at said *North Providence*[6] on the *second* day of

1. *Pennsylvania.* — Complaint is the name used in criminal proceedings to designate the allegation made to the proper officer that some person, whether known or unknown, has been guilty of the designated offense, and a request that the offender may be punished. The complaint should be made on oath or affirmation and reduced to writing by the magistrate. It should be correctly dated, should state the name of the place where it is taken, the name and style of the informant, the name of the magistrate, and, if possible, the name of the offender, the time of the commission of the offense, a description of the offense, and the place where the offense was committed. Grayd. Forms (1845), p. 189. Compare Form No. 6680, *supra*, and notes thereto.

For formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

Complaint under oath is necessary to the issuance of the warrant, unless the offense had been committed *super visum*. Conner *v.* Com., 3 Binn. (Pa.) 42.

2. **Charging part** of complaint, see *supra*, note 1, p. 932.

3. Instead of the words in [ ] insert "against the peace and dignity of the Commonwealth of Pennsylvania," if the offense is a common-law crime.

4. *Rhode Island.* — Gen. Laws (1896), c. 229.

For formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

Must be Reduced to Writing. — R. I. Gen. Laws (1896), c. 229, § 10.

A justice or clerk of the district court may, by an amanuensis, reduce the complaint to writing. The work becomes that of the justice, or the clerk, as the case may be, when he swears the complainant and issues the warrant. State *v.* Guinness, 16 R. I. 401.

5. **Magistrates** to whom the complaint may be made are enumerated in the statute. R. I. Gen. Stat. (1896), c. 229.

A criminal complaint beginning thus. "To *James W. Blackwood*, Esquire, Justice of the District Court of the *Sixth* Judicial District," the jurat to which shows that it was subscribed and sworn to before William B. Beach, justice of the district court of the sixth judicial district, was held to be not fatally defective, as the court might take judicial notice that William B. Beach was at the time of the date of the complaint justice of the district court of the sixth judicial district. State *v.* Wright, 16 R. I. 518.

6. **An allegation of place,** using the words "at Tiverton, in the county of Newport," raises the necessary infer-

March, A. D. 1898, with force and arms, *John Doe* of said *North Providence* (*Here state fully the facts constituting the offense charged*),[1] against the statute, and the peace and dignity of the state. Wherefore, he prays advice, and that process may issue, and that said respondent may be apprehended and held to answer to this complaint, and be further dealt with relative to the same according to law.

Richard Roe.[2]

Dated at *North Providence*, this *fifth* day of *March*, 1898.

Providence, sc.

In *North Providence* in said county on this *fifth* day of *March*, 1898, before me personally appeared *Richard Roe* and made oath that the statements made in the complaint by him above subscribed are true.

Abraham Kent, Justice of the Peace.[3]

Form No. 6698.[4]

The State of *South Carolina*, } ss.
County of *Sumter*. }

Personally appeared before me, *Abraham Kent*, one of the magistrates[5] within and for the county of *Sumter*, state of *South Carolina*, this *fifth* day of *March*, 1898, *Richard Roe*, of *Sumter*, in said county and state, who being duly sworn on oath[6] complains and says: (*Continuing and concluding as in Form No. 6663.*)[7]

Form No. 6699.[8]

The State of South Dakota, plaintiff, against *John Doe*, defendant. } Information *for Burglary in the First Degree.*

The State of *South Dakota*, } ss.
County of *Hughes*. }

Upon this *fifth* day of *March*, A. D. 1898, before me, *Abraham Kent*,

ence that the town of Tiverton is meant. State *v.* Lake, 16 R. I. 511.

1. Charging part of complaint, see *supra*, note 1, p. 932.

2. Must be signed by the complainant. R. I. Gen. Laws (1896), c. 229, § 10.

3. Verification. — Complainant must be examined under oath. R. I. Gen. Laws (1896), c. 229, § 10.

4. *South Carolina.* — 2 Rev. Stat. (1893), p. 268, § 19.

For the formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

5. Magistrates to whom complaints may be made are enumerated in the statute. 2 S. Car. Rev. Stat. (1893), c. 11.

6. Must be under Oath. — 2 S. Car. Rev. Stat. (1893), p. 268, § 19; State *v.* Wimbush, 9 S. Car. 309.

7. No particular formality or technical accuracy is necessary in the statement of the offense. A sworn information, setting forth the charge "plainly and substantially," so that the accused might understand the nature of the offense, seems to have been only what was intended by the statute. McConnell *v.* Kennedy, 29 S. Car. 180; 2 S. Car. Rev. Stat. (1893), p. 268, § 19.

May be amended at any time before trial. 2 S. Car. Rev. Stat. (1893), p. 268, § 19.

Previous affidavit and warrant are not necessary in order that the state solicitor may present a bill to the grand jury. State *v.* Bowman, 43 S. Car. 108.

Need not conclude "against the form of the statute." State *v.* Brown, 14 S. Car. 383.

8. *South Dakota.* — Dak. Comp. Laws (1887), §§ 7117, 7120 *et seq.*

For formal parts of affidavits, generally, see the title AFFIDAVITS, vol. 1, p. 548.

a justice of the peace[1] within and for the county of *Hughes*, state of *South Dakota*, personally appeared *Richard Roe*, who being duly examined and sworn upon oath[2] deposes and says: (*Continuing and concluding as in Form No. 6663.*)

Form No. 6700.[3]

State of *Tennessee*, *Maury* County.

Personally appeared before me, *Abraham Kent*, a justice of the peace[4] within and for the said county of *Maury*, this *fifth* day of *March*, 1898, one *Richard Roe*, of *Columbia*, in said county of *Maury*, who being duly sworn according to law on oath alleges and says: (*Continuing and concluding as in Form No. 6663.*)

Form No. 6701.[5]

The State of *Texas*, }
County of *Freestone*. }

Before me, the undersigned authority,[6] on this *fifth* day of *March*, 1898, personally appeared *Richard Roe*,[7] who, after being by me duly

1. **Magistrates** to whom information may be made are enumerated in the statute. Dak. Comp. Laws (1887), § 7119.

2. **Must be verified** by oath or affirmation. S. Dak. Comp. Laws (1887), §§ 7117, 7120 *et seq.*

3. *Tennessee.* — Code (1896), § 6973 *et seq.*, being similar to and in many respects identical with the statutory provisions relating to criminal complaints in preliminary proceedings in *Alabama* and *Arizona*. See *supra*, Forms Nos. 6662, 6663, and notes thereto.

For the formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

4. **Magistrates** to whom the complaint may be made are enumerated in the statute. Tenn. Code (1896), § 6974.

5. *Texas.* — Code Crim. Proc. (1895), art. 255 *et seq.*

For the formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

A complaint is prerequisite to an information. Dominguez *v.* State, (Tex. Crim. App. 1896) 35 S. W. Rep. 973; White *v.* State, (Tex. Crim. App. 1896) 35 S. W. Rep. 391.

6. **Magistrates** authorized to issue criminal processes are enumerated in the statute. Tex. Code Crim. Proc. (1895), art. 41.

Complaint may be sworn to before the county attorney or his assistant. Kelly *v.* State, (Tex. Crim. App. 1896) 38 S. W. Rep. 39.

Complaint shall be deemed sufficient, without regard to the form, if it has the requisites mentioned in the statute. Anderson *v.* State, 34 Tex. Crim. Rep. 96; Brown *v.* State, 11 Tex. App. 451; Clark *v.* State, 23 Tex. App. 260.

Must be in Writing. — Tex. Code Crim. Proc. (1895), art. 257.

7. **Name of the affiant** need not appear in the body of the complaint provided he signs it and swears to it. Upton *v.* State, 33 Tex. Crim. Rep. 231.

In Malz *v.* State, (Tex. Crim. App. 1896) 34 S. W. Rep. 267, it appears that the complaint originally read in the beginning part "personally appeared before the undersigned authority *R. L. Winfrey*," and was signed and appears to have been sworn to by William Jackson. Upon motion to quash on the ground that the affidavit was made by R. L. Winfrey and not by William Jackson, the county attorney filed an answer showing that the complaint as shown by the affidavit was signed and sworn to by William Jackson, and asked leave to amend the complaint by erasing the name of "*R. L. Winfrey*" and inserting "*William Jackson.*" It was held that it was competent to erase the name of Winfrey and insert that of Jackson on the theory that it was not necessary in the body of the complaint to state the name of the party making the complaint or the affidavit.

That it was made by a credible person is not necessary to be stated in the com-

sworn on his oath deposes and says,[1] that *John Doe*,[2] in the county of *Freestone*, and state of *Texas*, heretofore, to wit, on or about the *second* day of *March*, 1898,[3] did then and there (*Here name the offense charged, and state with particularity the facts constituting the same*),[4] contrary to the forms of the statute in such cases made and provided, and against the peace and dignity of the state of *Texas*.[5]

Richard Roe.[6]

Sworn to and subscribed before me this *fifth* day of *March*, 1898.

Abraham Kent, Justice of the Peace,
Precinct No. *6*, *Freestone* County, *Texas*.[7]

plaint. Dodson *v.* State, 35 Tex. Crim. Rep. 57.

An officer need not make the complaint. Lindley *v.* State, (Tex. Crim. App. 1898) 44 S. W. Rep. 165.

1. That affiant "has reason to believe and does believe" is equivalent to stating in the language of the statute that affiant has "good reason to believe and does believe." Dodson *v.* State, 35 Tex. Crim. Rep. 571.

That the affiant "has good reason to believe and does believe" that the accused has committed the offense charged is sufficient. Clark *v.* State, 23 Tex. App. 260; Brown *v.* State, 11 Tex. App. 451; Anderson *v.* State, 34 Tex. Crim. Rep. 96; Staley *v.* State, (Tex. Crim. App. 1895) 29 S. W. Rep. 272; Dean *v.* State, (Tex. Crim. App. 1895) 29 S. W. Rep. 477.

In Brown *v.* State, 11 Tex. App. 451, affiant stated that "to the best of his knowledge and belief" the alleged offense was committed, which was held to be sufficient.

2. Name of accused must be stated, if known; when not known, the complaint must give some reasonably definite description of him. Tex. Code Crim. Proc. (1895), art. 257. Describing accused as "Mrs. Beaumont" has been decided not a sufficient compliance with this provision of the statute. Beaumont *v.* Dallas, 34 Tex. Crim. Rep. 68.

3. Time and place of the commission of the offense must be stated as definitely as can be done. Tex. Code Crim. Proc. (1895), art. 257.

Charging an offense to have been committed on a date subsequent to the making of the complaint vitiates the complaint. Womack *v.* State, 31 Tex. Crim. Rep. 41; Jennings *v.* State, 30 Tex. App. 428.

4. Name of the offense must be stated. Tex. Code Crim. Proc. (1895), art. 257.

Charging part of complaint, see *supra*, note 1, p. 932.

That an offense against the laws of the state has been committed, or that affiant has good reason to believe and does believe that the accused has committed such an offense, must be stated. Tex. Code Crim. Proc. (1895), art. 257.

5. Need not conclude "against the peace and dignity of the state." Curry *v.* State, (Tex. Crim. App. 1893) 24 S. W. Rep. 516.

6. Must be signed by the affiant, if he can write his name; otherwise he must place his mark at the foot of the complaint. Tex. Code Crim. Proc. (1895), art. 257.

7. The want of a jurat to a complaint is fatally defective. Neiman *v.* State, 29 Tex. App. 360.

That the jurat was, in fact, made on May 2, 1889, instead of April 2, 1889, as written therein, is a mere clerical error, which does not vitiate the complaint. Allen *v.* State, (Tex. App. 1890) 13 S. W. Rep. 998.

A jurat to a complaint must be signed officially by the officer administering the oath. A jurat signed "*Wm. Greer, J. P.*" was held invalid in Neiman *v.* State, 29 Tex. App. 360, on the theory that such signature did not designate properly the official character; wherein it was intimated, however, that the signature would have been sufficient in the following words, "*Wm. Greer, J. P. Prec. No.* ——, *W. C.*"

A complaint was held to be fatally defective to which was appended a jurat which did not show the official character of the officer before whom the complaint was verified. Robertson *v.* State, 25 Tex. App. 529. The jurat in that case was signed "W. H. Edell," and following this name were some pen marks which resembled the letter "W."

In Mican *v.* State, (Tex. App. 1892) 19 S. W. Rep. 762, the record showed that the complaint was sworn and subscribed before one "John M. Keith," but there were no other words desig-

Form No. 6702.[1]

The State of Utah, plaintiff, against *John Doe*, defendant. } Complaint *for Burglary.*

The State of *Utah*, County of *Utah*. } ss.

Upon this *fifth* day of *March*, 1898, before me, *Abraham Kent*, a justice of the peace[2] of *Provo* precinct within and for the said county of *Utah*, in the state of *Utah* aforesaid, personally appeared *Richard Roe*, who being duly examined and sworn by me upon oath deposes and says:[3] (*Continuing and concluding as in Form No. 6663.*)[4]

Form No. 6703.[5]

State of *Vermont*, County of *Chittenden*, ss. } To *Abraham Kent*, Esq., a justice of the peace within and for the county of *Chittenden*, state of *Vermont*, comes *Richard Roe*,[6] a grand juror[7] for the

nating his official capacity. Reviewing Neiman *v.* State, 29 Tex. App. 360, the complaint was held to be sufficient.

1. *Utah.* — Rev. Stat. (1898), § 4604 *et seq.*, being similar to, if not identical with, the provisions relating to criminal complaints in preliminary proceedings in *Montana* and *North Dakota*. See *supra*, Forms Nos. 6686, 6692, and notes thereto.

For the formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

2. **Magistrates** to whom the complaint may be made are enumerated in the statute. Utah Rev. Stat. (1898), § 4608.

3. **Information and Belief.**— Complaint may be sworn to upon information and belief. U. S. *v.* Eldredge, 5 Utah 161.

4. **Must show** that the crime has been committed. Matter of Wiseman, 1 Utah 39.

5. *Vermont.* — Stat. (1894), c. 94.

For the formal parts of affidavits generally, consult the title AFFIDAVITS, vol. 1, p. 548.

For examples of complaints in this state see Forms Nos. 3946, 3960.

Complaint under oath is necessary to the issuance of the warrant, unless the offense had been committed *super visum*. State *v* J. H., 1 Tyler (Vt.) 448.

Certain omissions which shall not affect the validity of a complaint are enumerated in the statute. Vt. Stat. (1894), § 1911.

Certain variances in complaints which may be cured by amendment are mentioned in the statute. Vt. Stat. (1894), § 1912.

Complaint of grand juror cannot be amended in matter of substance in the appellate court. State *v.* Wheeler, 64 Vt. 569, where the defective complaint, omitting the formal parts, is set out in full.

6. **Name of complainant** need not appear in the body of the complaint. State *v.* Davis, 52 Vt. 376.

7. **What persons or officers** may make the complaint are enumerated in the statute. Vt. Stat. (1894), c. 94.

A justice may cause persons charged with crimes exceeding his jurisdiction to try, to be apprehended and committed, or bound over for trial by the county court. Vt. Stat. (1894), § 1940.

The form of grand jurors' complaint to a city court may be as follows:

"State of *Vermont*, City of *Burlington*, ss. } To the *Honorable City Court*, within and for the city of *Burlington*, in the county of *Chittenden*, state of *Vermont*, comes *S. M. Flint*, city grand juror within and for said city of *Burlington*, in his proper person, and on his oath of office complains that *John Doe*, late of said *Burlington*, on, to wit, the *second* day of *March*, 1898, at said city of *Burlington* (*Here state the offense charged, and the facts constituting the same*), contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the state.

S. M. Flint, City Grand Juror.

The foregoing complaint exhibited to me this *fifth* day of *March*, 1898.

Charles Jones, City Judge."

State's attorney's complaint may be as follows:

town of *Colchester*, in said county of *Chittenden*, in his own proper person, and on his oath of office complains, that *John Doe*, of said town of *Colchester*, in said county of *Chittenden*, on the *second* day of *March*, 1898, at said town of *Colchester*, in said county of *Chittenden*, (*Here state the offense charged and the facts constituting the same*),[1] contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the state.[2]

Richard Roe, Grand Juror.

The foregoing complaint exhibited to me this *fifth* day of *March*, 1898.

Abraham Kent, Justice of the Peace.

Form No. 6704.[3]

Commonwealth of *Virginia*, } to wit.
County of *Albemarle*. }

Richard Roe upon oath complains that on the *second* day of *March*, 1898, in the *county* of *Albemarle*, *commonwealth* of *Virginia*, one *John Doe*, late of said *Albemarle* county, did (*Here state the offense charged and the facts constituting the same*),[4] and he the said *Richard Roe* therefore prays that the said *John Doe* may be apprehended and held to answer the said complaint, and dealt with in relation thereto as the law may require.

Dated this *fifth* day of *March*, 1898.

Richard Roe.

"State of *Vermont*, } To *Abraham*
Windham County, ss. } *Kent*, one of the justices of the peace within and for the county of *Windham*, comes *Daniel Webster*, State's Attorney of said county of *Windham*, in his own proper person, and on his oath of office complains that (*Here insert charging part as in Form No. 6703*), contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the state.

Daniel Webster,
State's Attorney, *Windham* County.

The witnesses in support of this complaint are:

Banks Belk.
T. M. Hughes.
John Smith.

Daniel Webster,
State's Attorney, *Windham* County.

The within complaint was exhibited to me this *fifth* day of *March*, A. D. 1898, and process then issued.

Abraham Kent,
Justice of the Peace."

1. **Charging part** of complaint, see *supra*, note 1, p. 932.

2. **Must conclude** "against the form of the statute." State *v.* Soragan, 40 Vt. 450.

In State *v.* Bacon, 40 Vt. 456, it was held that a count in a criminal complaint having no reference to another count, and not concluding against the statute, etc., is bad in form.

The oath of a private prosecutor may be made before any officer authorized to administer oaths. State *v.* Freeman, 59 Vt. 661.

Where a private prosecutor actually made oath before the issuance of the warrant, the nonappearance of a certificate to that effect attached to the complaint may be amended. State *v.* Freeman, 59 Vt. 661.

A complaint by a private prosecutor need not be made before the magistrate who issues the warrant. State *v.* Freeman, 59 Vt. 661.

3. *Virginia*. — Code (1887), § 3956 *et seq.*

West Virginia. — Code (1891), p. 952, § 2 *et seq.*

For the formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

4. **Charging part** of complaint, see *supra*, note 1, p. 932.

County of *Albemarle*, to wit:

This *fifth* day of *March*, 1898, the said *Richard Roe* made oath to the truth of the foregoing complaint before me.

Abraham Kent, Justice of the Peace.[1]

Form No. 6705.[2]

The State of Washington against *John Doe.* } Complaint for *Burglary.*

The State of *Washington*, County of *Chehalis.* } ss.

Personally appeared before me, *Abraham Kent*, a justice of the peace[3] in and for *Blank* precinct, in said *Chehalis* county, state of *Washington* aforesaid, this *fifth* day of *March*, 1898, *Richard Roe*, of *Montesano*, in said county of *Chehalis*, who being first duly sworn by me complains and says: (*Continuing and concluding as in Form No. 6663.*)

Form No. 6706.[4]

The State of Wisconsin against *John Doe.* }

The State of *Wisconsin*, County of *Pierce.* } ss.

Personally appeared before me, a justice of the peace[5] within and for said county of *Pierce*, state of *Wisconsin*, this *fifth* day of *March*, 1898, *Richard Roe*, of *Ellsworth*, in said county of *Pierce*, who being duly sworn complains and says, that on the *second* day of *March*, 1898, at said county, *John Doe* did (*Here state the offense charged and the facts constituting the same*),[6] against the peace and dignity of the

1. **Officers who may issue process** for the apprehension of offenders are enumerated in the statute.

Virginia. — Code (1887), § 3955.

West Virginia. — Code (1891), p. 952, § 1.

2. *Washington.* — Ballinger's Codes & Stat. (1897), § 6695 *et seq.*

For the formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

Must be Reduced to writing. — Ballinger's Codes & Stat. Wash. (1897), § 6695.

Must be subscribed and sworn to by complainant. Ballinger's Codes & Stat. Wash. (1897), § 6695.

3. **Magistrates** to whom complaints may be made are enumerated in the statute. Ballinger's Codes & Stat. Wash. (1897), §§ 6695, 4691.

4. *Wisconsin.* — Sanb. & B. Anno. Stat. (1889), § 4776 *et seq.*

For the formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

For an example of a complaint in this state see Form No. 3948.

Must be Reduced to Writing. — Sanb. & B. Anno. Stat. Wis. (1889), § 4776.

5. **Magistrates** who may issue process for the apprehension of offenders are enumerated in the statute. Sanb. & B. Anno. Stat. Wis. (1889), § 4775; Faust *v.* State, 45 Wis. 273; State *v.* Stewart, 60 Wis. 587.

6. **A substantial statement** of the offense is sufficient. Ford *v.* State, 3 Pin. (Wis.) 449. But the statement must at least approach toward the charging of a criminal offense. Baldwin *v.* Hamilton, 3 Wis. 747.

As to the sufficiency of the statement of the offense, see State *v.* Dale, 3 Wis. 795.

Charging part of complaint, see *supra*, note 1, p. 932.

Information and belief may sustain the complaint in some states. State *v.* Davie, 62 Wis. 305; State *v.* Tall, 56 Wis. 577.

state of *Wisconsin*.

Richard Roe.[1]

Subscribed and sworn to before me this *fifth* day of *March*, 1898.
Abraham Kent, Justice of the Peace.[1]

Form No. 6707.[2]

State of *Wyoming*, County of *Johnson*, ss.

Before me, *Abraham Kent*, a justice of the peace[3] in and for said county, personally came *Richard Roe*, who being duly sworn according to law deposes and says,[4] that on or about the *second* day of *March*, 1898, at the county of *Johnson*, one *John Doe*[5] (*Here describe the offense committed as nearly according to the nature thereof as the case will admit*),[6] contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state.

Richard Roe.[7]

Sworn to and subscribed before me this *fifth* day of *March*, 1898.
Abraham Kent, Justice of the Peace.

Form No. 6708.[8]

United States of America,
District of *Indiana*, } ss.
City of *Indianapolis*.

Before me, *Carroll Carter*, a United States Commissioner,[9] appointed by the Circuit Court of the United States for the District of *Indiana*, in the *Seventh* Circuit, to take acknowledgments of bail, etc., according to the acts of congress in that behalf provided, personally appeared

1. **Must be subscribed and sworn** to by the complainant. Sanb. & B. Anno. Stat. Wis. (1889), § 4776.

2. *Wyoming*. — Rev. Stat. (1887), § 3181 *et seq*.

Kansas. — 2 Gen. Stat. (1897), p. 402, § 36. See *supra*, Form No. 6676, and notes thereto.

Ohio. — Bates' Anno. Stat. (1897), § 7133 *et seq*. See *supra*, Form No. 6693, and notes thereto.

Oklahoma. — Stat. (1893), § 4958. See *supra*, Form No. 6694, and notes thereto.

For the formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

Must be in Writing. — Wyoming Rev. Stat. (1887), § 3181.

3. **Magistrates** to whom the complaint may be made are enumerated in the statute. Wyoming Rev. Stat. (1887), § 3180.

4. **Must be under Oath.** — Wyoming Rev. Stat. (1887), § 3181.

5. **Must charge some person** with committing some offense. Wyoming Rev. Stat. (1887), § 3181.

6. **Charging part** of complaint, see *supra*, note 1, p. 932.

7. **Must be signed** by complainant. Wyoming Rev. Stat. (1887), § 3181.

8. **Offenses against the United States.** — U. S. Rev. Stat. (1878), § 1014, providing that for any crime or offense against the United States the offender may, by the proper magistrate and agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested, imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense.

For the formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

9. **Magistrates** to whom the complaint may be made are enumerated in the statutes. U. S. Rev. Stat. (1878), § 1014.

A United States commissioner acting under the provisions of the U. S. Rev. Stat., § 1014, is merely a committing magistrate; U. S. *v.* Martin, 17 Fed. Rep. 150, and exercises the same but no greater power than the state magistrates for the same purposes. U. S. *v.* Horton, 2 Dill. (U. S.) 94.

this day *Richard Roe*, who being first duly sworn deposes and says, [that he has good reason to believe, and does verily believe,][1] that on or about the *second* day of *March*, A. D. 1898, one *John Doe*, late of the said district, at the said district, unlawfully, wilfully, knowingly and feloniously, did then and there (*Here state the offense charged and the facts constituting the same*),[2] contrary to the form of

1. A complaint on information and belief made to a committing magistrate in *California* by virtue of U. S. Rev. Stat. (1878), § 1014, and the Cal. Pen. Code (1897), § 806, is insufficient. U. S. *v.* Collins, 79 Fed. Rep. 65, *citing* U. S. *v.* Rundlett, 27 Fed. Cas. No. 16, 208; U. S. *v.* Hardin, 10 Fed. Rep. 803; U. S. *v.* Horton, 26 Fed. Cas. No. 15, 393.

2. Charging part of complaint, see *supra*, note 1, p. 932.

"Agreeably to the usual mode of process against offenses in such states" is intended to assimilate the proceedings for holding accused persons to answer before a court of the United States for the proceedings had for similar purposes by the laws of the state where the proceedings should take place. U. S. *v.* Rundlett, 2 Curt. (U. S.) 41; U. S. *v.* Tureaud, 20 Fed. Rep. 621; Gould & Tucker's Notes to U. S. Rev. Stat., p. 339. Unless in contravention of the express provisions of the federal statutes. Turner *v.* U. S., 19 Ct. of Cl. 629; Gould & Tucker's Notes to U. S. Rev. Stat., p. 339.

Thus in *Florida* the complaint may be as follows:

" United States of America, } Sct.
Southern District of *Florida*. }

Before me, *Carroll Carter*, a Commissioner of the Circuit Court of the United States in and for said District, personally comes *Richard Roe* who, being duly sworn, on his oath says that he has good reason to believe, and does believe, that (*continuing as in Form No. 6708 as to the charging part and concluding thus:*) which is in violation of the laws of the United States, and contrary to the peace and dignity thereof.

Richard Roe.

Subscribed and sworn to before me this *fifth* day of *March*, A. D. 1898.

Carroll Carter, Commissioner
U. S. Circuit Court.

For the *Southern* District of *Florida*."

And in *Idaho* as follows:

" United States of America, } ss.
District of *Idaho*. }

Before *Carroll Carter*, a Commissioner of the Circuit Court of the United States for the District of *Idaho* to take bail, etc., *Richard Roe*, of *Murray*, in the County of *Shoshone* and State of *Idaho*, on oath, deposes and says that *John Doe*, late of the district aforesaid, heretofore, to wit, on the *second* day of *March*, A. D. 1898, at said district, did (*Here state the offense charged and the facts constituting the same*), contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

Wherefore, the said deponent prays that the said *John Doe* may be apprehended and dealt with according to law.

And furthermore, the said deponent prays that *Banks Belk* and *T. M. Hughes*, of *Murray*, in said County of *Shoshone*, and State of *Idaho*, whom he has reason to believe and does believe are material witnesses to the subject matter of this complaint, may be duly summoned to appear and give evidence thereto.

Subscribed and sworn to before me, this *fifth* day of *March*, 1898.

Carroll Carter, Commissioner
of the Circuit Court for the
District of *Idaho*."

And in *Illinois* as follows:

" Before *Carroll Carter*, United States Commissioner.

United States of America, } ss.
Southern District of *Illinois*. }

Richard Roe, of the city of *Cairo*, in the state of *Illinois*, being duly sworn, deposes and says, that on or about the *second* day of *March*, A. D. 1898, at said city of *Cairo*, in *Alexander* county, in said state of *Illinois*, in said district, one *John Doe*, late of said district, did (*Here state offense charged and the facts constituting the same*), contrary to the statute in such case made and provided, and against the peace and dignity of the United States.

Wherefore the said deponent prays that the said *John Doe* may be arrested and dealt with according to law.

Richard Roe.

the statute of the United States in such case made and provided, and against the peace and dignity of the United States of America.

Richard Roe.

Subscribed and sworn to in my presence, this *fifth* day of *March*, A. D. 1898, at *Indianapolis* in the district aforesaid.

Carroll Carter,
Commissioner of the Circuit Court of the United States for the District of *Indiana*.

II. FOR OFFENSES TRIABLE IN JUSTICES' AND OTHER INFERIOR COURTS.

1. In Justices' Courts.[1]

Form No. 6709.

In the Justice's Court, before *Abraham Kent*, Justice of the Peace . . .

Subscribed and sworn to before me this *fifth* day of *March*, A. D. 1898.

Carroll Carter, United States Commissioner for the *Southern* District of *Illinois*."

And in *Michigan* as follows:

"*Eastern* District of *Michigan*, ss.

The complaint of *Richard Roe*, who being duly sworn, says that *John Doe*, late of said district, heretofore, to wit, on the *second* day of *March*, A. D. 1898, at *the city of Detroit* in said district, aforesaid, did (*Here state offense charged and facts constituting the same*), contrary to the act of Congress, in such case provided, and against the peace and dignity of the United States.

Wherefore complainant prays the said *John Doe* may be apprehended and dealt with according to law.

Taken, subscribed and sworn to, this *fifth* day of *March*, A. D. 1898, before me,

Carroll Carter, U. S. Commissioner for the *Eastern* District of *Michigan*."

And in *Ohio* as follows:

" United States of America, } ss.
Western Division of the Northern }
District of *Ohio*. }

Before me, *Carroll Carter*, a Commissioner of the *Circuit* Court of the United States, for the *Northern* District of *Ohio*, personally appeared this day *Richard Roe*, who being first duly sworn, deposes and says that on or about the *second* day of *March*, A. D. 1898, at ———, in said district, *John Doe*, in violation of section —— of the Revised Statutes of the United States, did unlawfully (*Here state offense charged and the facts constituting the same*).

Deponent further says that he has reason to believe and does believe that *Banks Belk* and *T. M. Hughes* are material witnesses to the subject matter of this complaint.

Richard Roe.

Sworn to before me, and subscribed in my presence, this *fifth* day of *March* A. D. 1898.

Carroll Carter, (SEAL)
Commissioner of the *Circuit* Court of the United States for the *Western Division of the Northern* District of *Ohio*."

1. Offenses Triable in Justices' Courts. — The complaint is similar in all respects to a criminal complaint in preliminary proceedings, except that it must charge an offense such as to bring the case within the justice's jurisdiction. Form No. 6709 in the text is a general form, which may be used as a model for such a complaint in most of the states.

Arizona. — Pen. Code (1887), § 2208; see *supra*, Form No. 6663.

Arkansas. — Sand. & H. Dig. (1894), § 1963; see *supra*, Form No. 6664.

California.—Pen. Code (1897), § 1426; see *supra*, Form No. 6665.

Colorado. — Mills' Anno. Stat. (1891), §§ 1484, 2766; see *supra*, Form No. 6666.

Connecticut. — Gen. Laws (1888), § 693 *et seq*.; see *supra*, Form No. 6667.

Delaware. — Rev. Stat. (1893), p. 734, § 16; see *supra*, Form No. 6668.

Florida. — Rev. Stat. (1892), § 2950; see *supra*, Form No. 6670.

in and for the town (or *township* or *precinct*) of [(*naming town, township or precinct*) of] (*name of county*) county, state of (*name of state*).

State of (*name of state*), [plaintiff,] }
against } Complaint for (*name of offense*).
John Doe, [defendant.] }

State of (*name of state*), }
County of (*name of county*). } ss.

Richard Roe, being duly sworn on oath says that at (*name of place*), in said (*name of county*) county, on the *second* day of *March*, 1898,[1]

Idaho.— Rev. Stat. (1897), § 8280; see *supra*, Form No. 6672.

Illinois. — Starr & C. Anno. Stat. (1896), p. 1384, par. 564; see *supra*, Form No. 6673.

Indiana. — Horner's Stat. (1896), § 1625; see *supra*, Form No. 6674.

Iowa.—Code (1897), § 5575 *et seq.*; see *supra*, Form No. 6675.

Kansas. — 2 Gen. Stat. (1897), p. 507, § 3; see *supra*, Form No. 6676.

Kentucky. — Bullitt's Crim. Code, § 330, providing that no written complaint shall be required for prosecutions in justices' courts.

Maine. — Rev. Stat. (1883), c. 132; see *supra*, Form No. 6679.

Maryland. — Laws (1894), c. 338; see *supra*, Form No. 6680.

Massachusetts. — Pub. Stat. (1882), c. 155, § 43; see *supra*, Form No. 6681.

Michigan. — How. Anno. Stat. (1882), § 7093; see *supra*, Form No. 6682.

Minnesota. — Stat. (1894), §§ 5095, 5123, 1074, 1357, 1391; see *supra*, Form No. 6683.

Missouri. — Rev. Stat. (1889), § 4329; see *supra*, Form No. 6685.

Montana. — Pen. Code (1895), § 2680; see *supra*, Form No. 6686.

Nebraska.—Comp. Stat. (1897), § 7039; see *supra*, Form No. 6687.

Nevada. — Gen. Stat. (1885), § 4477; see *supra*, Form No. 6663.

New Hampshire. — Pub Stat. (1891), c. 248; see *supra*, Form No. 6688.

New Jersey. — Gen. Stat. (1895), p. 1119, § 1 *et seq.*; see *supra*, Form No. 6689.

New Mexico. — Comp. Laws (1884), § 2396; see *supra*, Form No. 6663.

New York.—Cook's Code Crim. Proc. (1891), § 145; see *supra*, Form No. 6690.

North Carolina. — Code (1883), § 892 *et seq.*, § 1133; see *supra*, Form No. 6691.

North Dakota. — Rev. Codes (1895), § 6738 *et seq.*; see *supra*, Form No. 6692.

Ohio. — Bates' Anno. Stat. (1897), § 7133 *et seq.*; see *supra*, Form No. 6693.

Oklahoma. — Stat. (1893), § 5540; see *supra*, Form No. 6694.

Oregon. — Hill's Anno. Laws (1892), § 2132 *et seq.*; see *supra*, Form No. 6695.

Pennsylvania. — See *supra*, Form No. 6696.

Rhode Island. — Gen. Laws (1896), c. 229; see *supra*, Form No. 6697.

South Carolina. — 2 Rev. Stat. (1893), p. 268, § 19; see *supra*, Form No. 6698.

South Dakota. — Dak. Comp. Laws (1887), § 6145 *et seq.*; Laws (1893), p. 46; see *supra*, Form No. 6699.

Tennessee. — See Form No. 6700, and notes thereto.

Texas. — Code Crim. Proc. (1895), art. 936 *et seq.*; see *supra*, Form No. 6701.

Utah.—Rev. Stat. (1898), § 5125; see *supra*, Form No. 6702.

Vermont. — Stat. (1894), § 1927; see *supra*, Form No. 6703.

Virginia. — Code (1887), § 4106; see *supra*, Form No. 6704.

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 6667; see *supra*, Form No. 6705.

West Virginia. — Code (1891), p. 488, § 223; see *supra*, Form No. 6704.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 4740 *et seq.*; see *supra*, Form No. 6706.

Wyoming. — Rev. Stat. (1887), § 3621; see *supra*, Form No. 6707.

Consult also annotations to Forms Nos. 6662 to 6708, *supra*.

For the formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

1. Time and Place. — A complaint in a justice or police court is sufficient which sets forth the offense charged, with such particulars of time, place, person and property as to enable the defendant to understand distinctly the character of the offense complained of, and to answer the complaint. *Ex p.* Mansfield, 106 Cal. 400.

Information and Belief. — A complaint before a justice of the peace charging

John Doe did commit the crime of (*name of offense charged*) as follows: the said *John Doe*, then and there being, did wilfully and unlawfully (*Here state the facts constituting the offense charged*), contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of (*name of state*).[1] Wherefore the said *Richard Roe* prays that the said *John Doe* may be arrested (or *apprehended*) and dealt with according to law (or *as iustice may require*).

Richard Roe.

Subscribed and sworn to before me this *fifth* day of *March*, A. D. 1898.

Abraham Kent, Justice of the Peace in and for [the town (or *township* or *precinct*) of (*name of town, township or precinct*), in] (*name of county*) county, state of (*name of state*).

Form No. 6710.[2]

The State of *Alabama*, }
Dale County. }

Personally appeared before me, *Abraham Kent*, a justice of the peace (or *a judge of the county court*) of said county, affiant one *Richard Roe*, who being duly sworn says on oath that he has probable cause for believing and does believe[3] that an offense, to wit, *an assault and battery* (*or other misdemeanor, designating it by name or by some other phrase which in common parlance designates it*),[4] has been committed in

defendant with a misdemeanor, sworn to by the county attorney "on information and belief," is not sufficient to sustain a conviction. So held in *Kansas* on petition for writ of habeas corpus. Matter of Lewis, 31 Kan. 71.

Scandalous Matter. — A complaint otherwise sufficient ought not to be dismissed merely because it contains scandalous matter. So held in a complaint for vagrancy, which charged the defendant with "being a first-class pimp." Butte *v.* Peasley, 18 Mont. 303.

Charging Part. — See *supra*, note 1, p. 932.

1. **Conclusion.** — While the rule is in force in *California* requiring the conclusion of an indictment or information to be against the form of the statute, yet this rule does not apply to complaints for misdemeanors in justice and police courts. *Ex p.* Mansfield, 106 Cal. 400.

Names of the witnesses need not be indorsed upon the complaint in a prosecution commenced before a justice of the peace. State *v.* Wood, 49 Kan. 711.

2. *Alabama.* — Crim. Code (1886), §§ 4204, 4236, prescribing the form of this affidavit. Consult also Form No. 6662, *supra*, and notes thereto.

Precedents. — See *Ex p.* Sam, 51 Ala. 35; Murphy *v.* State, 55 Ala. 254.

For the formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

A complaint on oath charging a person named with the commission of a specified offense is the initiatory step in criminal proceedings by which the jurisdiction of a justice of the peace is called into exercise. Drake *v.* State, 68 Ala. 510.

3. **"Has reason for believing** and does believe" is equivalent to the words "has probable cause for believing and does believe." Sale *v.* State, 68 Ala. 530.

4. **Describing offense** with same particularity as in an indictment is not necessary; it is sufficient to describe the offense by name or by some phrase which in common parlance describes it. Brazleton *v.* State, 66 Ala. 96; Louis *v.* State, 112 Ala. 52. The affidavit in the latter case was as follows: "Personally appeared before me, *A. A. Harris*, a justice of the peace in and for said

said county by one *John Doe* on the person (or *property*, as the case may be)[1] of one *Samuel Short*, against the peace and dignity of the state of *Alabama*.[2]

Richard Roe.

Subscribed and sworn to before me this *fifth* day of *March*, 1898.

Abraham Kent,
Justice of the Peace (or *judge of the County Court*).

Form No. 6711.

(Precedent in Ardery *v.* State, 56 Ind. 328.)[3]

[State of *Indiana*,
County of *Bartholomew*.][4]

Andrew J. Galbraith swears, that, on or about the *8th* day of *October*, 1875, at the county of *Bartholomew*, state of *Indiana*, one *Henry Ardery* did then and there, in a public place, make an indecent exposure of his person, by then and there making an uncovered exhibition of his privates, in the presence of divers persons then and there assembled,[5] contrary to the form of the statute in such case made and provided, as affiant is informed and verily believes.

Andrew J. Galbraith.

Subscribed and sworn to before
George W. Arnold, Justice of the Peace.

Form No. 6712.[6]

(Precedent in State *v.* Turnbull, 78 Me. 392.)

county, *Leroy Louis*, who being duly sworn, says on oath, that *Richard Louis*, within twelve months before making this affidavit, in said county, did commit assault and battery with a weapon, or assault, or affray, on the person of *Leroy Louis*, against the peace and dignity of the state of *Alabama*." And it was held that the addition of the words "or affray" did not invalidate the affidavit.

In Gandy *v.* State, 81 Ala. 69, the complaint was as follows: "Personally appeared *Rufus Graydon*, who being duly sworn deposes and says, that on or about the *20th* day of *September*, 1896, in said state and county, the offense of persuading my daughter (*Belle*) from my employment and at night, and also taking her to his home and secreting her to prevent me from securing and taking her back to my employ, and he has forbidden me from coming in his house and threatening to shoot me or any white man, was in the opinion of the complainant committed, and that *Lazarus Gandy* was guilty thereof." It was held that the complaint was wanting in that certainty of description which was necessary to constitute a formal accusation of crime.

Words of the Statute. — It is generally sufficient to follow the words of the statute, but this rule does not apply where the statute fails to prescribe with definiteness the constituents of the offense. Miles *v.* State, 94 Ala. 106.

Time need not be alleged in the affidavit. Bell *v.* State, 75 Ala. 25.

1. **Not confined to offenses** against the person or property, as the form indicates. Sale *v.* State, 68 Ala. 530.

2. **Need not conclude** with the words "against the peace and dignity of the state." Thomas *v.* State, 107 Ala. 61.

3. It was held in this case that the complaint sufficiently charged the offense of public indecency. Ardery *v.* State, 56 Ind. 328. See Horner's Ind. Stat. (1896), § 1625. Consult also Form No. 6674, *supra*, and notes thereto.

For the formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

4. The words in [ ] will not be found in the reported case, but have been added to make the form complete.

5. **Charging part** of complaint, see *supra*, note 1, p. 932.

6. *Maine.* — Rev. Stat. (1883), c. 132. Consult also Form No. 6679, *supra*, and notes thereto.

State of *Maine*, *Lincoln*, ss.

To *James J. York, Jr.*, one of the trial justices within and for the county of *Lincoln*:

William Vannah of *Nobleboro* in the county of *Lincoln*, on the *fifteenth* day of *May* in the year of our Lord one thousand eight hundred and *eighty-four*, in behalf of said State, on oath complains that *William Turnbull* and *Edward Harrington*, both of *Edgecomb* in the county of *Lincoln*, on the *first* day of *May*, A. D. 1884, and on divers other days and times between said *first* day of *May* and the day of making this complaint, did keep and maintain, for the purpose of taking alewives and other fish, a certain fish weir, in the waters of the *Damariscotta* river aforesaid in said county of *Lincoln*, [at a place (*naming or describing it*) *East of the railroad bridge near Damariscotta Mills*, which waters are not by section thirty-one of chapter forty-six of the Maine Revised Statutes, exempt from the provisions of section forty-three of chapter forty-six of the Maine Revised Statutes relating to migratory fishes and the supervision of fishways by the commissioners,][1] and that said *William Turnbull* and *Edward Harrington* were bound and required by law to take out and carry on shore the netting and other material which, while fishing, closes that part of said weir where the fish are usually taken, and let the same there remain during the weekly close time as prescribed and required by section forty-three of chapter forty of the Revised Statutes of *Maine* of the year 1883; to wit, during the time between sunrise on *Saturday* morning of the *tenth* day of *May*, A. D. 1884, and sunrise on the following *Monday* morning of the *twelfth* day of *May*, A. D. 1884, but the said *William Turnbull* and *Edward Harrington* did not take out and carry on shore the netting or other material which, while fishing, closes the part of said weir where the fish are

1. This was a complaint for fishing with weirs in a river during Sunday (close time) and was adjudged to be bad on demurrer for not alleging that the weirs were located in that part of the river not exempted from the provisions of the statute (Me. Rev. Stat., c. 40, §§ 43 and 31). State *v.* Turnbull, 78 Me. 392. This omission has been supplied by words in [ ].

For the formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

Charging part of complaint, see *supra*, note 1, p. 932.

In Pinkham *v.* Dorothy, 55 Me. 135, the complaint asked for the right to impress property to be used for taking care of persons inflicted, with sickness dangerous to the public health. It was held that under the law the impressment of a stage coach for the removal of such a person was not authorized by the Me. Rev. Stat., c. 14, as the impressing of property can only be exercised when expressly granted by statute. The complaint was as follows:

"To *Eusebeus Weston* and *James Bell*, Esq'rs, Justices of the Peace in and for the county of *Somerset*:

The undersigned, selectmen of *Skowhegan*, represent that *Mehitable Nicholas*, *Sarah J. Hayden*, *Elbridge G.* and *William H. Hayden*, *Mary J.* and *Frederick York*, *Martha Colway* and her two children, names unknown, *Elizabeth* and *Sally Belougee* and three small boys of *Louis Belougee*, names unknown, all of said *Skowhegan*, in said *Skowhegan*, are infected with contagious sickness, and they therefore request you to issue to a proper officer a warrant requiring him to remove said infected persons, and to impress and take up convenient houses, lodgings, nurses and attendants, and other necessaries for the accommodation, safety and relief of said persons.

Dated at *Skowhegan* this *31st* day of *March*, A. D. 1864.

James B. Dascomb, } *Selectmen of*
Daniel Snow, } *Skowhegan.*"

usually taken, and let the same there remain during said close time as required by said statute, to wit: during the time between sunrise on *Saturday* morning of the *tenth* day of *May* aforesaid and sunrise on the following *Monday* morning of the *twelfth* day of *May* aforesaid, but did, then and there during said close time keep the part of said weir where the fish are usually taken as aforesaid closed, against the peace of said State and contrary to the form of the statute in such case made and provided. Wherefore the said *William Vannah* prays that the said *William Turnbull* and *Edward Harrington* may be apprehended and held to answer to this complaint and further dealt with relative to the same as the law directs. Dated at *Nobleboro* in the county of *Lincoln* this *fifteenth* day of *May*, A. D. 1884.

William Vannah.

State of *Maine*, *Lincoln*, ss.

On the *fifteenth* day of *May*, A. D. 1884, the above named *William Vannah* personally appeared and made oath to the truth of the foregoing complaint.

Before me, *Thomas J. York*, trial justice.

Form No. 6713.[1]

(Precedent in LaRoe *v.* Roeser, 8 Mich. 537.)[2]

State of *Michigan*, county of *Saginaw*, ss: *Garrett Freeland*,[3] of *Tittabawassee*, in said county, on his oath complains, that on the *18th* day of *June*, 1859, *James LaRoe*, *Jefferson Chapman*, and *Joe Hackney*, without his, the said *Garrett Freeland's* consent, or any other authority, forcibly entered his house on the premises occupied by him, on the southwest corner of section *sixteen* in said township, and on his command to leave and quit the said house, refused to do so, and did not go, and the said *James LaRoe* drew a pistol from his pocket, and pointed it towards this complainant, threatening to shoot him, and said complainant; and the said *Jefferson Chapman* raised a club against the said complainant, saying that he would fix him, and knock his old brains out; against the peace of the said people, and against the form of the statute in such case made and provided; for which assault the said *Garrett Freeland* prays that the said *James LaRoe*, *Jefferson Chapman*, and *Joe Hackney*, may be apprehended to

1. **Must be reduced to writing,** and must show in substance the commission of such an offense as the justice can hear and try. It must allege the time and place of the offense, so that it may appear whether or not the prosecution is barred by the statute of limitations, and whether the act was committed within the legal jurisdiction of the justice. How. Anno. Stat. Mich. (1882), § 7093; People *v.* Gregory, 30 Mich. 371.

For the formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

2. This complaint was held to be sufficient. Consult also *supra*, Form No. 6682, and notes thereto.

Charging part of complaint, see *supra*, note 1, p. 932.

For example of complaint in this state, for assault, see Form No. 2414; for bastardy, see Forms Nos. 3941, 3953; for carrying weapons, see Form No. 5157.

3. **May be made by a constable or other person,** and must be signed by the complainant. How. Anno. Stat. Mich. (1882), § 7093.

answer to his complaint, and further dealt with relative to the same as law and justice may require.

Garrett Freeland.

Sworn to and subscribed before me, this *14th* day of *June*, 1859.
Otto Roeser, Justice of the Peace.

Form No. 6714.[1]

State of *Mississippi*, }
Winston County. }

Personally appeared before me *Abraham Kent*, a justice of the peace in and for said county, and in Justice's District No. *four*,[2] *Richard Roe*, who being duly sworn, deposes and says, that *John Doe*, on or about the *tenth* day of *March*, 1896, at and in said county and justice's district aforesaid, did (*Here set forth the facts constituting the offense*),[3] against the peace and dignity of the state of *Mississippi*.

Richard Roe.

Sworn to and subscribed before me this *eleventh* day of *March*, 1896.
Abraham Kent, J. P.

Form No. 6715.[4]

State of *North Dakota*, } ss. In Justice Court, before *Abraham Kent*,
County of *Burleigh*. } Justice of the Peace.

The State of North Dakota }
against } Criminal Complaint.
John Doe. }

Richard Roe, being first duly sworn, says that on the *second* day of *March*, A. D. 1898, at said county, the above named defendant did (*Here state the offense*),[5] against the peace and dignity of the State of *North Dakota*.

Wherefore complainant prays that defendant *John Doe* may be arrested and dealt with according to law.

Richard Roe.

Subscribed and sworn to before me this *fifth* day of *March*, 1898.
Abraham Kent, Justice of the Peace.[6]

1. *Mississippi*. — Affidavit must be filed to procure issuance of warrant. Anno. Code (1892), § 2421; Bigham *v.* State, 59 Miss. 529.

For the formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

2. **Justices' district** in which the offense is committed should be stated. Miss. Anno. Code (1892), §§ 2420, 2421.

3. **Charging part** of complaint, see *supra*, note 1, p. 932.

4. *North Dakota*.— Rev. Codes (1895), §§ 6738–6742. Section 6742 prescribes the form of the complaint substantially as set out in the text. Consult also *supra*, Form No. 6692, and notes thereto.

For the formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

5. **Must state facts** constituting the offense in ordinary and concise language, with sufficient certainty and with such particulars of time, place, person and property as will enable a person of common understanding to know what is intended and to authorize the court to pronounce judgment. N. Dak. Rev. Codes (1895), § 6740. See also *supra*, note 1, p. 932.

6. **Must be sworn to** before the justice. N. Dak. Codes (1895), § 6741.

Form No. 6716.[1]

In the Justice's Court for the Precinct of *Blank*, County of *Linn*, and State of *Oregon*.

The State of Oregon, plaintiff,
against
John Doe, defendant. } Complaint.

Richard Roe is accused by *John Doe* by this complaint, of the crime of (*name of offense*), committed as follows:

The said *John Doe*, on the *second* day of *March*, A. D. 1898, in the county of *Linn* and state of *Oregon* (*Here state facts constituting the offense charged*),[2] contrary to the statute in such cases made and provided, and against the peace and dignity of the state of *Oregon*.

Dated at *Albany*, in the county of *Linn* and state of *Oregon*, the *fifth* day of *March*, A. D. 1898.

Richard Roe.

State of *Oregon*,
County of *Linn*, } ss.

I, *Richard Roe*, being duly sworn, say that I am the person commencing the within-entitled action, and that the complaint therein is true, as I verily believe.

Richard Roe.

Subscribed and sworn to before me the *fifth* day of *March*, A. D. 1898.

Abraham Kent, Justice of the Peace.

Form No. 6717.[3]

In Justice's Court,
Precinct No. *Three*,
Freestone County. } No. *33*.

In the name and by the authority of the State of *Texas*:

Before me, the undersigned authority, on this day personally appeared *Richard Roe*, who, after being by me duly sworn, on oath deposes and says that heretofore, to wit, on or about the *second* day of *March*, 1898,[4] at *Fairfield*, in the county of *Freestone*,[5] and state of

1. *Oregon*.— Hill's Anno. Laws (1892), § 2132, providing that in a justice's court a criminal action is commenced by the filing of the complaint therein, verified by the oath of the person commencing the action, who is thereafter known as the private prosecutor. Consult also Form No. 6695, *supra*, and notes thereto.

Complaint must be deemed an indictment within the meaning of the provisions of chapter VIII of the Code of Criminal Procedure, prescribing what is sufficient to be stated in such plea and the form of stating it. Hill's Anno. Laws Oregon (1892). § 2133.

For the formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

2. **Charging part** of complaint, see *supra*, note 1, p. 932.

3. *Texas*. — Code Crim. Proc. (1895), art. 936 *et seq*. Consult also Form No. 6701, *supra*, and notes thereto.

For the formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

Must be Reduced to Writing. — Tex. Code Crim. Proc. (1895), art. 937.

4. **Time.** — That offense is not barred by limitation must appear from the date of the offense stated in the complaint. Tex. Code Crim. Proc. (1895), art. 938.

5. **County.** — That offense was committed in the county must appear. Tex. Code Crim. Proc. (1895), art. 938.

Texas, one *John Doe*,[1] of said county and state, and then and there unlawfully (*State offense charged and the facts constituting it*),[2] contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state.

Richard Roe.

Sworn to and subscribed before me by said *Richard Roe* this *fifth* day of *March*, 1898.

Abraham Kent, Justice of the Peace,
Precinct No. *Three*, *Freestone* county, *Texas.*

Form No. 6718.[3]

(Sanb. & B. Anno. Stat. Wis. (1889), § 4741.)

State of *Wisconsin*, }
County of *Pierce.* } ss.

The State of *Wisconsin*, }
against }
John Doe. }

Richard Roe being duly sworn, says that on the *second* day of *March*, in the year 1898, at said county, (*name of accused or alias*) did (*state the crime*),[4] against the peace and dignity of the state of *Wisconsin.*

Richard Roe.[5]

Subscribed and sworn to before me, this *fifth* day of *March*, 1898.

Abraham Kent, Justice of the Peace.

Form No. 6719.[6]

(Wyoming Rev. Stat. (1887), § 3623.)

Territory of *Wyoming*, }
County of *Johnson.*[7] } ss.

Territory of *Wyoming* }
against }
John Doe, defendant.[8] }

Before Justice *Abraham Kent.*[9]

1. **Name of accused,** if known, must be stated; if unknown, he must be described if practicable. Tex. Code Crim. Proc. (1895), art. 938.

2. **Offense charged** must be stated in the complaint in intelligible words. Tex. Code Crim. Proc. (1895), art. 938.

Charging part of complaint, see *supra*, note 1, p. 932.

3. *Wisconsin.* — Sanb. & B. Anno. Stat. (1889), § 4740 *et seq.* Consult also Form No. 6706, *supra*, and notes thereto.

For the formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

Must be Reduced to Writing. — Sanb. & B. Anno. Stat. Wis. (1889), § 4740.

Made on information and belief may be sufficient. State *v.* Davie, 62 Wis. 305.

4. **Charging part** of complaint, see *supra*, note 1, p. 932.

5. **Must be signed and sworn to** by the complainant. Sanb. & B. Anno. Stat. Wis. (1889), § 4740.

6. *Wyoming.* — Rev. Stat. (1887), § 3623. Consult also Form No. 6707, *supra*, and notes thereto.

For the formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

7. **Must contain name of county** where the information is filed. Wyoming Rev. Stat. (1887), § 3622.

8. **Must contain name of the defendant** if known, and if not, then such name as may be given by the complainant. Wyoming Rev. Stat. (1887), § 3622.

9. **Must contain name of justice** before whom it is filed. Wyoming Rev. Stat. (1887), § 3622.

The defendant is accused of the crime or offense. For that the defendant on the *tenth* day of *March*, A. D. 1896,[1] at the town of *Buffalo* in the county aforesaid (*Here state the act or information constituting the offense as in the indictment*).[2]

Richard Roe.[3]

Subscribed and sworn[5] to before me this the *fifteenth* day of *March*, 1896.

Abraham Kent, Justice of the Peace.

2. In Other Inferior Courts.[4]

a. Chairman of Board of Trustees.

1. Time and Place. — The information must contain a statement of the facts constituting the offense in ordinary and concise language, and the time and place of the commission of the offense, as near as may be. Wyoming Rev. Stat. (1887), § 3622.

2. Charging part of complaint, see *supra*, note 1, p. 932.

3. Must be subscribed and sworn to. Wyoming Rev. Stat. (1887), § 3621.

4. Offenses Triable in Other Inferior Courts. — The complaint, affidavit or information in mayors' courts, police courts, and other inferior courts having jurisdiction similar to that exercised by justices of the peace in the trial of misdemeanors and petty offenses, is similar in all material respects to criminal complaints in justices' courts, except that the complaint must charge an offense within the jurisdiction of the particular court. Examples of such complaints are given in the text in Forms Nos. 6718 to 6733.

Alabama. — Crim. Code (1886), § 4204.

Arizona. — Pen. Code (1887), § 2208.

Arkansas. — Sand. & H. Dig. (1894), § 5291 *et seq.*

California. — Pen. Code (1897), § 1426.

Colorado. — Mills' Anno. Stat. (1891), § 3525.

Connecticut. — Gen. Stat. (1888), § 709.

District of Columbia. — Comp. Stat. (1894), p. 478, § 10.

Florida. — Rev. Stat. (1892), §§ 2847, 2871.

Georgia. — 3 Code (1895), § 735 *et seq.*

Idaho. — Laws (1891), p. 163, § 11.

Illinois. — Starr & C. Anno. Stat. (1896), p. 720, par. 69; p. 792, par. 199.

Indiana. — Horner's Anno. Stat. (1896), §§ 3062, 3206.

Iowa. — Code (1897), §§ 688, 691, 692, 5182.

Kansas. — 1 Gen. Stat. (1897), p. 364, § 133 *et seq.*, p. 424, § 97 *et seq.*, p. 465, § 91 *et seq.*

Kentucky. — Bullitt's Crim. Code (1895), § 13, subd. 4, §§ 312, 318.

Maine. — Stat. (1882), c. 132. See also Form No. 2409 for a precedent of a complaint in the municipal court.

Massachusetts. — Pub. Stat. (1882), c. 154.

Michigan. — How. Anno. Stat. (1882), §§ 2497, 2498, 2839, (Supp. 1890) 6591*a*2.

Minnesota. — Stat. (1894), §§ 1074, 1357, 1391.

Mississippi. — Anno. Code (1892), § 3001.

Missouri. — Rev. Stat. (1889), §§ 1063, 1289, 1552, 1555 *et seq.*, 1634, 1676, 1685.

Montana. — Pen. Code (1895), §§ 4911, 4912.

Nebraska. — Comp. Stat. (1897), §§ 1268, 6984.

Nevada. — Gen. Stat. (1885), § 2452 *et seq.*

New Hampshire. — Pub. Stat. (1891), c. 248, § 7 *et seq.*

New Jersey. — Gen. Stat. (1895), p. 1119, § 1, p. 1163, § 217, p. 2481, § 1, p. 2483, § 4, p. 2487, § 32.

New Mexico. — Comp. L. (1884), § 1628.

New York. — Cook's Code Crim. Proc., §§ 74, 699, 741.

North Carolina. — Code (1883), § 3818.

North Dakota. — Rev. Codes (1895), §§ 2193, 2194, 2203.

Ohio. — Bates' Anno. Stat. (1897), §§ 1787, 1831, 7134, 7135.

Oklahoma. — Stat. (1893), §§ 606, 607, 614, 692, 707, 1562; Laws (1895), p. 203, § 36.

Oregon. — Const., art. VII, § 1.

Pennsylvania. — Pepp. & L. Dig. (1894), p. 3497, § 1 *et seq.*

Rhode Island. — Gen. Stat. (1896), c. 229.

Tennessee. — Code (1896), § 6926.

Texas. — Code Crim. Proc. (1895), arts. 98, 930.

Utah. — Rev. Stat. (1898), § 239.

Form No. 6720.[1]

(Mo. Rev. Stat. (1889), § 1685.)

State of *Missouri*,
County of *Barton*,
Town of *Liberal*. } ss. Before *George H. Walser*, Chairman of the Board of Trustees.

The *Town of Liberal*, plaintiff,
against
John Doe, defendant.

John Doe To the *Town of Liberal*, Dr.

To violation of town ordinance No. *32*, in relation to (*Here state to what the ordinance violated relates, whether it be in relation to disturbing the peace, or any other violation, as the case may be*), *one hundred* dollars. In, this, to wit, that the said *John Doe*, on the *second* day of *March*, 1*898*, at the town of *Liberal* and within the limits thereof, did then and there unlawfully (*Here state in brief and concise language the facts constituting the offense*),[2] contrary to the said ordinance in such cases made and provided, and against the peace and dignity of said town of *Liberal*.

Thomas W. Martin,[3]
Town Attorney.

Thomas W. Martin makes oath and says, that the facts and allegations contained in the foregoing complaint are true according to the best knowledge, information and belief of the affiant.

Thomas W. Martin.

Subscribed and sworn to before me this *fifth* day of *March*, 1*898*.

George H. Walser,
Chairman of the Board of Trustees.

b. City Court.

Form No. 6721.

(Precedent in Beaumont *v.* Dallas, 34 Tex. Crim. Rep. 68.)[4]

Virginia. — Code (1887), § 4106.

Washington. — 1 Hill's Anno. Stat. (1891), §§ 533, 612, 657, 691; Ballinger's Anno. Codes & Stat. (1897), §§ 752, 909 *et seq.*, 962, 1036.

West Virginia. — Code (1891), p. 430, § 39.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), §§ 852*d*, 886, p. 564, § 69, prescribing the form of a complaint in a police court.

1. *Missouri.* — Rev. Stat. (1889), § 1685, providing that all prosecutions for violating any town ordinance shall be entitled "The Town of—— against ——," naming the town and the person, or persons, charged, and the chairman of the board of trustees shall state in his docket the name of the plaintiff, the nature and character of the offense, the date of the trial, the names of all witnesses examined, etc. The complaint, when made by the marshal, assistant marshal, or regular policeman, need not be in writing, if the defendant be present in court and in custody, but in every other case the complaint shall be in writing, and sworn to before the warrant be issued for the arrest of the defendant.

For formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

Justices of the peace have like jurisdiction upon complaint by the town constable, or marshal, to issue warrants, provided every such application be sustained by the affidavit of the person making the same. Mo. Rev. Stat. (1889), § 1676.

2. **Charging Part.** — See *supra*, note 1, p. 932.

3. **Who may Make the Complaint.** — The town attorney, the town marshal, or any other person competent to testify in the cause, may make the complaint. Mo. Rev. Stat. (1889), § 1686.

4. This was a complaint in the city

The City of Dallas v. *John Doe.* } No. *417.*

[State of *Texas*, *Tarrant* County, *City* of *Dallas.*][1] }

Personally appeared before me, the undersigned authority, *C. F. Durham*, who after being duly sworn, deposes and says, that [*John Doe*,][1] in the *city* of *Dallas*, and the state of *Texas*, on the *twenty-first* day of *March*, A. D. 1894, and before the filing of this complaint, was the owner, tenant, and lessee of a house, building, and edifice then and there situated; and he, the said [*John Doe*,][1] did then and there unlawfully keep, was concerned in keeping, and knowingly permitted to be kept the said house, building and edifice for prostitution, where prostitutes were then and there permitted by the said [*John Doe*][1] to resort and reside for the purpose of plying their vocation, contrary to the ordinance in such cases made and provided, against the peace and dignity of the state.

C. F. Durham.

Sworn to and subscribed before me this *twenty-fourth* day of *March*, A. D. 1894.

M. C. Kahn,
Clerk of the *City* Court, *City* of *Dallas*, *Texas*.

c. County Court.[2]

court of Dallas charging defendant with keeping a disorderly house. See also Form No. 6717, *supra*, and notes thereto. Consult also list of statutes cited *supra*, note 1, p. 932.

For formal parts of affidavits, generally, see the title AFFIDAVITS, vol. 1, p. 548.

1. The words in [ ] do not appear in the reported case.

Description of Defendant. — In the complaint appearing in the reported case, instead of "John Doe," the complaint charged that "Mrs. Beaumont, whose given name is to affiant unknown, a better description of whom affiant cannot give." It was held that under the *Texas* Code of Criminal Procedure, art. 236, subd. 1, requiring that the complaint "must state the name of the accused, if known, and if not known, must give some reasonably definite description of him," the complaint was insufficient.

Charging part, *generally*, see *supra*, note 1, p. 932.

Charging Two Misdemeanors.— An affidavit on which an accusation is founded in the city court may charge two misdemeanors of the same class as committed by the same person, and the accusation founded thereon may consist of two counts, each charging one of the offenses set forth in the affidavit. Hathcock *v.* State, 88 Ga. 91.

Verification. — Where the affidavit sets out one of two misdemeanors, and adds the facts concerning the other, introducing these facts with the phrase "The deponent further charges and accuses the said William Hathcock with misdemeanor in this," the verification of the affidavit is not confined to these terms of accusation, but extends also to the facts set out in the subjoined statement as to the mode of committing the misdemeanor. Hathcock *v.* State, 88 Ga. 91.

2. In the county court in *Alabama* the affidavit follows the same form substantially as in the justice's court. Ala. Crim. Code (1886), § 4204. See Form No. 6710, *supra*.

In Henderson *v.* State, 109 Ala. 40, appellant was convicted under a complaint made before the judge of the county court, the complaint being as follows: "Before me, *W. R. DeLoach*, as judge of the county court in and for said county, personally appeared *Woodson S. Gulley*, who being by me duly sworn, says on oath, that he has prob-

Form No. 6722.[1]

In Court of *County Judge*,[2] *Marion* County.

State of *Florida*,
County of *Marion*.

Before me, *Richard Johnson*, county judge in and for said county, personally came *Richard Roe*, who being duly sworn, says that on the *tenth* day of *March*, A. D. 1896, in the county aforesaid, one *John Doe* did (*Here the nature of the offense committed must be stated and the circumstances attending its commission*).[3]

Richard Roe.

Sworn to and subscribed before me this *eleventh* day of *March*, 1896.
Richard Johnson, County Judge for *Marion* County.

Form No. 6723.[4]

Georgia, *Bibb* County.

Personally came *Richard Roe*, who on oath saith to the best of his knowledge and belief *John Doe* did on the *tenth* day of *March* in the year one thousand eight hundred and *ninety-six*, in the county aforesaid, commit the offense of (*Here must be set forth the offense and a statement of the facts constituting it*),[5] and this deponent makes this affidavit that a warrant may issue for his arrest.

Richard Roe.

Sworn to and subscribed before me this *eleventh* day of *March*, 1896.
Richard Johnson, County Judge of *Bibb* County.[6]

able cause for believing and does believe that before the making of this affidavit *Frank Henderson*, with the purpose to hinder, delay, and defraud affiant, who had a lawful and valid claim thereto under a written instrument, lien created by law, for rent or advances, or other lawful and valid claim, verbal or written, did sell, or remove personal property, consisting of fourteen bushels of corn, of the value of *ten* dollars, the said *Frank Henderson* having, at the time a knowledge of the existence of such claim.

W. S. Gulley."

Information and belief may support a complaint in the county court in *Texas*. Dean *v.* State, 88 Tex. 290.

1. *Florida*. — Rev. Stat. (1892), §§ 2847, 2871. Consult also list of statutes cited *supra*, note ——, p. ——. See also Form No. 6670, *supra*, and notes thereto.

For the formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

2. **Jurisdiction.** — See Rev. Stat. Fla. (1892), §§ 2833, 2847.

3. **Charging Part.** — See *supra*, note 1, p. 932.

4. *Georgia*. — 3 Ga. Code (1895), § 735 *et seq.*; Dickson *v.* State, 62 Ga. 586. Consult also list of statutes cited *supra*, note 1, p. 932. See also Form No. 6709, *supra*, and notes thereto.

The affidavit before a county court shall be in the form prescribed by 3 Ga. Code (1895), § 884. See also *supra*, Form No. 6671, and notes thereto.

For the formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

5. **Need not charge the offense absolutely** and without qualification, but only to the best of the affiant's knowledge and belief. Thomas *v.* State, 91 Ga. 207.

Charging Part. — See *supra*, note 1, p. 932.

6. **Neither attested by an officer** authorized to administer oaths nor purporting to be sworn to in open court is void as the basis of a criminal proceeding. Scroggins *v.* State, 55 Ga. 380.

Form No. 6724.[1]

In the County Court of *Colfax* County, *Nebraska*.

The state of *Nebraska*
against
John Doe.
} Complaint for (*name of offense*).

State of *Nebraska*,
County of *Colfax*.
} ss.

The complaint and information of *Richard Roe*, of the county aforesaid, made in the name of the state of *Nebraska*, before me, the county judge within and for said county, this *fifth* day of *March*, A. D. 1898, who being duly sworn, on his oath, says that one *John Doe*, on the *second* day of *March*, A. D. 1898, in the county aforesaid, then and there being, did then and there (*Here state offense charged and the facts constituting the same*),[2] contrary to the form of statutes in such case made and provided, and against the peace and dignity of the people of the state of *Nebraska*.

Richard Roe.

Subscribed in my presence, and sworn to before me, this *fifth* day of *March*, 1898.

Carroll Johnson, County Judge.

d. Mayor's Court.

Form No. 6725.[3]

The State of *Texas*,
Freestone County,
Town of *Fairfield*.
}

In the name and by the authority of the state of *Texas*:

Before me, the undersigned authority, on this day personally appeared *Richard Roe*, who, after being by me duly sworn, on oath deposes and says that heretofore, to wit, on or about the *second* day of *March*, 1898, and prior to the filing of this complaint, in the *town* of *Fairfield*, county of *Freestone* and state of *Texas*, one *John Doe* did then and there unlawfully (*Here state offense charged and the facts constituting the same*),[4] contrary to the ordinances of said *town* in

1. *Nebraska*. — Comp. Stat. (1897), § 6984. Consult also list of statutes cited *supra*, note 4, p. 973, and Form No. 6687, *supra*, and notes thereto.

For the formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

2. **Charging Part.** — See *supra*, note 1, p. 932.

3. *Texas*. — Code Crim. Proc. (1895), § 929 *et seq*. See also Form No. 6717, *supra*, and notes thereto. Consult also list of statutes cited *supra*, note 4, p 973.

For the formal parts of affidavits, genally, consult the title AFFIDAVITS, vol. 1, p. 548.

Title. — Where an information in *Iowa* before a mayor for a violation of an ordinance was headed: "State of Iowa, City of Washington, *v.* Charles Smouse," it was held that the words "State of Iowa" were surplusage and did not make the prosecution one under the state law. State *v.* Smouse, 49 Iowa 634.

4. **Charging Part.** — See *supra*, note 1, p. 932.

Indiana. — In Schwab *v.* Madison, 49 Ind. 529, the complaint before the mayor was as follows:

"The State of *Indiana*,
Jefferson County, ss.
The City of *Madison*.
}

Before me, *John Marsh*, mayor of the city of *Madison* and ex officio a justice

such cases made and provided, and against the peace and dignity of the state.

Richard Roe.

Sworn to and subscribed before me by said *Richard Roe*, this *fifth* day of *March*, A. D. *1898*.

William M. White,
Mayor of the *Town of Fairfield, Freestone* County, *Texas.*

of the peace in and for said city and county, personally came *John W. Grayson*, who, being duly sworn, deposeth and saith that, on the *18th* day of *December*, *1873*, at said city and county, *William Schwab*, as affiant very believes, did commit an act of public indecency in *Spring Dale Cemetery Graveyard.*

John W. Grayson.

Subscribed and sworn to this *18th* day of *December*, *1873*.

John Marsh,
Mayor and ex officio
Justice of the Peace."

It was held in this case that the complaint was so defective that the prosecution might have been dismissed on that account. No copy of the ordinance, or section of the ordinance violated, was set out in the affidavit, as is required; nor did the affidavit conform to the law by stating the number of the section charged to have been violated, as required by law. Schwab *v.* Madison, 49 Ind. 331 *citing*, Green *v.* Indianapolis, 22 Ind. 192, 25 Ind. 490; Whitson *v.* Franklin, 34 Ind. 392.

Michigan. — In Napman *v.* People, 19 Mich. 352, defendant was charged before the recorder's court of the city of Detroit on the complaint of Patrick Keenan, "that at the city of *Detroit*, aforesaid, on the *seventeenth* day of *April*, A. D. one thousand eight hundred and *sixty-eight*, within the corporate limits of said city, one *John Napman*, a duly licensed omnibus agent, on the arrival of railroad cars in the city of *Detroit*, did then and there unlawfully and wilfully approach within twenty feet of the depot, when said cars had stopped running, within fifteen minutes thereafter, said *John Napman*, omnibus agent as aforesaid, not being requested by any person to remove any trunk or other baggage from said depot, to the evil example of all others in like case offending, and contrary to the ordinances of said city of *Detroit*, in such case made and provided." This complaint was held to be defective in not averring that the defendant was then acting in the capacity of porter or runner for a hotel. Napman *v.* People, 19 Mich. 352.

Missouri. — In Marshall *v.* Standard, 24 Mo. App. 194, the defendant was charged with the violation of an ordinance of the city of Marshall. The complaint was made by the city marshal, and was verbal, the defendant being at the time in court and under arrest. The charge entered of record by the mayor was as follows: "*June 20*, *1885*, *Joseph W. Bartlett*, city marshal, informs the mayor that at the city of *Marshall*, on the *twentieth* day of *June*, *1885*, one *Geo. W. Standard*, now in court and in custody, did then and there forcibly oppose a policeman, to wit, *Phillip Coiner*, deputy marshal of the city of *Marshall*, in making the lawful arrest of *Abe Allenberg*, and then and there did aid the said *Abe Allenberg*, the person arrested, to escape from said *Phillip Coiner*, policeman aforesaid; contrary to the form of the ordinances of said city, and against the peace and dignity of said city and the state of *Missouri*." It was held, the allegation "contrary to the form of the ordinances of said city" was too indefinite, as from such statement it would not be known under what particular ordinance defendant was charged.

The complaint in the recorder's court in *Missouri* is similar to that made before the chairman of the board of trustees in villages. Mo. Rev. Stat. (1889), § 1555. See also *supra*, Form No. 6720.

North Carolina. — In State *v.* Eason, 114 N. Car. 788, the affidavit before the mayor, omitting the formal parts as amended, was as follows: "On the *21st* day of *September*, *1893*, before me, *E. M. Short*, mayor of *Washington, N. C.*, personally appeared *J. R. Ghrist*, who being duly sworn, complains on oath and says, that *Charles Eason*, on the *20th* of *September*, *1893*, did unlawfully and wilfully throw dead fish in the *Pamlico* river, in said town, in violation of the town ordinance No. *11*, of the town of *Washington*, in force in said town, con-

e. Municipal Court.

Form No. 6726.[1]

Commonwealth of *Massachusetts*.

To the Justices of the *Municipal Court* of the *Charlestown* District, holden in said district in the city of *Boston*, for the transaction of criminal business within and for the county of *Suffolk*.

Richard Roe, of *Boston*, in the county of *Suffolk*, *deputy state constable*, on behalf of the Commonwealth of *Massachusetts*, on oath complains that one *John Doe*, of *Boston*, in the county of *Suffolk*, did on the *tenth* day of *March*, in the year of our Lord one thousand eight hundred aud *ninety-six*, at the city of *Boston*, within the judicial district of said court in the county of *Suffolk*, with force and arms, (*Here state the offense committed and the facts constituting the offense charged*),[2] against the peace of said commonwealth and the form of the statute made and provided.

Richard Roe.

Suffolk, ss. Received and sworn to the *eleventh* day of *March*, in the year of our Lord one thousand eight hundred and *ninety-six*, before said court.

John Hancock, Clerk.

f. Police Court.[3]

trary to the statute in such case made and provided, and against the peace and dignity of the state."

Ohio. — A form of an affidavit in criminal proceedings before a mayor is set out in Bates' Anno. Stat. (1897), § 7135.

Oregon. — In Nodine *v.* Union, 13 Oregon 587, it was held that in a prosecution for the violation of a city ordinance prior to the act of February 25, 1885, in the recorder's court, it was not sufficient to merely refer to the ordinance by number, but the ordinance should be set out or recited.

Vermont. — In State *v.* Bacon, 40 Vt. 456, the complaint before the recorder of the city of Burlington is set out in full. The complaint was, however, held to be insufficient for want of substance.

1. *Massachusetts.* — Pub. Stat. (1882), c. 154. See also *supra*, Form No. 6681, and notes thereto. Consult also list of statutes cited *supra*, note 4, p. 973.

For the formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

2. **Charging Part.** — See *supra*, note 1, p. 932.

Minnesota. — In State *v.* Segel, 60 Minn. 507 the defendant was convicted in the municipal court of Minneapolis of dealing in second-hand goods without a license, in violation of a city ordinance, upon a complaint that he "unlawfully and wrongfully engaged in the business and occupation of dealer in second-hand goods, to wit, second-hand furniture, carpets, stoves, and divers other articles and things," at a certain place in the city without having first obtained a license so to do. The conviction was sustained on appeal.

3. **A police informing officer's complaint** in *Vermont* may be as follows:

"State of *Vermont*, } To *Abraham Kent*, Esquire, *Windham* County, ss. } one of the justices of the peace within and for the county of *Windham*, comes *Clyde Culp*, police informing officer within and for *Bellows Falls Village Corporation*, in the town of *Rockingham* in said county, in his own proper person, and on his oath of office complaint makes that, on the *second* day of *March*, A. D. 1898, within the limits of said *Bellows Falls Village Corporation*, *John Doe*, late of the said *Bellows Falls Village Corporation* (*Here state the offense charged and the facts constituting the same*), contrary to the form, force and effect of the statute in such case made and pro-

Form No. 6727.[1]

State of *Colorado*,
County of *Park*,
Town of *Fair Play*. } ss. In Police Magistrate's Court.

The People of the State of Colorado
against
John Doe, defendant.

Richard Roe, being duly sworn, on his oath says that section *three* of ordinance No. *ten* of the town of *Fair Play*, being an ordinance entitled "An Ordinance (*giving title of ordinance*) passed and approved the *second* day of *January*, A. D. 1898, has been violated, and that this affiant has good reason to believe that *John Doe* is guilty thereof, in this: That the said *John Doe*, on or about the *first* day of *March*, A. D. 1898, at the town of *Fair Play*, in the county of *Park*, and state of *Colorado* (*Here state the facts constituting the violation of the ordinance*),[2] against the peace and dignity of the people of the state of *Colorado*.[3]

Richard Roe.

Subscribed and sworn to before me this *fifth* day of *March*, A. D. 1898.
Peter Morrison, Police Magistrate. (SEAL)

Form No. 6728.[4]

State of *Illinois*,
Green County,
City of *Carrollton*. } ss.

Richard Roe, of said *city* of *Carrollton*, being duly sworn, on oath

vided, and against the peace and dignity of the state.

Clyde Culp,
Police Informing Officer.

The witnesses in support of this complaint are:

Banks Belk.
T. M. Hughes.
John Smith.

Clyde Culp,
Police Informing Officer.

The within complaint was exhibited to me this *fifth* day of *March*, A. D. 1898, and process then issued.

Abraham Kent,
Justice of the Peace."

1. *Colorado.*—Mills' Anno. Stat. (1891), §§ 3500 *et seq.*, 3525. See also *supra*, Form No. 6666, and notes thereto. Consult also list of statutes cited *supra*, note 4, p. 973.

For the formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

2. **Charging Part.**—See *supra*, note 1, p. 932.

New Hampshire.—In State *v.* Goulding, 44 N. H. 284, a complaint, under an ordinance which provided that "no person shall be or remain upon any sidewalk, etc., to the annoyance of any person," etc., pursuing the very language of the ordinance, its literal terms embracing cases not within its equity and spirit, need not necessarily be sufficient. So held where the complaint alleged that Goulding, at Portsmouth, on, etc., was and remained a long time upon the sidewalk on the northerly side of Market square, in said Portsmouth, to the annoyance and disturbance of all persons passing and repassing, contrary to the form of the ordinance in such case made and provided, contrary to the form of the statute, etc.

3. **Conclusion.**—The fact that the complaint in a justice or police court, for misdemeanor, does conclude contrary to the provisions of a county ordinance, does not tend to prejudice the substantial rights of the defendant, and the defendant may be punished under the penal code. *Ex p.* Mansfield, 106 Cal. 400.

4. *Illinois.*—Starr & C. Anno. Stat. (1896), p. 720, par. 69. See also *supra*,

complains and charges that one *John Doe* did on the *second* day of *March*, A. D. 1898, at the *city* of *Carrollton* aforesaid, violate a certain ordinance of said *city* concerning (*Here insert title, number and reference to ordinance, as well as the nature of the act or omission complained of*),[1] and that he, the said *Richard Roe*, has reasonable grounds to believe, and does believe, the said *John Doe*, charged as aforesaid, to be guilty thereof as hereinbefore set forth.

Richard Roe.

Subscribed and sworn to this *fifth* day of *March*, A. D. 1898, before me, *Peter Morrison*, Police Magistrate.

Form No. 6729.[2]

(Precedent in Matter of Dassler, 35 Kan. 678.)[3]

The State of *Kansas*,
City and County of *Leavenworth*. } Police Court. Sct.

The City of Leavenworth
v.
C. F. W. Dassler. }[4]

W. D. Shallcross, being duly sworn, deposes and says: That *C. F. W. Dassler* is now and has been ever since *January 1*, 1884, a male resident and citizen of said *city* of *Leavenworth*, and is now and was during all of said time between the ages of twenty-one and forty-five years, [and] a registered voter of said city, and that said *Dassler*

Form No. 6673, and notes thereto. Consult also list of statutes cited *supra*, note 4, p. 973.

For the formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

1. **Charging Part.** — See *supra*, note 1, p. 932.

2. *Kansas.* — 1 Gen. Stat. (1897), p. 364, § 133 *et seq.*, p. 424, § 97 *et seq.*, p. 465, § 91 *et seq.* See also *supra*, Form No. 6676, and notes thereto.

Oklahoma. — Stat. (1893), § 609. See also Form No. 6694, *supra*, and notes.

Consult also list of statutes cited *supra*, note 4, p. 973.

For the formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

Liberal rules should be applied to complaints filed in police courts for violation of city ordinances. The same strictness of pleading is not required in such cases as in prosecutions for public offenses in the name of the state by information or indictment. Kingman *v.* Berry, 40 Kan. 625.

When to be in Writing. — When made by the marshal, assistant-marshal, or regular policeman, need not be in writing if the defendant be present in court and in custody; but in every other case the complaint shall be in writing and sworn to. 1 Kan. Gen. Stat. (1897), p. 364, § 137, p. 424, § 102, p. 466, § 99; Oklahoma Stat. (1893), § 609

3. This complaint was for a failure to work upon the streets, alleys and avenues of the city, or to pay a sum of money in lieu thereof. Upon conviction under this complaint, defendant sought a discharge under a writ of habeas corpus, which was refused and the prisoner remanded. Matter of Dassler, 35 Kan. 678.

4. **Title of Proceeding.** — All prosecutions for violating any city ordinance shall be entitled: "The city of ——— against ———" (naming the city, and the person, or persons, charged), and the police judge shall state in the docket the name of the complainant, the nature and character of the offense, the date of the trial, the names of all witnesses sworn and examined, the finding of the court, the judgment of fine and costs, the date of payment, the date of issuing commitment, if any, and every other fact necessary to show the full proceedings in such case. 1 Kan. Gen. Stat. (1897), p. 364, § 137, p. 424, § 101, p. 466, § 98; Oklahoma Stat. (1893), § 609.

unlawfully neglects and refuses to perform two days' labor, or any part thereof, upon the streets, alleys and avenues of said city, and also unlawfully neglects and refuses to pay to the street commissioner of said city the sum of three dollars, or any part thereof, in lieu of said labor, and has during all of the time since *January 1, 1884*, so neglected and refused to perform said labor or pay said money in lieu thereof, although duly notified in writing so to do by the street commissioner of said city;[1] and further saith not.

W. D. Shallcross.

Sworn to before me, and subscribed in my presence, this *30th* day of *December*, 1884.

M. L. Hacker, Police Judge.[2]

Form No. 6730.

(Precedent in Smith *v.* Emporia, 27 Kan. 529.)[3]

State of *Kansas*, County of *Lyon*, City of *Emporia*.[4] Before *James R. Barnes*, Police Judge of said city.

City of Emporia, plaintiff, v. *F. E. Smith*, defendant.

T. Johnson, being first duly sworn, upon oath says, that the city of *Emporia* is a city of the second class, duly organized under and by virtue of the laws of the state of *Kansas*; that upon the *4th* day of *August*, 1881, within the corporate limits of said city, one *F. E.*

1. Charging Part. — See *supra*, note 1, p. 932.

In Kingman *v.* Berry, 40 Kan. 625, the complaint before a police judge, omitting the formal parts, was as follows: "*J. W. Pettijohn*, being duly sworn, states on oath, that *George F. Berry*, within the city of *Kingman*, county of *Kingman*, state of *Kansas*, did on the *thirteenth* day of *January*, 1887, unlawfully keep and maintain certain barrels of oil on Avenue *A*, near the corner of *Maine* street, North, the same not being within three feet of his said store building, being used by him as a general store; contrary to the ordinances of the city of *Kingman* in such cases made and provided." This complaint was upheld as sufficient, though criticised for not being as formal, full and precise in its allegations as it should have been. It did not follow the language of the ordinance. As to its formal parts, however, there were no defects except that the police judge before whom the complaint was sworn signed the jurat attached to the same without including in the signature the name of his office. Kingman *v.* Berry, 40 Kan. 625.

For another precedent of complaint in a police court see Junction City *v.* Keeffe, 40 Kan. 276.

2. Where the jurat to a complaint was signed by the police judge without the name of his office appearing, the error did not invalidate the complaint, it appearing, on appeal, from the face of the transcript that the person who signed the jurat was actually the police judge. Kingman *v.* Berry, 40 Kan. 625.

3. This complaint was in violation of a certain ordinance, and was for breaking open the inclosure established by the city as a pound, and unlawfully taking and driving therefrom animals therein impounded. The complaint was held to be sufficient. Smith *v.* Emporia, 27 Kan. 528. Consult annotations to Form No. 6729, *supra*.

4. Statement of Venue. — A complaint in a police court of a city of the second class for violation of one of the city ordinances sufficiently sets forth the venue where, in the caption, the state, county and city are named, and the complaint, in the body thereof, states the name of the city, and alleges that said city is a city of the second class, organized under and by virtue of the laws of the state, and that the defend-

Smith, above named, defendant, then and there being, did break open the inclosure established by said city as the city pound, and did take and drive therefrom animals therein lawfully impounded, without first paying the lawful officers' fees for the same; all contrary to an ordinance of said city in such cases made and provided.

T. Johnson.

Sworn to and subscribed before me, by *T. Johnson*, this *5th* day of *August*, 1*881*.

James R. Barnes, Police Judge.

Form No. 6731.

(Precedent in People *v.* Bechtel, 80 Mich. 626.)[1]

State of *Michigan*, } ss.
County of *Bay*. }

The complaint and examination on oath in writing of *Samuel M. Catlin*, taken and made before me, *Daniel Mangan*, police justice of the city of *Bay City*, in said county, upon *September 11*, A. D. 1*889*, who, being duly sworn, says that heretofore, to wit, on *December 6*, A. D. 1*889*, at the city and in the county aforesaid, *Fred Bechtel* [was then and there engaged in the business of selling and offering for sale spirituous and intoxicating liquors, and malt, brewed, and fermented liquors at retail, and, being so engaged in said business, he, the said *Fred Bechtel*, did then and there, on said *December 6*, 1*889*, unlawfully offer for sale spirituous and intoxicating liquors, and did then and there unlawfully give and furnish spirituous and intoxicating liquors, to wit, whiskey, to one *Peter Tierney*, he, the said *Fred Bechtel*, not having then and there paid to the county treasurer of said county the tax required by law for selling and offering for sale spirituous and intoxicating, and malt, brewed, and fermented liquors, and he, the said *Fred Bechtel*, not being then and there a druggist, nor any person whose business consists, in whole or in part, of the sale of drugs and medicines, and the liquors so sold and given and furnished as aforesaid not being then and there proprietary patent medicine.][2] All of which complainant has good reason to suspect, and does suspect, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of *Michigan*; wherefore the said *Catlin* prays that the said *Bechtel* may be apprehended and held to answer this complaint, and further dealt with in relation to the same as law and justice may require.

Sam'l M. Catlin.

Taken, subscribed, and sworn to before me the day and year first above written.

Daniel Mangan, Police Justice.

ant, upon a day therein named, did, within the corporate limits of said city then and there being, commit the offense charged. Smith *v.* Emporia, 27 Kan. 528.

1. A conviction under this complaint was affirmed on appeal. People *v.* Bechtel, 80 Mich. 623.

For the formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

Need not be Reduced to Writing.— People *v.* Bechtel, 80 Mich. 623.

2. **Charging Part.** -- See *supra*, note 1, p. 932.

Form No. 6732.[1]

(Sanb. & B. Anno. Stat. (1889), p. 564, § 69).

State of *Wisconsin*, } ss. In the Police Court of said city.
City of *Milwaukee*. }

Richard Roe complains on oath to the police court of the city of *Milwaukee* that *John Doe* did, as the deponent verily believes, on or about the *second* day of *March*, A. D. 1*898*, at said city, violate an ordinance of said city, to wit, (*Here insert the title and date of the ordinance, or the chapter and section of the general ordinance*), in that he did then and there, contrary to said ordinance (*Here insert the act or omission complained of*);[2] Wherefore the complainant prays that said *John Doe* be arrested and dealt with according to law.

Richard Roe, Complainant.

Subscribed and sworn to before me this *fifth* day of *March*, A. D. 1*898*.

Peter Johnson, Judge (or *Clerk*).

g. Probate Court.

Form No. 6733.[3]

In the *Probate* Court of *Shoshone* County, State of *Idaho*.

State of Idaho, plaintiff, }
against } Complaint — Criminal.
John Doe, defendant. }

Personally appeared before me this *fifth* day of *March*, 1*898*, *Richard Roe*, of *Murray*, in the county of *Shoshone*, who being duly sworn, complains and says:

That *John Doe*, of *Murray*, on the *second* day of *March*, 1*898*, at *Murray*, in the county of *Shoshone*, and state of *Idaho*, did (*Here state offense charged and the facts constituting the same*).[4] All of which is contrary to the form of the statute in such case made and provided and against the peace and dignity of the state of *Idaho*.

Said complainant therefore prays that a warrant may be issued for the arrest of said *John Doe*, and that he may be dealt with according to law.

Richard Roe.

Subscribed and sworn to before me this *fifth* day of *March*, 1*898*.

John Pomeroy, Probate Judge.

1. *Wisconsin*. — Sanb. & B. Anno. Stat. (1889), § 925*k et seq*. See also *supra*, Form No. 6706, and notes. Consult also list of statutes cited *supra*, note 4, p. 973.

For the formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

2. **Charging Part.** — See *supra*, note 1, p. 932.

3. *Idaho*. — Rev. Stat. (1887), § 8280. See also *supra*, Form No. 6672, and notes thereto. Consult also list of statutes cited *supra*, note 4, p. 973.

For the formal parts of affidavits, generally, consult the title AFFIDAVITS, vol. 1, p. 548.

4. **Charging Part.** — See *supra*, note 1, p. 932.

CRIMINAL CONVERSATION.

By Francis X. Hennessy.

I. Complaint, Declaration or Petition, 985.
II. Answer or Plea, 989.
1. *General Denial*, 989.
2. *Accord and Satisfaction*, 990.

CROSS-REFERENCES.

For Forms in other Actions of similar character, see the titles ALIENATION OF AFFECTIONS, vol. 1, p. 684; *SEDUCTION.*
For matters of Pleading and Practice, consult the title CRIMINAL CONVERSATION, 5 Encyclopædia of Pleading and Practice, p. 616.

I. Complaint, Declaration or Petition.[1]

1. Requisites of Complaint or Declaration — *Generally.* — For the formal parts of the complaint, petition or declaration in a particular jurisdiction consult the titles Complaints, vol. 4, p. 1019, and Declarations.

Marriage Relation. — The relationship of husband and wife between the plaintiff and seduced spouse at the time of the criminal conversation must be distinctly averred. Keppler *v.* Elser, 23 Ill. App. 643; Kibby *v.* Rucker, 1 A. K. Marsh. (Ky.) 391; Perry *v.* Lovejoy, 49 Mich. 529; Hutchins *v.* Kimmell, 31 Mich. 126; Dann *v.* Kingdom, 1 Thomp. & C. (N. Y.) 492; Morris *v.* Miller, 4 Burr. 2057; Catherwood *v.* Caslon, 13 M. & W. 261.

It is a sufficient allegation of marriage in a complaint for criminal conversation with the plaintiff's wife to aver that at the time she was debauched she was his wife. Hauck *v.* Grautham, 22 Ind. 53.

Criminal Intercourse. — The criminal intercourse must be substantially averred. Perry *v.* Lovejoy, 49 Mich. 529.

Means. — The means by which the intercourse was effected need not be alleged, as the means is but an incident to increase or mitigate the damages. Bedan *v.* Turney, 99 Cal. 649; Wales *v.* Miner, 89 Ind. 118.

Scienter. — It need not be alleged that the defendant knew of the marriage relation. Wales *v.* Miner, 89 Ind. 118.

Place is not of the essence of the action and need not be alleged, and if alleged, the averment is treated as formal merely and it need not be proved. Long *v.* Booe, 106 Ala. 570.

Time. — The complaint may, as in actions of trespass, lay the time of the alleged wrongful acts with a *continuando*, and the evidence may be directed to any time within that covered by the complaint. Lemmon *v.* Moore, 94 Ind. 40; and see also Yatter *v.* Miller, 61 Vt. 147; Johnston *v.* Disbrow, 47 Mich. 59. But it seems that when time and place are not alleged with particularity it is in the discretion of the court to order a bill of particulars. Shaffer *v.* Holm, 28 Hun (N. Y.) 264; Tilton *v.* Beecher, 59 N. Y. 176. In the latter case it was held that plaintiff's affidavit was substantially equivalent to a bill of particulars, as it contained everything which a defendant could properly seek to learn by means of a bill. The affidavit was as follows:

"City of *Brooklyn*, *Kings* County, ss.

Theodore Tilton, the above named plaintiff, being duly sworn, deposes: That the sum total of the knowledge possessed by him of the sexual intercourse between *Henry Ward Beecher*

and *Elizabeth R. Tilton*, and of the times and places thereof, consists as follows:

First: Confessions of the said sexual intercourse made by *Henry Ward Beecher* to *Francis D. Moulton*, *Emma R. Moulton* and *Theodore Tilton*, and others.

Second: Confessions of the said sexual intercourse made by *Elizabeth R. Tilton* to *Emma R. Moulton*, *Martha B. Bradshaw*, *Florence Tilton*, *Theodore Tilton*, and others.

Third: Written and printed papers, documents and letters by *Henry Ward Beecher*.

Fourth: Written and printed papers, documents and letters by *Elizabeth R. Tilton*.

Fifth: Written and printed papers, documents and letters by other persons.

Sixth: Acts, declarations and conduct by said *Henry Ward Beecher* and said *E. R. Tilton*, respectively, tending to prove such sexual intercourse, without locating it in any time or place.

Seventh: And various circumstances not amounting to direct proof, derived from the acts, oral declarations, and written papers and documents of the said *Henry Ward Beecher* and of other persons, communicated to him, and admissible against him.

And the deponent further says that the aforesaid confessions, made to others than this deponent, did not, to this deponent's knowledge, nor did any or either of them, specify any time when or place where any sexual intercourse between the said defendant and the wife of this plaintiff occurred.

That the confession so made to this defendant named but two specific occasions and but two places when and where such intercourse was had, namely, the one at the house of said defendant, in the city of *Brooklyn*, on the *10th* day of *October*, 1868, and the other at the house of this plaintiff on the *17th* day of *October*, 1868.

But this deponent is not absolutely certain that the above are the precise dates given by said confessions, but is positive that they were about and very near to those two days.

Nor is this deponent positive that the places assigned to these dates were as above stated, it being possible that the intercourse stated above as occurring on the *10th October*, 1868, may have been at the house of this deponent, and that on the *17th October*, 1868, at the house of the defendant.

And this deponent further says that the confessions so made to him admitted various acts of adultery by the said defendant with the said wife of this deponent between the said *10th* of *October*, 1868, and the spring of 1870, but did not particularize any time or place otherwise than as above stated.

That this deponent does not expect to be able on the trial of this action to prove by any eye-witness any such intercourse, or to prove any definite time or place when or where such intercourse occurred, except by the confessions aforesaid, and that the only proof of the adultery charged by the complainant within the control or knowledge of this deponent, or which he expects to be able to offer upon the said trial, are as above set forth; and this deponent is unable to furnish any further or other statement 'of the particular times or places at which he expects or intends to prove that any such acts of adultery or criminal intercourse took place between the defendant and the wife of the plaintiff,' than is above given.

And this deponent respectfully says than any order for particulars as prayed by this motion which shall preclude this deponent from maintaining this action by proof of confessions, acts and declarations, and other testimony tending to prove the adultery named in the complaint, although such evidence may not the time and place of its commission, would deprive this deponent of material testimony, and, as he is advised by his counsel, and believes, would injuriously and unjustly restrict his legal rights, and he therefore respectfully prays and insists, in case this court should grant any order for particulars, that a clause may be inserted therein to the following effect, viz:

But this order is not to be so construed or applied as to prohibit the plaintiff on the trial of this action from introducing evidence of confessions, acts, declarations, writings and documents which may be admissible under the general rules of evidence as if this order had not been made, and which do not in terms refer to any particular act or time of adultery, but proving by such evidence the adulterous intercourse charged in the complaint, although it may not thereby appear to have been committed on any particular day or at any particular place.

Theodore Tilton.

Sworn to before me this *10th* day of *Dec.*, 1874.

Geo. W. Roderick, Notary Public."

Form No. 6734.

(9 Wentw. Pl. 13.)[1]

In the *King's Bench.*

Trin. Term, *51 Geo. III.*

London, to wit. *Isaac Loring*, late of the parish of *St. Paul, Covent Garden*, was attached to answer *Israel Harkness* in a plea, wherefore with force and arms he made an assault upon *Ellen Harkness* the wife of the said plaintiff, at *London* aforesaid, to wit, in the parish of *St. Paul, Covent Garden*, and did ravish, lye with, debauch, and carnally know the said *Ellen Harkness*, whereby the said plaintiff lost and was deprived of the comfort, fellowship, and society of his said wife, and other wrongs to the said plaintiff then and there did to the great damage of the said plaintiff, and against the peace of our lord the now king, whereupon the said plaintiff, by *Jeremiah Mason* his attorney, complains, for that the said defendant on the *tenth* day of *June*, A. D. *1799*, and on divers other days and times, between that day and the day of suing out the original writ of the said plaintiff, with force and arms at the parish of *St. Paul, Covent Garden*, in *London* aforesaid made an assault on the said *Ellen Harkness* the wife of the said plaintiff, and at those several days and times did debauch and carnally know the said *Ellen Harkness*, whereby the said plaintiff lost and was deprived of the comfort, fellowship and society of his said wife for all the time aforesaid, and other wrongs to the said plaintiff then and there did, to the great damage of the said plaintiff and against the peace of our lord the now king, whereupon the said plaintiff saith that he is injured and hath sustained damage to the value of *one thousand* pounds; and therefore he brings his suit, etc.

Form No. 6735.

(Conn. Prac. Act, p. 75, No. 110.)[2]

(*Commencement of writ as in Form No. 5912.*)

1. **Precedents.** — In 2 Humph. Prec. 780, the declaration, omitting formal parts, is as follows:

"For that whereas the said *Charles Davis*, contriving, and wrongfully, wickedly and unjustly intending to injure the said *Alfred Brown*, and to deprive him of the comfort, fellowship, society, aid and assistance of *Ellen Brown*, the wife of him the said *Alfred Brown*, and to alienate and destroy her affections for him, the said *Alfred Brown* heretofore, to wit: on, *etc.*, and divers other days and times between that day and the day of exhibiting this bill, at, *etc.*, wrongfully, wickedly, and unjustly debauched and carnally knew the said *Ellen Brown* then and there, and still being the wife of him the said *Alfred Brown*, and thereby the affection of the said *Ellen Brown* for him the said *Alfred Brown* was then and there alienated and destroyed, and also, by means of the premises, he the said *Alfred Brown* had thence hitherto wholly lost and been deprived of the comfort, fellowship, society, aid and assistance of the said *Ellen Brown* his said wife, in his domestic affairs, which he the said *Alfred Brown* during all that time ought to have had, and otherwise might and would have had, to wit, at, *etc.*"

For other precedents see Tillingh. Forms, p. 415; 1 Saunds. Pl. 395.

2. **Florida.** — In Fla. Rev. Stat. (1892), § 1058, subs. 24, the declaration, omitting the formal parts, is as follows: "That the defendant debauched and carnally knew the plaintiff's wife."

Maryland. — In Md. Pub. Gen. Laws (1888), p. 1103, § 30, the same form is given.

1. *Jane Stiles* is, and for more than *five* years last past has been, the wife of the plaintiff.

2. The defendant, on *March 11th*, 1878, and on divers other days since that date, seduced and carnally knew said *Jane Stiles.*

3. In consequence of said seduction, the plaintiff has lost the affection of said *Jane Stiles*, and has been deprived of her society, and assistance, which he otherwise would have had, and has suffered great distress of body and mind.

The plaintiff claims $*10,000* damages.

(*Conclusion as in Form No. 5912.*)

Form No. 6736.

(Precedent in Wales *v.* Miner, 89 Ind. 119.)[1]

[State of *Indiana*, } ss. *Union Circuit* Court.
Union County. } *October* Term, 1881.

John Miner, plaintiff,
against
James Wales, defendant.

John Miner, plaintiff, complains of *James Wales*, defendant, and says][2] that *Eglantine Miner* was on the *18th* day of *October*, 1881, the lawful wife of the plaintiff, and had been for a long time previous thereto, and was at the time hereinafter mentioned; that the defendant contriving and wrongfully and maliciously intending to injure the plaintiff, and to deprive the plaintiff of the comfort, fellowship and assistance of his said wife, *Eglantine Miner*, and to alienate and destroy her affections for him, the defendant, on the *1st* day of *January*, 1872, and on every day since, until the *18th* day of *October*, 1881, at the county of *Union* and State of *Indiana*, wrongfully and wickedly persuaded, seduced, debauched, and carnally knew the said *Eglantine Miner*, the then wife of plaintiff, who was his said wife at, between and upon all the time between the said *1st* day of *January*, 1872, and the *18th* day of *October*, 1881; and thereby did seduce her affections, the said *Eglantine Miner*, and alienate from him the said plaintiff, and that thereby her affections were then and there alienated and destroyed. That by means of the premises the plaintiff from that time to the said *18th* day of *October*, 1881, has been wholly deprived of the comfort, fellowship, society, aid and assistance of the said *Eglantine Miner*, his then wife, in his domestic affairs, which during all that time he ought and would otherwise have had, to his damage

1. This form is the first paragraph of plaintiff's complaint. It was held no objection to this paragraph that it does not aver that when the alleged seduction occurred the defendant knew that Eglantine Miner was the wife of the plaintiff. When a man engages in the practice of illicit intercourse with a woman, he is bound to take notice of her domestic relations and takes the hazard of being held responsible for any injuries that may result. It is in no case necessary that before the action will lie the guilty man must be charged in the complaint with having at the time of the seduction actual notice or knowledge of the domestic relations of the seduced.

2. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

$15,000, for which sum he sues and demands judgment, and for general relief.

[*J. W. Connaway*,
T. D. Evans,
Plaintiff's Attorneys.][1]

Form No. 6737.

Supreme Court, *Suffolk* County.

John Doe, plaintiff,
against
Richard Roe, defendant.

The complaint of the above named plaintiff respectfully shows to this court that *Jane Doe* is, and at the times hereinafter mentioned was, the wife of this plaintiff. That on the *first* day of *May*, 1897, while the plaintiff and said *Jane Doe* were living happily together as man and wife, the defendant wrongfully contriving and intending to injure the plaintiff, and to defraud him of the affection and society of his said wife, *Jane Doe*, at the village of *Northport* in said county, wickedly, wilfully and maliciously debauched and carnally knew the said *Jane Doe* without the privity or consent of this plaintiff. That by reason of the premises, the plaintiff was deprived of the comfort, society, aid and assistance which he otherwise would have had from the said *Jane Doe*, and has suffered great distress of body and mind, to his damage *five thousand* dollars.

Wherefore plaintiff demands judgment against said defendant for said sum of *five thousand* dollars and all costs and expenses of this action.

Jeremiah Mason, Plaintiff's Attorney.

II. ANSWER OR PLEA.[2]

1. General Denial.

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. For the formal parts of an answer or plea in a particular jurisdiction consult the titles ANSWERS IN CODE PLEADING, vol. 1, p. 799, and PLEAS.

Plaintiff's Misconduct. — In Patterson *v.* McGregor, 28 U. C. Q. B. 280, the following pleas were held a good defense:

1. That long before the committing of the pretended trespass in the declaration set forth, the plaintiff had been guilty of adultery with one Isabella Lowe, on whom he had begotten a child now living with the plaintiff, and had continually treated his wife with intolerable cruelty, and had frequently used severe personal violence toward her, and finally had put her away from him by force and threatened to put her to death if ever she returned to him, so that she was in danger of her life and did live apart from him permanently.

Secondly, that long before the committing of the said pretended trespass, the plaintiff's wife had, while living separate from him as aforesaid, on account of the plaintiff's adultery and cruelty aforesaid, applied for and obtained an order for protection, according to the statute in such case made and provided, after the plaintiff had received due notice of the application therefor, which order was duly registered, and has ever since been and now is in full force and effect, by reason whereof the plaintiff lost all claim to the comfort and society of his wife.

Form No. 6738.[1]

Supreme Court.

Peter Smith, plaintiff.
against
John O'Brien, defendant.

The defendant, *John O'Brien*, in answer to the complaint in this action, denies each and every allegation therein, except the allegation that *Mary Smith* is the wife of the plaintiff, *Peter Smith*, as the said defendant is informed and believes to be true.

John Gibney, Defendant's Attorney.

Address and post-office address, *Sing Sing*, *N. Y.*

2. Accord and Satisfaction.

Form No. 6739.

(9 Wentw. Pl. 13.)

In the *King's Bench.*

Trin. Term, *51 Geo. III.*

Richard Roe
ats.
John Doe.

And the said defendant, by *Jeremiah Mason* his attorney, comes and defends the wrong and injury, when, etc.,[2] and saith that he is not guilty of the premises above laid to his charge in manner and form as the said plaintiff hath above thereof complained against him, and of this he puts himself upon the country, etc.; and for further plea in this behalf, the said defendant by leave of the court here for this purpose first had and obtained according to the form of the statute in such case made and provided, comes and defends the force and injury, when, etc.,[8] and says, the said *John Doe* ought not to have or maintain his aforesaid action thereof against him, because he says that after the said several times, when, etc., to wit, on the *first* day of *August*, A. D. *1799*, at the parish of *St. Paul, Covent Garden*, in *London* aforesaid, it was mutually agreed by and between the said defendant and the said plaintiff, that by way of atonement and satisfaction for the said several trespasses and all damages sustained by the said plaintiff on occasion thereof, the said defendant should at his own proper costs and charges maintain and keep a certain child of him, the said plaintiff, begotten on the body of his said wife; and the said defendant in fact further says, that in pursuance of the said agreement, he the said defendant at his own proper costs and charges hath from thence hitherto maintained and kept, and still maintains and keeps the said child, to wit, at the parish of *St. Paul* aforesaid, and this the said defendant is ready to verify, wherefore he prays judgment if the said *John Doe* ought to have or maintain his aforesaid action thereof against him, etc.

1. This form is copied from the records in Smith *v.* O'Brien, 127 N. Y. 684.
As to what can be shown under the general denial, see the title CRIMINAL CONVERSATION, 5 Encyclopædia of Pleading and Practice, p. 616.

2. See vol. 2, p. 109, note 2.

CROSS-BILLS.

See the title BILLS IN EQUITY, vol. 3, p. 417.

CROSS-COMPLAINTS.

I. IN GENERAL, 991.
II. ANSWER AND CROSS-PETITION, 993.

CROSS-REFERENCES.

For Forms of Answers, generally, see the title ANSWERS IN CODE PLEADING, vol. 1, p. 799.
For Forms of Complaints, generally, see the title COMPLAINTS, vol. 4, p. 1019.
For Forms of Corresponding Pleading in Equity, see the title BILLS IN EQUITY, vol. 3, p. 468.
For Forms connected with Set-off and Counterclaim, see the title SET-OFF AND COUNTERCLAIM.
For matters of Procedure, see the title CROSS-COMPLAINTS, 5 ENCYCLOPÆDIA OF PLEADING AND PRACTICE, p. 673.

I. IN GENERAL.[1]

Form No. 6740.

State of *Indiana*, } ss. *Posey Circuit* Court.
Posey County. } *October* Term, 1897.

Jane Doe, plaintiff,
against
John Doe, defendant.

1. In General. — In several states it is provided that whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint. The cross-complaint must be served upon the parties affected thereby, and such parties may demur or answer thereto as to the original complaint.

Arkansas. — Sand. & H. Dig. (1894), § 5712.
California. — Code Civ. Proc. (1897), § 442.
Idaho. — Rev. Stat. (1887), § 4188.
Iowa. — Code (1897), §§ 3176, 3574.
Utah. — Rev. Stat. (1898), § 2974.

And in Hopkins *v.* Gilman, 47 Wis. 581, quoted in a note to Sanb. & B. Anno. Stat. Wis. (1889), § 2656, it was said: "The code is silent respecting cross bills or complaints. It neither authorizes nor prohibits the filing of a cross-complaint in a case wherein a

The defendant, for a cross-complaint against the plaintiff herein, says:

[That defendant and plaintiff were duly married on the *first* day of *June*, 1885, and lived together as husband and wife until the *first* day of *May*, 1897; that plaintiff committed the crime of adultery with one *Samuel Short*, on or about the *first* day of *April*, 1897, and that, as soon as defendant discovered that plaintiff had committed said offense, he ceased to cohabit with her.][1]

cross-bill formerly would have been proper. Under the ample provisions of the code respecting counterclaims, it seems a cross bill or complaint is no longer necessary or proper in case of a mere cross-demand or claim for affirmative relief, existing in favor of one or more defendants against the plaintiff in the action alone, as in such case the defense can, and should, always be set up in the answer by way of counterclaim and the whole matter litigated and determined in one action. But there may be cases, under the code, in which a cross-action is not only proper but necessary, in order to enable a defendant to bring his defense properly before the court, and to settle equities existing between him and his codefendants. Thus, in Thursby *v.* Mills, 1 Code Rep. (N. Y.) 83, it was held that, in order to enable a defendant to obtain an injunction, he must serve a complaint in the nature of a cross-suit, unless where the defendant's right to an injunction appears from the original complaint."

And that a cross-complaint may be used in *Indiana*, although the statute contains no provision relating thereto, see the cases cited *infra*, note 1, p. 992.

The chief difference in the statutes cited above consists in the parties against whom relief may be had by the cross-complaint. Thus, in *Utah*, relief can be had against a codefendant only, and in *Arkansas* and *Iowa* against any person other than the plaintiff.

Complaint and Cross-complaint Distinguished. — The only real difference between a complaint and a cross-complaint is, that the first is filed by the plaintiff and the second by the defendant. Both contain a statement of the facts, and each demands affirmative relief upon the facts stated. Ewing *v.* Patterson, 35 Ind. 326, *quoted* in Conger *v.* Miller, 104 Ind. 594.

1. Ground of Relief. — The cross-complaint, like an original complaint, must state facts sufficient to entitle the pleader to affirmative relief. Winter *v.* McMillan, 87 Cal. 263; Stratton *v.* California Land, etc., Co., 86 Cal. 353; Peabody *v.* Prince, 78 Cal. 511; Harrison *v.* McCormick, 69 Cal. 618; Coulthurst *v.* Coulthurst, 58 Cal. 239; Brodrib *v.* Brodrib, 56 Cal. 566; Kreichbaum *v.* Melton, 49 Cal. 55; Collins *v.* Bartlett, 44 Cal. 381; Marriott *v.* Clise, 12 Colo. 561; Murray *v.* Hobson, 10 Colo. 66; Norris *v.* Norris, 3 Ind. App. 500; Wood *v.* Hughes, 138 Ind. 179; Holland *v.* Holland, 131 Ind. 196; Kempshall *v.* East, 127 Ind. 320; Conger *v.* Miller, 104 Ind. 592; Gardner *v.* Fisher, 87 Ind. 375; Masters *v.* Beckett, 83 Ind. 595; Shoemaker *v.* Smith, 74 Ind. 71; Ewing *v.* Patterson, 35 Ind. 326. And see Scheiffelin *v.* Weatherred, 19 Oregon 172.

And it cannot be helped out by the averments of any of the other pleadings in the action. Coulthurst *v.* Coulthurst, 58 Cal. 239; Kreichbaum *v.* Melton, 49 Cal. 55; Conger *v.* Miller, 104 Ind. 592; Masters *v.* Beckett, 83 Ind. 595. Nor by an agreed statement of facts. Collins *v.* Bartlett, 44 Cal. 381.

Yet in matters of mere description it may refer to and adopt some of the allegations of the complaint. Anderson *v.* Wilson, 100 Ind. 402; Gardner *v.* Fisher, 87 Ind. 375; Cookerly *v.* Duncan, 87 Ind. 332; Coe *v.* Lindley, 32 Iowa 437. Thus a description in a cross-complaint in an action to quiet title, designating it as the real estate in the complaint mentioned, is sufficient. Such a reference is not intended to supply a needed statement of fact, but is for identification only. Cookerly *v.* Duncan, 87 Ind. 332. Nor is it necessary to set out in a cross-complaint a copy of a written instrument which forms the basis of the original action; it being sufficient for the cross-complaint to refer to such instrument. Gardner *v.* Fisher, 87 Ind. 369; Coe *v.* Lindley, 32 Iowa 437.

Where the defendant has two separate rights, instead of setting them up in the form of two cross-complaints, they should be stated separately in one

Wherefore he prays judgment that [the said bonds of matrimony be dissolved, and a divorce granted in favor of this defendant.][1]

Jeremiah Mason, Defendant's Attorney.

Form No. 6741.

(Conn. Prac. Act, p. 192, No. 335.)[2]

John Doe vs. *Richard Roe and John Fen.* } *Superior* Court, *New Haven* County, *January* Term, 1879.

Cross-complaint of *John Fen*, against *John Doe* and *Richard Roe.*

1. After the defendant *Richard Roe* made the note and mortgage in the original complaint described, he sold and conveyed, by a proper deed, his interest in the mortgaged premises to this defendant, *John Fen.*

2. On *June 1st*, 1878, when said note fell due, and before the commencement of the plaintiff's said action, and after notice to him of said conveyance, this defendant tendered to the plaintiff the full amount due on said note, with interest, being in all $*10,600*, in payment thereof, and the plaintiff refused to accept the same.

3. This defendant has ever since been, and now is, ready and willing to pay said sum to the plaintiff, or into court for his use.

This defendant claims a conveyance to himself from the plaintiff of the mortgage title, on tender or payment into court by this defendant of $*10,600.*

By *Jeremiah Mason*, his attorney.

II. ANSWER AND CROSS-PETITION.[3]

cross-complaint, to avoid confusion. Van Bibber *v.* Hilton, 84 Cal. 585.

1. Prayer for Relief. — The cross-complaint, like the original complaint, must contain a prayer for relief. Ringo *v.* Woodruff, 43 Ark. 469; Sylvis *v.* Sylvis, 11 Colo. 331. But a cross-complaint which states a cause of action in favor of the defendant is not insufficient on demurrer for want of facts merely because it demands more relief than the defendant is entitled to. Mark *v.* Murphy, 76 Ind. 534.

2. In *Connecticut* the cross-complaint differs from an ordinary complaint in that the ordinary complaint is inserted in the writ, while the cross-complaint, being in the nature of an answer, is not so inserted, but is filed separately. For rules relating to cross-complaints in *Connecticut* see Rules Under Practice Act, No. 5. For other forms of cross-complaints in *Connecticut* see Conn. Prac. Act, p. 193, No. 336, p. 194, No. 337.

3. In some states it is provided that when affirmative relief is demanded in the answer it may be styled a "cross-petition."

Ohio. — Bates' Anno. Stat. (1897), § 5059.

Wyoming. — Rev. Stat. (1887), § 2446.

And see Okla. Stat. (1893), § 3972; Tucker *v.* St. Louis L. Ins. Co., 63 Mo. 588.

In *Kentucky* it is provided that no pleading except an answer to an original petition, or the plaintiff's reply to such answer, shall be made a cross-petition. Bullitt's Civ. Code Ky. (1895), § 111. See also § 96.

In *Georgia* it is provided that "A petition in the nature of a cross-bill need not be filed in this state. The defendant in every case may set up in his answer any matter which, under the English practice, should be the subject of a cross-bill, and may require therein any discovery from the petitioner he may desire. No supplemental petition need be filed in this state. All such matter shall be allowed by way of amendment. If new parties are necessary, by reason of any matter

Form No. 6742.[1]

The State of *Ohio*, } In the Court *of Common Pleas.*
Vinton County, ss. }

John Doe, plaintiff, }
against } Answer and Cross-petition.
Richard Roe, defendant. }

The plaintiff, on the *first* day of *May*, 1897, for valuable consideration, duly executed and delivered to defendant his agreement in writing whereby, in consideration of *fifty* dollars, he agreed to convey said premises to the defendant. The defendant has duly performed all the conditions of said agreement on his part to be performed, but the plaintiff neglects and refuses to convey said premises to defendant.[2]

Wherefore defendant prays that plaintiff, in accordance with said agreement, be ordered to convey said premises to defendant, and that he be forthwith enjoined from prosecuting this suit further.[3]

Jeremiah Mason, Attorney for Defendant.

(*Verification.*)[4]

thus set up in the answer, or by way of amendment, the court shall give such direction to the cause, to secure a hearing to such parties, as if a petition in the nature of a cross-bill or supplemental bill had been filed." 2 Ga. Code (1895), § 4969.

The cross-petition in these states need not be joined with a denial of the allegations of the petition, but may consist of purely affirmative matter. Bradford *v.* Andrews, 20 Ohio St. 221.

In other states it is held that a single paragraph of the defendant's pleading cannot be both an answer and a cross-complaint; and where it is treated below both by court and counsel as a cross-complaint, it will be so considered by the supreme court. Shain *v.* Belvin, 79 Cal. 262; Anderson Bldg., etc., Assoc. *v.* Thompson, 88 Ind. 405; Thompson *v.* Toohey, 71 Ind. 296; State Board of Agriculture *v.* Gray, 54 Ind. 91. And that if a defendant has a cause of cross-complaint, and wishes affirmative relief, his pleading should show distinctly that it was intended as a cross-complaint. If it commences as follows: "And for a further and separate answer and defense to said action, defendant avers by way of cross-complaint," the pleading will be construed against the pleader, and as against him it will be treated as an answer merely. Shain *v.* Belvin, 79 Cal. 262. And see O'Connor *v.* Frasher, 53 Cal. 435.

But in Wright *v.* Anderson, 117 Ind. 351, it was held that a pleading, though denominated an answer, will be regarded as a cross-complaint if facts are alleged therein which authorize the granting of affirmative relief. In this case the second paragraph of the answer, which was regarded by the court as a cross-complaint, commenced as follows: "Said defendant for further answer says that," etc.

1. **Precedents.** — For a good precedent of an answer and cross-petition see Peter *v.* Farrel Foundry, etc., Co., 53 Ohio St. 534, and *ante*, Form No. 6448. See also a form in Wilson *v.* McLaughlin, 11 Colo. 465.

2. **Ground of Relief.** — See *supra*, note 1, p. 992.

3. **Prayer for Relief.** — As the answer is called a cross-petition only "when affirmative relief is demanded therein," it follows *ex vi termini* that the cross-petition must pray for the desired relief. And see *supra*, note 1, p. 993.

4. **Verification.** — For form of verification in a particular jurisdiction consult the title VERIFICATIONS.

CROSSINGS.

See the title RAILROADS.

CRUELTY TO ANIMALS.

By John H. Gabriel and Jos. R. Long.

I. **In General**, 995.
II. **Cruelly Abandoning**, 998.
III. **Cruelly and Needlessly Killing**, 998.
IV. **Tormenting and Torturing**, 999.
1. *By Cruelly Beating*, 999.
2. *By Inflicting Unnecessary Cruelty*, 1000.
3. *By Mutilating or Wounding*, 1000.
4. *Causing or Permitting Torture*, 1001.
V. **Failure to Provide Proper Food or Shelter**, 1002.
1. *Generally*, 1003.
2. *Impounding Without Food and Water*, 1003.
3. *Exposing Team to Cold and Stormy Weather*, 1003.
VI. **In Transporting**, 1004.
1. *Generally*, 1004.
2. *By a Common Carrier*, 1004.
VII. **In Working**, 1004.
1. *Overdriving*, 1004.
2. *Overloading*, 1006.
3. *When Unfit for Labor*, 1006.
VIII. **Pigeon Shooting**, 1007.

CROSS-REFERENCES.

For Forms connected with Prosecutions for Unlawfully Killing and Maiming Cattle, see the title CATTLE AND DOMESTIC ANIMALS, vol. 4, p. 376.

For matters of Procedure, see the title CRUELTY TO ANIMALS AND CHILDREN, 5 Encyclopædia of Pleading and Practice, p. 645.

I. In General.[1]

1. Requisites of Indictment — *Generally.* — A charge in an indictment may be made in the words of the statute, without a particular statement of facts and circumstances, when, by using those words, the act in which an offense consists is fully, directly and expressly alleged without any uncertainty

or ambiguity. State *v.* Comfort, 22 Minn. 271; State *v.* Haley, 52 Mo. App. 520; Turman *v.* State, 4 Tex. App. 586.

Description of Animal. — A description of the animal as a "certain horse" is sufficient. Com. *v.* McClellan, 101 Mass. 34. Or "a certain animal, to wit, a cow." Com. *v.* Whitman, 118 Mass. 458.

A description of the animal as "a certain horse, a dumb animal under the statute," is sufficient under Willson's Crim. Stat. Tex. (1889), art. 680. Benson *v.* State, 1 Tex. App. 6.

In an indictment for cruelty to a mule, under a statute relating to cruelty to "any domestic animal," it is unnecessary to allege that the mule was a domestic animal, as the court will take judicial notice of that fact. State *v.* Gould, 26 W. Va. 258.

Ownership of Animal. — An allegation as to the ownership of the animal is unnecessary. Grise *v.* State, 37 Ark. 456; State *v.* Bruner, 111 Ind. 98; Com. *v.* Lufkin, 7 Allen (Mass.) 579; Com. *v.* McClellan, 101 Mass. 34; Com. *v.* Whitman, 118 Mass. 458; State *v.* Brocker, 32 Tex. 611, *overruling* State *v.* Smith, 21 Tex. 748; Benson *v.* State, 1 Tex. App. 6; Turman *v.* State, 4 Tex. App. 586; Darnell *v.* State, 6 Tex. App. 482; State *v.* Gould, 26 W. Va. 258.

But where the ownership is alleged, it becomes a matter of description which must be proved as alleged. State *v.* Bruner, 111 Ind. 98.

Maliciously and Mischievously. — In a prosecution under Miss. Code (1871), § 2708 (Anno. Code (1892), § 1022), providing that "any person who shall maliciously, either out of a spirit of revenge or wanton cruelty, or who shall mischievously kill, maim or wound or injure" any animal, shall be punished, etc., it must be alleged that the offense was committed "maliciously" or "mischievously." Thompson *v.* State, 51 Miss. 353. See also Duncan *v.* State, 49 Miss. 331.

But an averment that the offense was "maliciously" committed is sufficient, without adding the words "out of a spirit of revenge or wanton cruelty," these words being merely descriptive of "maliciously." Rembert *v.* State, 56 Miss. 280.

Wilfully and Wantonly. — Under the former statute of *Texas* (Pasc. Dig., art. 2345) making it a misdemeanor to "wilfully and wantonly kill, maim, wound," etc., any dumb animal, an indictment which failed to allege that the killing was done both "wilfully" and "wantonly" was insufficient. State *v.* Rector, 34 Tex. 565; Branch *v.* State, 41 Tex. 622. But under Willson's Crim. Stat. (1889), art. 680 (Tex. Pen. Code (1895), art. 787), the use of both words is unnecessary, the language of the statute being "wilfully or wantonly.' Rountree *v.* State, 10 Tex. App. 110. And an information charging that defendant did "cruelly and unmercifully beat and abuse" a horse need not allege that the act was wilfully and wantonly done. Burgman *v.* State, (Tex. Crim. App. 1896) 34 S. W. Rep. 111.

Duplicity — Surplusage. — Where the statute makes any person liable to punishment who cruelly ill-treats an animal in any of certain ways named, and further provides for the punishment of any person who has the charge and custody of the animal for an unnecessary failure to provide for its wants, an indictment joining both these offenses is bad for duplicity, but if the latter offense be insufficiently charged, as on account of the omission of an averment that the defendant had charge and custody of the animal, the latter allegation may be rejected as surplusage. State *v.* Haskell, 76 Me. 399.

Where a complaint charged that the defendant, at a time and place named, "with force and arms unlawfully and cruelly did beat and torture a certain horse, of the property of him the said *Edward Bassett* and one *Knott P. Martin*," etc., it was held that it did not charge two separate and distinct offenses under Mass. Gen. Stat. (1860), c. 165, § 41, providing that "whoever cruelly beats or tortures any horse or other animal, whether belonging to himself or another, shall be punished," etc. Com. *v.* Lufkin, 7 Allen (Mass.) 579.

For another form see Stephens *v.* State, 65 Miss. 329.

For the formal parts of an indictment, information or criminal complaint in a particular jurisdiction consult the titles INDICTMENTS; INFORMATIONS; CRIMINAL COMPLAINTS, *ante*, p. 930.

For statutes of the various states relating to cruelty to animals see as follows:

Alabama. — Crim. Code (1886), § 3872; Acts (1894–5), p. 697.

Arkansas. — Sand. & H. Dig. (1894), § 1516 *et seq.*

Form No. 6743.[1]

State of *Maryland*, *Washington* County, to wit:

The jurors for the state of *Maryland*, for the body of *Washington* county, upon their oath do present, that *Caspar Falkenham*, late of *Washington* county aforesaid, on the *fourth* day of *October*, in the year of our Lord one thousand eight hundred and *ninety*, with force and arms, in said county of *Washington*, unlawfully and wilfully did then and there engage in an act of cruelty to a certain animal, to wit, a *horse*; contrary to the form of the act of assembly in such case made and provided, and against the peace, government and dignity of the state.

California. — Pen. Code (1897), p. 506 *et seq.*

Colorado. — Mills' Anno. Stat. (1891), § 104.

Connecticut. — Gen. Stat. (1888), §§ 1458, 1543.

Delaware. — Rev. Stat. (1893), p. 403, §§ 1, 2.

Florida. — Rev. Stat. (1892), §§ 2509, 2510.

Illinois. — Starr & C. Anno. Stat. (1896), p. 1261, par. 122.

Indiana. — Horner's Stat. (1896), § 2101.

Iowa. — Code (1897), §§ 4969, 4972.

Kansas. — Gen. Stat. (1889), §§ 2420, 2421, 2428.

Kentucky. — Stat. (1894), §§ 1246, 1249.

Maine.—Rev. Stat. (1883), c. 124, § 29.

Massachusetts. — Pub. Stat. (1882), c. 207, §§ 52, 53.

Michigan. — How. Anno. Stat. (1882), §§ 9391, 9393.

Minnesota. — Stat. (1894), §§ 6792, 6793.

Mississippi. — Anno. Code (1892), §§ 1014–1018.

Missouri. — Rev. Stat. (1889), §§ 3896, 3897.

Montana. —Pen. Code (1895), §§ 1090–1093.

Nebraska. — Comp. Stat. (1897), § 6718 *et seq.*

New Hampshire. — Pub. Stat. (1891), c. 267, § 1.

New Jersey. — Gen. Stat. (1895), p. 34, § 17 *et seq.*

New York. — Pen. Code, §§ 655, 657, 659.

North Carolina. — Code (1883), §§ 2482, 2484, 2486.

North Dakota. — Rev. Codes (1895), § 7560.

Ohio. — Bates' Anno. Stat. (1897), § 6951.

Oklahoma. — Stat. (1893), § 2485.

Oregon. — Hill's Anno. Laws (1892), §§ 1878–1880.

Pennsylvania. — Pepp. & L. Dig. (1894), p. 1158, § 148 *et seq.*

Rhode Island. — Gen. Laws (1896), c. 114, §§ 1, 2.

South Carolina. — Crim. Stat. (1893), § 506–508.

Tennessee. — Code (1896), §§ 2857, 2859.

Texas. — Pen. Code (1895), art. 787.

Utah. — Rev. Stat. (1898), §§ 4453, 4455.

Vermont. — Stat. (1894), §§ 4993, 4994.

Virginia. — Code (1887), § 3796.

Washington. — Pen. Code (1893), § 2321.

West Virginia. — Code (1891), p. 919, § 14.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 4445.

Wyoming. — Laws (1895), p. 57, §§ 1, 2.

1. This form is drawn under Md. Laws (1890), c. 198, § 1, which provides that "any person who wilfully sets on foot, instigates, engages in, or in any ways furthers any act of cruelty to any animal," etc., shall be deemed guilty of a misdemeanor. The charging part of the indictment is the same as that held sufficient in State *v.* Falkenham, 73 Md. 463.

For similar statutes, see

Arkansas. — Sand. & H. Dig. (1894), § 1521.

Georgia. — 3 Code (1895), §§ 703, 705.

Montana. — Pen. Code (1895), § 1090.

New York. — Pen. Code, § 655.

North Carolina.—Code (1883), § 2487.

Tennessee. — Code (1896), § 2863.

An indictment charging that the defendant did "cruelly drive and cruelly treat" two bay mares charges an offense within the *Georgia* statute. McKinne *v.* State, 81 Ga. 164.

II. CRUELLY ABANDONING.

Form No. 6744.[1]

Commonwealth of *Massachusetts*, } ss. At the *Superior* Court begun
County of *Hampshire*. } and holden at *Northampton*, within and for the county of *Hampshire*, on the *second Monday* of *February*, in the year of our Lord one thousand eight hundred and *ninety-eight*.

The jurors for said *commonwealth* on their oath present that *John Doe*, late of *Northampton*, in the county of *Hampshire*, on the *first* day of *January*, in the year of our Lord one thousand eight hundred and *ninety-eight*, at *Northampton* aforesaid, in the county of *Hampshire* aforesaid,* having the charge and custody of a certain cow, which by reason of a broken leg was unable to walk, and incapable of taking care of itself or supporting itself with food, did then and there unlawfully and cruelly abandon the said cow, against the peace and dignity of said *commonwealth*, and contrary to the form of the statute in such case made and provided.

Daniel Webster, District Attorney.

III. CRUELLY AND NEEDLESSLY KILLING.[2]

Form No. 6745.[3]

Johnson Circuit Court.

The State of Arkansas against *John Doe.* } Indictment.

1. *Massachusetts.*—Pub. Stat. (1882), c. 207, § 53. See also list of statutes cited *supra*, note 1, p. 995.

2. Requisites of Indictment — *Manner of Killing.* — An indictment for needlessly killing an animal need not state the manner nor the particular circumstances of the killing. State *v.* Greenlees, 41 Ark. 353.

Value and Ownership. — No allegations as to the value and ownership of the animal killed are necessary. Grise *v.* State, 37 Ark. 456.

See also *supra*, note 1, p. 995.

Sufficient Indictment.— An indictment charging that the defendant did "knowingly, wilfully, and needlessly act in a cruel manner towards a certain fowl, to wit, a *chicken*, by killing said *chicken*," is sufficient under N. Car. Code (1883), § 2482. State *v.* Neal, 120 N. Car. 613.

Insufficient Complaints.—A complaint charging that defendant did, at a certain time and place, "unlawfully and cruelly shoot and injure a certain *dog*, by then and there shooting said *dog* with leaden shot and killing him," was held insufficient under Ind. Rev. Stat. (1881), § 2101, the needless killing being the offense, and not the cruel killing. Hunt *v.* State, 3 Ind. App. 383.

A complaint in the following words, to wit:

"*Genesee* County, ss.

John Mohr, being duly sworn, says: That on the *15th* day of *July*, 1875, he was at the house of *Squire Perry*, in the town of *Darien*, in said county, and he saw a man on a peddler's cart, in said town, shoot at a dog of and belonging to said *Squire Perry*, in said town; that the said dog was hit in the neck, and he believes the said dog will die.

his
John × *Mohr.*
mark

Sworn before me this *15th* day of *July*, 1875.

A. H. Perry, J. P."

was held insufficient, under the *New York* statutes making it a misdemeanor to "maliciously" or "needlessly" kill any animal (Laws (1866), c. 682, Laws (1867), c. 375, § 1), to confer jurisdiction upon the justice to issue a warrant of arrest thereupon, there being no allegation from which he could infer that the shooting was malicious or needless. Warner *v.* Perry, 14 Hun (N. Y.) 337.

3. *Arkansas.*— Sand. & H. Dig. (1894), § 1516. See also list of statutes cited

The grand jury of *Johnson* county, in the name and by the authority of the state of *Arkansas*, accuse *John Doe* of the crime of needlessly killing an animal, committed as follows, viz.: The said *John Doe*, on the *first* day of *April*, 1898, in the county aforesaid, did unlawfully and needlessly[1] kill a certain *hog*, against the peace and dignity of the state of *Arkansas*.

Daniel Webster, Prosecuting Attorney.

IV. TORMENTING AND TORTURING.[2]

1. By Cruelly Beating.

Form No. 6746.[3]

(*Commencing as in Form No. 6744, and continuing down to* *) did then and there unlawfully and cruelly beat a certain *horse*, against the peace (*concluding as in Form No. 6744*).

supra, note 1, p. 995. The form given in the text has been held sufficient in Grise *v.* State, 37 Ark. 456; State *v.* Greenlees, 41 Ark. 353.

1. For the word "needlessly" substitute "cruelly" where the statute employs the latter word.

2. **Requisites of Indictment** — *Generally.* — Consult note 1, p. 995, *supra*.

Specific Acts of Torture. — In charging the offense of torturing an animal, the method of torture, as well as the effect produced, must be stated. Avery *v.* People, 11 Ill. App. 332; State *v.* Bruner, 111 Ind. 98; State *v.* Pugh, 15 Mo. 509; State *v.* Watkins, 101 N. Car. 702.

Thus an indictment charging that the defendant did "knowingly and wilfully and unlawfully torture, torment and act in a cruel manner towards a certain animal, to wit, a *hog*, the property of," etc., without setting forth the facts which constituted such torturing, etc., was held fatally defective under the *North Carolina* statute (Code (1883), § 2482). State *v.* Watkins, 101 N. Car. 702.

And an indictment for torturing animals which charges merely the act of tying brush or boards to the tail of a horse, unaccompanied by averments declaring the effects of the act, is insufficient; for such an act does not necessarily produce torture. State *v.* Pugh, 15 Mo. 509.

Sufficient Indictment. — An allegation in a complaint drawn under Me. Rev. Stat. (1883), c. 124, § 29, that defendant "did cruelly and unlawfully torment, torture, maim, beat, wound and deprive of necessary sustenance" a horse belonging to himself, was held to charge but one offense. State *v.* Haskell, 76 Me. 399.

3. *Massachusetts.* — Pub. Stat. (1882), c. 207, § 52. See also list of statutes cited *supra*, note 1, p. 995. The charging part of this form is taken from Com. *v.* McClellan, 101 Mass. 34.

The intent with which the cruel beating was done is immaterial and need not be alleged. State *v.* Hackfath, 20 Mo. App. 614.

Ownership. — A complaint under the *Massachusetts* statute charging that the defendant at a time and place named, "having the charge or custody of another certain animal, to wit, a *cow*, did then and there cruelly torture and torment said *cow*, by then and there cruelly beating, bruising and wounding said *cow*," was held sufficient without any allegation as to the ownership of the animal, or that the cruelty was unnecessary. The words "having the charge or custody of" may be rejected as surplusage. Com. *v.* Whitman, 118 Mass. 458.

Forms Held Sufficient. — An indictment, omitting the formal parts, which charged that the defendant did "unlawfully, with a club, *four* feet in length and two inches thick, maliciously and cruelly beat a certain *horse*, the property of him, the said *William Hackfath*, from the effects of which the said *horse* did then and there die," was held sufficient under the *Missouri* statute. State *v.* Hackfath, 20 Mo. App. 614.

A complaint under the *Massachusetts* statute charging that the defendant, at

2. By Inflicting Unnecessary Cruelty.

Form No. 6747.[1]

(*Commencing as in Form No. 6744, and continuing down to* *) having the charge and custody of a certain *horse*, did then and there unlawfully and unnecessarily inflict unnecessary cruelty upon the said *horse*, by compelling it to draw a heavy load while provided with unsuitable harness, which cut into the flesh of the said *horse*, thereby causing it great pain and suffering, against the peace (*concluding as in Form No. 6744*).

3. By Mutilating or Wounding.[2]

a time and place named, "with force and arms unlawfully and cruelly did beat and torture a certain horse, of the property of him, the said *Edward Bassett* and one *Knott P. Martin*," etc., is sufficient, and does not charge two offenses. Com. *v.* Lufkin, 7 Allen (Mass.) 579.

An indictment in the following words, to wit:

"The grand jurors of the state of *West Virginia*, in and for the body of the county of *Wood*, and now attending the said court, upon their oaths present, that *Stephen Gould*, on *October 13*, A. D. 188*1*, in the said county, did unlawfully and wilfully and cruelly beat, shoot, torture and otherwise ill-treat a certain beast called a *mule*; the owner or owners of which said *mule* is to the grand jurors unknown, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state," was held sufficient, the words "shoot, torture and otherwise ill-treat," and the allegation as to ownership, being regarded as surplusage. State *v.* Gould, 26 W. Va. 258.

For other forms see Com. *v.* Whitman, 118 Mass. 458; State *v.* Avery, 44 N. H. 392.

1. *Massachusetts.*—Pub. Stat. (1882), c. 207, § 52. See also *supra*, note 1, p. 995.

2. **Requisites of Indictment.**—*Generally.*—Consult note 1, p. 995, *supra*.

The manner of mutilating should be set forth in the indictment. Avery *v.* People, 11 Ill. App. 332; State *v.* Bruner, 111 Ind. 98. And an information charging that the defendant at a certain time and place was "guilty of cruelty to a certain *hog*, the said *hog* then and there being an animal, by then and there mutilating the said animal, contrary to the form of the statute," etc., was held defective in that it did not show the manner and character of the mutilation, and that it was unlawful. Avery *v.* People, 11 Ill. App. 332. But an information charging the mutilation of a dog, which states the means employed in the commission of the offense, need not describe the injury inflicted upon the animal. State *v.* Giles, 125 Ind. 124.

Dishorning Cattle.—Under Stat. 12 & 13 Vic., c. 92, § 2, providing that "if any person shall cruelly beat, ill-treat, overdrive, abuse, or torture. * * * any animal," every such offender shall be liable, etc., it was held that the defendant was properly convicted for the offense of dishorning cattle upon an information charging that he "did ill-treat, abuse and torture, and cause to be ill-treated, abused and tortured, *sixteen oxen* on the *8th* and *sixteen* other *oxen* on the *15th* day of *October*, 1*88*8." Ford *v.* Wiley, L. R. 23 Q. B. Div. 203. See also Brady *v.* M'Argle, 15 Cox C. C. 516.

Maiming.—An information charging that the accused, at a certain time and place, "did then and there unlawfully, wilfully and wantonly maim a dumb animal, to wit, a certain *dark-bay mule*, the same being a dumb animal such as is enumerated in article 713 of the Penal Code of the state of *Texas*, and being the property of him, the said" defendant, etc., was held sufficient under Pasc. Dig. Tex., art. 2345 (Willson's Crim. Stat. Tex. (1889), art. 680). Turnman *v.* State, 4 Tex. App. 586.

Shooting Cow.—An indictment charging that the defendant wilfully and unlawfully "did cruelly beat and shoot, and needlessly mutilate, torment and torture a certain useful animal, to wit: *one cow*, the property of *Joseph Dixon*, contrary to the form of the statute," etc., although not in the words of the statute, was held to sufficiently charge

Form No. 6748.

(Precedent in State *v.* Bruner, 111 Ind. 99.)[1]

[State of *Indiana*, } ss.]
Pike County. }[2]

Before me *John M. White*, a justice of the peace for said county, came *William Long*, who being duly sworn according to law, deposeth and sayeth that on or about the *21st* day of *November*, in the year 1885, at the county of *Pike* and State of *Indiana*, *Ralph Smith* and *Edward Bruner*, late of said county, did then and there unlawfully and cruelly torture, torment and needlessly mutilate a certain animal, to wit, a *goose*, the property of some person or persons to the affiant unknown,[3] by then and there unlawfully turpentining and burning, in a cruel and wanton manner,[4] the said *goose*.

[*William Long*.

Subscribed and sworn to this *twenty-first* day of *November*, 1885.

John M. White, Justice of the Peace.][2]

Form No. 6749.[5]

North Carolina, } *Superior* Court,
Cumberland County. } *Spring* Term, 1898.

The jurors for the state, upon their oath present, that *John Doe*, late of the county of *Cumberland*, on the *first* day of *January*, in the year of our Lord one thousand eight hundred and *ninety-eight*, at and in the said county, did unlawfully and needlessly mutilate a certain *cow*, by then and there twisting off the tail of said *cow*,[6] contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state.

Daniel Webster, Solicitor.

4. Causing or Permitting Torture.[7]

the offense of wounding under *North Carolina* statute (Code (1883), § 2482). State *v.* Butts, 92 N. Car. 784.

Other Forms. — For other forms see Hodge *v.* State, 11 Lea (Tenn.) 528; State *v.* Brocker, 32 Tex. 612; Benson *v.* State, 1 Tex. App. 6; Rountree *v.* State, 10 Tex. App. 110.

1. *Indiana.* — Horner's Stat. (1896), § 2101. See also *supra*, note 1, p. 995.

2. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

3. The allegation that the goose was "the property of some person or persons to the affiant unknown was held equivalent to an averment that the goose was a domestic fowl, so as to be an animal within the meaning of the statute.

4. The charge as to the method of torturing, etc., though perhaps not so full and apt a description of the offense as might have been given, was held sufficient.

5. *North Carolina.* — Code (1883), § 2482. See also *supra*, note 1, p. 995. The offense is charged in the language used in State *v.* Allison, 90 N. Car. 733, which was held sufficient under this statute.

6. See *supra*, note 2, p. 1000.

7. **Sufficient Complaint.** — A complaint under Mass. Pub. Stat. (1882), c. 207, § 53, alleging that the defendant, at a certain time and place, "was the person having the charge and custody of a certain animal, to wit, a *fox*, and did then and there knowingly and wilfully permit the said *fox* to be subjected to unnecessary suffering, by then and there knowingly and wilfully turning the said *fox* loose, to be hunted by divers dogs, in consequence of which turning

Form No. 6750.[1]

(Precedent in Com. *v.* Thornton, 113 Mass. 457.)

[(*Commencing as in Form No. 6744, and continuing down to* *)][1] having the charge and custody of a certain animal, to wit, a *dog*, did then and there knowingly and wilfully authorize and permit said *dog* to be subjected to unnecessary torture, suffering and cruelty, by then and there knowingly and wilfully suffering and permitting said *dog* to be bitten, mangled and cruelly tortured by a certain other dog, [against (*concluding as in Form No. 6744*).][2]

V. FAILURE TO PROVIDE PROPER FOOD OR SHELTER.[3]

loose of the said *fox*, as aforesaid, the said *fox* was hunted by divers dogs and thereby subjected to unnecessary suffering as aforesaid," was held to sufficiently charge an offense. Com. *v.* Turner, 145 Mass. 296.

Insufficient Complaint. — A complaint in a prosecution for cruelty to an animal committed by an agent, servant or employee, under N. J. Laws (1880), § 13, "Cruelty to Animals," charging that defendant "did by his agent and employee, cruelly torture, torment and beat one living animal, to wit: one mule," etc., "and did by such agent, beat such mule by striking him many times with a heavy whip, using the butt end," etc., "besides kicking the mule many times," was held insufficient, because it does not charge that the defendant did, by his agent, servant or employee, cause or procure, or was active in some way in causing or procuring, the cruelty complained of to be committed. Roeber *v.* Society, etc., 47 N. J. L. 237.

1. *Massachusetts.* — Pub. Stat. (1882), c. 207, § 53. See also *supra*, note 1, p. 995.

2. The matter to be supplied within [ ] will not be found in the reported case.

3. **Requisites of Indictment** — *Generally.* — Consult note 1, p. 995, *supra.*

Animals in Defendant's Charge. — An allegation that the defendant had the charge and custody of the animal is necessary in an indictment for failing to provide proper food, etc. State *v.* Haskell, 76 Me. 399; State *v.* Spink, (R. I. 1896) 36 Atl. Rep. 91. See also Com. *v.* Whitman, 118 Mass. 458.

But a general averment that the defendant had the charge and custody of the animal is sufficient, without charging the custody "as owner or otherwise," or otherwise defining it. State *v.* Clark, 86 Me. 194.

Unnecessarily. — The omission of the word "unnecessarily" renders the indictment insufficient. Ferrias *v.* People, 71 Ill. App. 559.

Time. — A count in a complaint charging the defendant with neglecting to provide certain oxen with proper food, drink and protection from the first to the fourteenth day of a certain month, charges but a single offense, and properly charges it as a continuing one. State *v.* Bosworth, 54 Conn. 1.

Forms Held Sufficient. — A complaint which charged, omitting the formal parts, that the defendant during a certain period of time "was the person having the charge and custody of a certain animal, to wit, a *horse*, and it was then and during the whole time aforesaid the duty of the said *Rodney Edmands* to provide the said *horse* with proper shelter and protection from the weather; and that the said *Rodney Edmands* did then and during the whole time aforesaid there unnecessarily and cruelly fail to provide the said *horse* with proper shelter and protection from the weather," etc., was held to clearly and sufficiently describe an offense under Mass. Pub. Stat. (1882), c. 207, § 52. The words "and cruelly" were mere surplusage. Com. *v.* Edmands, 162 Mass. 517.

In State *v.* Clark, 86 Me. 194, the following form was held sufficient, to wit:

"*Eben N. Perry*, on the *twelfth* day of *January*, in the year of our Lord one thousand eight hundred and *ninety-three*, in behalf of said state, on oath complains that *Frederick A. Clark*, of *Portland*, in said county, on the *eleventh* day of *January*, A. D. 1893, at said *Portland*, then and there having the custody and control of a certain horse, did then and there unnecessarily fail to provide such horse with proper shelter and protection from the weather, against the peace of the State, and contrary to the

1. Generally.

Form No. 6751.[1]

(*Commencing as in Form No. 6744, and continuing down to* *) having then and there the charge and custody of a certain *horse*, did then and there unlawfully and unnecessarily fail to provide the said *horse* with proper food and drink (or *shelter* or *protection from the weather*), against the peace (*concluding as in Form No. 6744*).

2. Impounding Without Food and Water.

Form No. 6752.[2]

In the *Superior* Court of the County of *Sacramento*, State of *California*, *Monday*, the *third* day of *February*, A. D. 1896.

The People of the State of California
against
John Doe.

John Doe is accused by the grand jury of the county of *Sacramento*, state of *California*, by this indictment, of a misdemeanor committed as follows: The said *John Doe*, on the *fifteenth* day of *March*, A. D. eighteen hundred and *ninety-eight*, at the county of *Sacramento*, aforesaid, did impound (or *cause to be impoundea*) in a certain pound there situate *two* certain *cows*, and did then and there unlawfully fail to supply the said *cows* during such confinement as aforesaid with a sufficient quantity of good and wholesome food and water, contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the people of the state of *California*.

Daniel Webster, District Attorney.

3. Exposing Team to Cold and Stormy Weather.

Form No. 6753.[3]

State of *Nebraska*,
County of *Colfax*. } ss.

State of Nebraska
against
John Doe.

At the *February* Term, A. D. 1898, of the *District* Court of the *Fourth* Judicial District of the State of *Nebraska*, within and for the County of *Colfax*.

At the *February* term of the *District* Court of the *Fourth* Judicial District of the state of *Nebraska*, within and for the county of *Colfax*, in said state, in the year of our Lord one thousand eight hundred and *ninety-eight*, the grand jurors, chosen, selected and sworn in and for the county of *Colfax*, in the name and by the authority of the state of *Nebraska*, upon their oaths present,* that *John Doe*, late of the county aforesaid, on the *first* day of *January*, in the year of our Lord one thousand eight hundred and *ninety-eight*, in the county of

form of the statute in such case made and provided."

1. *Massachusetts.* — Pub. Stat. (1882), c. 207, § 52. See also *supra*, note 1, p. 995, and note 3, p. 1002.

2. *California.* — Pen. Code (1897), p. 510, § 12. See also *supra*, note 3, p. 1002.

3. *Nebraska.* — Comp. Stat. (1897), § 6718. See also *supra*, note 3, p. 1002.

Colfax aforesaid, and state of *Nebraska*, did wilfully, unlawfully and inhumanely allow his team, to wit, two horses (or *mules* or *oxen*), the property of him, the said *John Doe*, to stand tied upon the street for four consecutive hours at a time in cold and stormy weather, to the injury of said team, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of *Nebraska*.

Daniel Webster, County Attorney.

VI. IN TRANSPORTING.

1. Generally.

Form No. 6754.[1]

(*Commencing as in Form No. 6744, and continuing down to* *) having the care and custody of a certain *horse*, did carry the said *horse* (or *cause the said horse to be carried*) in and upon a certain wagon (*or other vehicle or otherwise*) in an unnecessarily cruel and inhuman manner, by then and there placing the said *horse* upon its back in and upon the said wagon, and fastening it in this position by ropes in such a manner that the said *horse* was made to suffer great pain and torture by reason of being so fastened as aforesaid, and by then and there driving the said wagon containing the said *horse* so placed and fastened as aforesaid, against the peace (*concluding as in Form No. 6744*).

2. By a Common Carrier.

Form No. 6755.[2]

(*Commencing as in Form No. 6753, and continuing down to* *) that *The Pleasant Valley Railroad Company* is a corporation duly incorporated under the laws of this state, and is operating a line of railroad in said county of *Colfax*; and that on the *first* day of *January*, in the year of our Lord one thousand eight hundred and *ninety-eight*, in the county of *Colfax* aforesaid, and state of *Nebraska*, in carrying and transporting live stock, to wit, *two hundred* head of *steers*, on its said railway, did unlawfully detain such stock in cars for a longer continuous period than *twenty-four* hours, without supplying the said stock with food and water; contrary to the form (*concluding as in Form No. 6753*).

VII. IN WORKING.

1. Overdriving.

Form No. 6756.

(Precedent in Friedline *v.* State, 93 Ind. 370.)

State of *Indiana*, *Randolph* County, ss:

Before me, *Jacob Dick*, a justice of the peace for said county, came

1. *Massachusetts.* — Pub. Stat. (1882), c. 207, § 53. See also *supra*, note 1, p. 995.

2. *Nebraska.* — Comp. Stat. (1897), § 6723. See also *supra*, note 1, p. 995.

Oliver Y. Sackman, who, being duly sworn according to law, deposeth and saith; That on or about the *26th* day of *June*, 1*881*, at the county of [*Randolph*][1] and state of *Indiana*, one *Albert Friedline*, late of said county, did then and there unlawfully and cruelly beat, torture and overdrive a team of horses, mares or geldings, at said county, said horses, mares or geldings being then and there the property of one ———, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of *Indiana*.

[*Oliver Y. Sackman.*

Subscribed and sworn to before me, this *twelfth* day of *July*, 1*881*.

(SEAL) *Jacob Dick*, J. P.][2]

Form No. 6757.

(Precedent in State *v.* Haley, 52 Mo. App. 521.)[3]

State of *Missouri*, } ss.
County of *Monroe*. }

The State of Missouri }
v. }
William Haley. }

Before *R. E. L. Sevier*, a justice of the peace, within and for *Monroe* township, *Monroe* county, *Missouri*.

William T. Ragland, assistant prosecuting attorney within and for the county of *Monroe* in the state of *Missouri*, informs the justice that one *William Haley*, on or about the *thirteenth* day of *March*, A. D. 1*891*, at the said county of *Monroe*, did then and there unlawfully torture *two* domestic animals, to wit, *two black mares*, the property of *E. P. Nelson* and *D. D. Nelson*, by then and there forcing said animals through mud and over miry roads with violent speed, by cruelly whipping them, the said mares, when they were greatly distressed, fatigued and injured by reason of having been previously driven over a great distance of muddy roads, and with great speed, against the peace and dignity of the state.

William T. Ragland, assistant prosecuting attorney within and for the county of *Monroe*, as aforesaid, further informs the justice that *William Haley*, on or about the *thirteenth* day of *March*, 1*891*, at the said county of *Monroe*, did then and there unlawfully and cruelly outdrive *two* domestic animals, to wit, *two black mares*, by then (and there) driving said animals through mud and over miry roads with violent speed, by whipping and beating them, the said mares, when

1. The name of the county in which the offense was committed was omitted in the above affidavit, which was objected to on that ground, but the court held that the omission was immaterial, as the venue was sufficiently shown by the name of the county in the title, and the use of the word "there" in the body of the affidavit, which must be construed as referring to the venue stated in the title. The name of the county has been supplied to overcome the defect urged.

2. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

3. The state appealed from the judgment of the circuit court quashing this information, and the judgment was reversed.

they were greatly distressed, fatigued and injured by reason of having been previously driven with great speed, a long distance over muddy roads, against the peace and dignity of the state.

William T. Ragland,
Assistant Prosecuting Attorney.

2. Overloading.

Form No. 6758.

(Precedent in People *v.* Tinsdale, 10 Abb. Pr. N. S. (N. Y. Gen. Sess.) 374.)[1]

City and County of *New York*, ss.

The jurors of the people of the state of *New York*, in and for the body of the *city and* county of *New York*, upon their oath present: That *George W. Tinsdale*, late of the *first* ward of the city of *New York* in the county of *New York* aforesaid, he then and there being a conductor of a passenger car, on the Bleecker-street and Fulton Ferry Railroad of the city of *New York*, and *Arthur Taggart*, late of the same place, he then and there being the driver of said passenger car of said railroad, on the *second* day of *January*, in the year of our Lord one thousand eight hundred and *sixty-eight*, at the ward, city and county aforesaid, with force and arms did unnecessarily overload and procure said passenger car to be overloaded, then and there being attached to said passenger car *two* living creatures, to wit, *two horses*; by means whereof on a certain portion of the route of the said railroad the *horses* so attached to said passenger car were unable to draw said passenger car, but were, by reason of the premises aforesaid, overloaded, overdriven, tortured and tormented; against the form of the statute in such case made and provided, and against the peace of the people of the state of *New York*, and their dignity.

A. Oakey Hall, District Attorney.

3. When Unfit for Labor.

Form No. 6759.[2]

(*Commencing as in Form No. 6744, and continuing down to* *) having the charge and custody of a certain *horse*, which said *horse*, by reason of sores upon its back and legs, was then and there unfit for labor, did then and there unlawfully and cruelly drive (or *work*) said *horse*, against the peace (*concluding as in Form No. 6744*).

1. This form sufficiently charged an offense under N. Y. Laws (1867), c. 375. See also *supra*, note 1, p. 995.

2. *Massachuseits.* — Pub. Stat. (1882), c. 207, § 53. See also *supra*, note 1, p. 995. This form is substantially the same as the one held good in Com. *v.* Porter, 164 Mass. 576. In that case it was moved to quash the indictment on the ground that there was no allegation that the defendant knew of the unfitness of the horse for labor, but it was held that no such allegation was necessary.

VIII. PIGEON SHOOTING.

Form No. 6760.[1]

State of *Maine*.

Cumberland, ss. At the *Superior* Court begun and held at *Portland*, within and for the said county of *Cumberland*, on the *first Tuesday* of *September*, in the year of our Lord one thousand eight hundred and *ninety-eight*.

The jurors for said state, upon their oath present, that *John Doe*, of said *Portland*, in the county of *Cumberland*, *merchant*, at *Deering*, in the

1. It is provided by statute in *Maine* (Rev. Stat. (1883), c. 124, § 30), that "whoever keeps or uses any live pigeon, fowl or other bird for a target, or to be shot at, either for amusement or as a test of skill in marksmanship, and whoever shoots at any bird as aforesaid, * * * shall be punished," etc.

Similar statutes are as follows:

Connecticut. — Gen. Stat. (1888), § 2548.

Massachusetts. — Pub. Stat. (1882), c. 207, § 59.

Michigan. — How. Anno. Stat. (1882), § 9392.

Mississippi. — Anno. Code (1892), § 1021.

New Hampshire. — Pub. Stat. (1891), c. 267, § 7.

Rhode Island. — Gen. Laws (1896), c. 114, §§ 11, 17.

Vermont. — Stat. (1894), § 4995.

In several cases prosecutions for pigeon shooting have been brought under the general statutes prohibiting cruelty to animals, but not always with success. Thus under the *Missouri* statute (Rev. Stat. (1889), § 3896), making it a misdemeanor for any person to "needlessly kill any living creature," a complaint charging that defendant "did unmercifully kill certain living creatures by shooting them with a shot-gun for the purpose of displaying his skill as a marksman, to wit, *twenty-five pigeons*, contrary to the form of the statute," etc., was held not to charge an offense. State *v.* Bogardus, 4 Mo. App. 215.

So also where an indictment charged that the defendant did "unlawfully, wantonly and cruelly shoot, wound, torture, abuse and ill-treat a certain pigeon," etc., and the evidence showed that the defendant at a shooting match shot at two pigeons liberated from a trap, killing one and wounding the other, the latter being immediately afterwards killed, and both birds sold for food, it was held that the defendant was not guilty under the *Pennsylvania* statute making it a misdemeanor for any person to "wantonly or cruelly illtreat * * * or otherwise abuse any animal." Com. *v.* Lewis, 140 Pa. St. 261.

But in Waters *v.* People, 23 Colo. 33, the plaintiff in error was convicted in the lower court upon the following complaint, taken from the files in the case:

"State of *Colorado*, } ss.
El Paso County. }

The complaint and information of *Francis B. Hill* made before *William Saxton*, Esq., one of the Justices of the Peace in and for said County, on the *12th* day of *January*, A. D. 1895, who, being duly sworn, on oath says that *Frank Waters*, on the *12th* day of *January*, A. D. 1895, in said county, did unnecessarily mutilate and torture certain animals, to wit, doves, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the People of the State of *Colorado*.

Francis B. Hill.

Subscribed and sworn to before me this *12th* day of *January*. A. D. 1895.

William Saxton, (SEAL)
Justice of the Peace."

On appeal the conviction was affirmed. The defendant below was a member of a gun club, and the offense charged consisted of shooting doves for amusement as they were released from a trap. The case was a test case to determine whether this was within the inhibition of the statute (Mills' Anno. Stat. Colo. (1891), § 104), and the court held that it was. No question was raised as to the sufficiency of the complaint.

For a similar decision in *North Carolina* see State *v.* Porter, 112 N. Car. 887.

said county of *Cumberland*, on the *first* day of *August*, in the year of our Lord one thousand eight hundred and *ninety-eight*, did then and there unlawfully keep and use a large number, to wit, *twenty* live pigeons (*or fowls or other birds, as the case may be*) for targets (or *to be shot at for amusement* or *as a test of skill in marksmanship*), against the peace of said state and contrary to the form of the statute in such case made and provided.

Richard Roe, Foreman.

Daniel Webster, County Attorney.

CRUELTY TO CHILDREN.

By Jos. R. Long.

I. In General, 1009.
II. Exposing to Inclemency of Weather, 1010.
III. Neglecting to Provide Support, 1010.
1. *Against Parent*, 1010.
2. *Against Any Person Having Control of Child*, 1012.
IV. Illegal Employment, 1013.
1. *In Acrobatic, Mendicant or Obscene Employment*, 1013.
2. *In Manufacturing or Mercantile Establishment*, 1014.
3. *In Mining*, 1015.
4. *Overworking in Factories*, 1016.
5. *Violating School Law*, 1016.

CROSS-REFERENCES.

For Forms in Prosecutions for Abandoning a Child, see the title ABANDONMENT OF CHILDREN, vol. 1, p. 1.
For Forms in Prosecutions for Assault, see the title ASSAULT, vol. 2, p. 228.
For matters of Procedure, see the title CRUELTY TO ANIMALS AND CHILDREN, 5 Encyclopædia of Pleading and Practice, p. 695.

I. In General.

Form No. 6761.[1]

State of *New Jersey*, } ss.
County of *Mercer*. }

John Doe of the *village* of *Princeton* in the county of *Mercer* and state of *New Jersey*, upon his oath (or *affirmation*) complains that on the *third* day of *January*, A. D. 1898, at the *village* of *Princeton* in the county aforesaid:

Richard Roe, of *Princeton* aforesaid, being then and there the father

1. *New Jersey*. — Gen. Stat. (1895), p. 1720, § 38.
See also similar statutes as follows:
Colorado. — Laws (1891), p. 60, § 3.
Georgia. — 3 Code (1895), § 708.
Illinois. — Starr & C. Anno. Stat. (1896), p. 1262, par. 125.
Kansas. — Gen. Stat. (1889), § 2170.
Kentucky. — Stat. (1894), § 327.
Minnesota. — Stat. (1894), §§ 6540, 8014.
Missouri. — Rev. Stat. (1889), § 3499.
Montana. — Pen. Code (1895), § 473.
New Hampshire. — Pub. Stat. (1891), c. 265, § 1.
New Jersey. — Gen. Stat. (1895), p. 1717, § 26.
Pennsylvania. — Bright. Pur. Dig. (1894), p. 1017, § 25.
Washington. — Ballinger's Anno. Codes & Stat. (1897), § 7071.

of one *Robert Roe*, a child of tender years, to wit, of the age of *eight* years, and having the care, custody and control of said child, did unlawfully, wilfully, maliciously and in a cruel and inhuman manner beat, whip and punish said child, so as to endanger its life and injure its health, by stripping said child of his clothing and suspending him by his thumbs and then striking him *fifty* blows on the bare back with a strap of leather and metal.

And therefore, he prays that the said *Richard Roe* may be apprehended and held to answer to said complaint, and dealt with as law and justice may require.

John Doe.

Sworn (or *affirmed*) and subscribed the *fifth* day of *January*, 1*898*, before me, *Abraham Kent*, Justice of the Peace.

II. Exposing to Inclemency of Weather.

Form No. 6762.[1]

State of *Illinois*, } ss. Of the *September* Term of the *McLean Circuit*
McLean County. } Court, in the year of our Lord one thousand eight hundred and *ninety-seven.*

The grand jurors, chosen, selected and sworn in and for the county of *McLean*, in the name and by the authority of the people of the state of *Illinois*, upon their oaths present that *John Doe*, on the *first* day of *August*, in the year of our Lord one thousand eight hundred and *ninety-seven*, at the city of *Bloomington*, in the county of *McLean* aforesaid, did then and there unlawfully, feloniously,[2] wilfully and unnecessarily expose to the inclemency of the weather one *David Doe*, then and there being the child (or *apprentice*) of the said *John Doe*, and under his legal control, and then and there did thereby injure the said child (or *apprentice*) in health and limb, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the same people of the state of *Illinois*.

Alexander Hamilton, State's Attorney.

III. Neglecting to Provide Support.

1. Against Parent.

Form No. 6763.

(Precedent in Reg. *v.* Chandler, Dears. C. C. 453.)[3]

[*Kent*, to wit.] The jurors for our lady the Queen, upon their oath present that during all the time hereinafter in this indictment

1. *Illinois.* — Starr & C. Anno. Stat. (1896), p. 1262, par. 125.

See also similar statutes as follows:

Colorado. — Laws (1891), p. 60, § 3.

Kentucky. — Stat. (1894), § 327.

Tennessee. — Code (1896), § 6466.

Intent. — Under the *Tennessee* statute the exposure must have been "with intent to injure him [the child] in health or limb." Tenn. Code (1896), § 6466.

2. **Feloniously.** — Only under the statutes of *Illinois* and *Tennessee* is the offense a felony. See statutes cited *supra*, note 1.

3. The defendant having been found

mentioned one *Elizabeth Chandler* was a single woman and was the mother of a certain *male* child known by the name of *Albert* of very tender age and wholly unable by reason of his tender age to provide himself with food or nourishment or to take care of himself, and that during all the time aforesaid it was the duty of the said *Elizabeth Chandler* to protect, shelter and nourish the said child, and to provide for and give and administer to the said child suitable food in proper and sufficient quantities for the nourishment and support of his body and the preservation of his health, she, the said *Elizabeth Chandler*, during all the time aforesaid being able and having the means to perform and fulfil her said duty. And the jurors aforesaid upon their oath aforesaid further present that the said *Elizabeth Chandler*, late of the parish of *Speldhurst* in the county of *Kent*, well knowing the premises, and not regarding her duty in that behalf, but being a person of unfeeling and inhuman disposition, on the *first* day of *October*, in the year of our Lord one thousand eight hundred and *fifty-four*, and continually from thence until the *twenty-second* day of *January*, in the year of our Lord one thousand eight hundred and *fifty-five*, at the parish aforesaid, in the county aforesaid, did unlawfully, wilfully and on purpose give to the said child food and nourishment in quantities wholly inadequate and insufficient for the support and preservation of the body and health of the said child, and did unlawfully [and] wilfully omit, neglect and refuse to provide for and to give to the said child meat, drink or food in any sufficient or proper quantity whatsoever, whereby, by reason of the premises last aforesaid, the life of the said child was endangered, and the said child became and was sick, ill, weak, starved and greatly emaciated in his body,[1] to the great damage of the said child, and against the peace of our said lady the Queen, her crown and dignity.

Form No. 6764.

(Precedent in Com. *v.* Burlington, 136 Mass. 435.)[2]

[*Commonwealth* of *Massachusetts.*

To the Justice of the *First District* Court of the *Eastern Middlesex* District, holden in said District in the City of *Malden*, for the transaction of criminal business, within and for said District.

guilty on this indictment, the conviction was quashed, because there was no evidence to show that the defendant had the means to maintain the child as alleged in the indictment.

For a similar indictment charging abandonment see Reg. *v.* Phillpott, 6 Cox C. C. 140, Dears. C. C. 179.

1. Neglect on the part of a parent to provide an infant child with necessary food and clothing is not a misdemeanor at common law unless some actual injury is done to the child; and in an indictment for that offense an averment that the child was actually injured is a necessary and material allegation and must be proved. Reg. *v.* Phillpott, 6 Cox. C. C. 140, Dears. C. C. 183.

2. This complaint was held sufficient under Mass. Stat. (1882), c. 270, § 4, and is good under this statute as amended by Stat. (1885), c. 176, and Stat. (1893), c. 262.

Similar statutes exist in the following states, to wit:

Arizona. — Pen. Code (1887), § 442.
California. — Pen. Code (1897), § 270.
Idaho. — Rev. Stat. (1887), § 6782.
Kentucky. — Stat. (1894), § 328.
Minnesota. — Stat. (1894), § 6536.
Montana. — Pen. Code (1895), § 470.
Utah. — Rev. Stat. (1898), § 4224.

John Doe, of *Wakefield*, in the county of *Middlesex*, on behalf of the *commonwealth* of *Massachusetts*, on oath, complains][1] that *Burkner F. Burlington*, late resident of *Wakefield*, in the county of *Middlesex*, is the father of one *Mary L. Burlington*, a minor child under the age of twenty-one years, and that the said *Burkner F. Burlington*, on the *first* day of *July*, in the year of our Lord one thousand eight hundred and *eighty-two*, at *Wakefield*, in the county of *Middlesex*, did knowingly and unreasonably neglect to provide for the support of the said *Mary L. Burlington*, the minor child of him, the said *Burkner F. Burlington*, and that the said *Burkner F. Burlington*, the father of the said *Mary L. Burlington*, the minor child aforesaid, from the said first-mentioned day to the day of making this complaint, at *Wakefield* aforesaid, in the county aforesaid, knowingly and unreasonably has neglected to provide for the support of the said *Mary L. Burlington*, the minor child aforesaid, against the peace of the said *Commonwealth* and the form of the statute in such case made and provided.

[*John Doe.*

Middlesex, ss. Received and sworn to the *first* day of *August*, in the year of our Lord one thousand eight hundred and *eighty-two*, before said court.

John Hancock, Clerk.][1]

2. Against Any Person Having Control of Child.[2]

Form No. 6765.

(Precedent in Cowley *v.* People, 21 Hun (N. Y.) 417.)[3]

[Court *of General Sessions* of the *City and* County of *New York.*

The People of the State of New York }
against
Edward Cowley. }

The grand jurors of the *city and* county of *New York*, by this indictment, accuse *Edward Cowley* of the crime of neglecting to supply a child in his custody with proper food, committed as follows:][1]

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. **Precedents.** — See also forms in Rex *v.* Friend, R. & R. C. C. 20; Rex *v.* Ridley, 2 Campb. 650.

3. This indictment contained five counts, but the first and second counts alone were resorted to. The indictment was drawn under the *New York* Act of 1876, c. 122, § 4, providing that "whoever, having the care or custody of any child, shall wilfully cause or permit the life of such child to be endangered, or the health of such child to be injured, or who shall wilfully cause or permit such child to be placed in such a situation that its life may be endangered, or its health shall be likely to be injured, shall be guilty of a misdemeanor."

Similar statutes are to be found as follows:

Colorado. — Laws (1891), p. 60, § 3.

Illinois. — Starr & C. Anno. Stat. (1896), p. 1263, par. 129.

Minnesota. — Stat. (1894), § 6537.

Missouri. — Rev. Stat. (1889), § 3499.

New Jersey — Gen. Stat. (1895), p. 1717, § 26; p. 1720, § 38.

New York. — Birds. Rev. Stat. (1896) p. 420, § 44; p. 421, § 45.

Pennsylvania. — Bright. Pur. Dig. (1894), p. 1017, § 25.

The statutes cited above have reference only to those who have the child under their charge and control. In *Georgia* and *Washington*, however, it is provided that whoever shall deprive a

First count. That *Edward Cowley*, late of the *nineteenth* ward of the city of *New York*, in the county of *New York* aforesaid, being an evilly-minded and cruelly-disposed person, and well knowing and intending the premises hereinafter set forth, unlawfully, wilfully and wickedly, on the *twenty-sixth* day of *December*, in the year of our Lord one thousand eight hundred and *seventy-nine*, at the ward, city and county aforesaid, did neglect to provide a certain child, then and there known by the name of *Louis Kulkusky*, otherwise called *Louis Victor*, and of which child he then and there had the care and custody, and which said child was then and there in his custody, and was an infant of tender age, to wit, of the age of *five* years, with, and to give and administer unto the said child, proper, wholesome and sufficient food, meat, drink, warmth, clothing, bed-covering and means of cleanliness, and did therein and thereby wilfully cause and permit the health of said child to be injured, against the form of the statute in such case made and provided, and against the peace of the people of the state of *New York* and their dignity.

Second count. And the jurors aforesaid upon their oath aforesaid do further present: That afterwards, to wit, on the day and in the year aforesaid, at the ward, city and county aforesaid, the said *Edward Cowley*, wilfully and wickedly, a certain child then and there known by the name of *Louis Kulkuski*, otherwise called *Louis Victor*, and of which child he then and there had the care and custody, and which said child was then and there in his custody, and was an infant of tender age, to wit, of the age of *five* years, and which said child theretofore had been and then was diseased, sick and ailing in its body and limbs, and then and there required proper medicine and medical attendance, did wilfully neglect to provide with, and to give and administer unto said child due, proper and sufficient medicine and medical attendance and care, when so as aforesaid diseased, sick and ailing, and did therein and thereby wilfully cause and permit the health of said child, to wit, the infant aforesaid, to be injured, against the form of the statute in such case made and provided, and against the peace of the people of the state of *New York* and their dignity.

[*B. K. Phelps*,
District Attorney of the *City and* County of *New York*.][1]

IV. ILLEGAL EMPLOYMENT.

1. In Acrobatic, Mendicant or Obscene Employment.

Form No. 6766.[2]

In the *Superior* Court of the *City and* County of *San Francisco*, State of *California*.

child of necessary food or clothing shall be punished, etc.

Georgia. — 3 Code (1895), § 708.

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 7071.

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. This form is drawn under Cal. Pen. Code (1897), § 272, which provides that "Any person, whether as parent, relative, guardian, employer or otherwise, having in his care, custody or

The People of the State of California, plaintiff,
against
Richard Roe, defendant.

Richard Roe is accused by the district attorney of the said *city and* county by this information of the crime of giving away and apprenticing for the purpose of *rope-walking* a child under the age of *sixteen*[1] years, in his care, custody and control, committed as follows: The said *Richard Roe*, on the *first* day of *January*, A. D. 1898, at the said *city and* county of *San Francisco*, and before the filing of this information, was the father of one *Robert Roe*, a child under the age of *sixteen* years, to wit, of the age of *fourteen* years, and on said date did unlawfully give away and apprentice to one *Samuel Short* the said *Robert Roe* for the vocation, use, occupation, calling, service and purpose of *rope-walking*, contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the people of the state of *California*.

Dated *February 1*, A. D. 1898.

Daniel Webster,
District Attorney of said *City and* County of *San Francisco*.

2. In Manufacturing or Mercantile Establishment.

Form No. 6767.[2]

Newport, Sc. At the court *of Common Pleas* of the State of *Rhode Island and Providence Plantations*, holden at *Newport*, within and for

control any child under the age of sixteen years, who shall sell, apprentice, give away, let out, or otherwise dispose of any such child to any person, under any name, title, or pretense, for the vocation, use, occupation, calling, service, or purpose of singing, playing on musical instruments, rope-walking, dancing, begging, or peddling, in any public street or highway, or in any mendicant or wandering business whatsoever, and any person who shall take, receive, hire, employ, use, or have in custody any child for such purpose, or either of them, is guilty of a misdemeanor."

Similar statutes exist as follows:

Arizona. — Pen. Code (1887), § 444.

Colorado. — Laws (1891), p. 59, §§ 1, 2.

Connecticut.—Gen. Stat. (1888), § 1417.

Georgia. — 3 Code (1895), § 706.

Illinois. — Starr & C. Anno. Stat. (1896), p. 1263, par. 131.

Indiana. — Horner's Stat. (1896), § 6620.

Kansas. — Gen. Stat. (1889), § 2170.

Kentucky. — Stat. (1894), § 326.

Michigan. — How. Anno. Stat. (1882), § 1998.

Minnesota. — Stat. (1894), § 6539.

Montana. — Pen. Code (1895), § 472.

New Hampshire. — Pub. Stat. (1891), c. 265, § 3.

New Jersey. — Gen. Stat. (1895), p. 1717, §§ 27, 28.

New York. — Birds. Rev. Stat. (1896), p. 423, § 48.

Rhode Island. — Gen. Laws (1896), c. 115, §§ 4, 5.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 4587*a*.

Obscene or Indecent Employment. — All the statutes cited above, save those of *Arizona*, *California*, *Kansas* and *Montana*, make it illegal to employ or exhibit a child in an obscene or immoral exhibition.

1. Age. — In most states the age fixed by the statute is sixteen. In *Indiana*, however, the age is fifteen; in *Colorado*, *Illinois*, *Kansas*, *New Hampshire* and *Wisconsin*, fourteen; and in *Connecticut* and *Georgia*, twelve.

In *New Jersey* it is made an offense so to hire, etc., for the purpose of rope-walking, etc., where the child is under fifteen, but for street singing or other mendicant pursuit it is an offense if the child is under eighteen.

2. *Rhode Island.* — Gen. Laws (1896), c. 68, §§ 1, 2, 12. Similar statutes exist as follows:

the county of *Newport*, on the *first Monday* of *February*, in the year of our Lord one thousand eight hundred and *ninety-seven*.

The grand jurors for the state of *Rhode Island and Providence Plantations*, in and for the county of *Newport*, upon their oaths present, that *John Doe*, late of *Newport*, in said county, upon the *first* day of *January*, in the year of our Lord one thousand eight hundred and *ninety-seven*, with force and arms, at *Newport*, in the county of *Newport* aforesaid, did then and there unlawfully, knowingly and wilfully employ and suffer and permit to be employed in a certain dry goods store there situate, known as "*The Yankee Notion*," in which were employed a large number[1] of women and children, to wit, *twenty* women and children, one *David Roe*, a child then under *twelve*[2] years of age, to wit, *ten* years of age, against the form of the statute in such case made and provided, and against the peace and dignity of the state.

Alexander Hamilton, Attorney-General.

3. In Mining.

Form No. 6768.[3]

The State of *Indiana*, *Posey* County, sct:

Before me *Abraham Kent*, a justice of the peace for said county, came *John Doe*, who, being duly sworn according to law, deposeth and saith: That on or about the *first* day of *June*, in the year 18*98*, at the county of *Posey* and state of *Indiana*, one *Samuel Short*, late of said county,* did then and there unlawfully take one *Leonard A. Ford*, a child under the age of *twelve*[4] years, in certain underground works, to wit, a coal mine there being, and did then and there unlawfully employ said *Leonard A. Ford* in mining coal in such mine contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the state of *Indiana*.

John Doe.

Subscribed and sworn to before me this *fifth* day of *June*, 18*98*.

Abraham Kent, J. P. (SEAL)

Connecticut. — Gen. Stat. (1888), §§ 1753–55.

Massachusetts. — Stat. (1894), c. 508, § 13.

Michigan. — How. Anno. Stat. (Supp. 1890), § 1997*c*3.

New Hampshire. — Pub. Stat. (1891), c. 93, § 10.

Wisconsin. — Sanb. & B. Anno Stat. (1889), § 1728*a*.

In *Indiana* it is unlawful for any person, firm, company, corporation or association, engaged in manufacturing iron, steel, nails, metals, machinery or tobacco, to employ or keep at work any child under twelve years of age. Horner's Stat. Ind. (1896), § 2125*a et seq.*

1. Number Employed. — The manufacturing or mercantile establishment, to be within the *Rhode Island* statute, must employ not less than five persons who are women or children. R. I. Gen. Laws (1896), c. 68, § 2. In *Michigan* not less than ten must be employed. How. Anno. Stat. (Supp. 1890), § 1997*c*4.

2. Age. — In *New Hampshire* the age is ten; in *Connecticut*, *Massachuetts* and *Wisconsin*, thirteen.

3. *Indiana.* — Horner's Stat. (1896), § 6623.

Montana. — Pen. Code (1895), § 474.

New Jersey. — Gen. Stat. (1895), p. 1718, § 30.

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 3172.

4. Age. — In *Montana* the age is fourteen years.

4. Overworking in Factories.

Form No. 6769.[1]

(*Commencing as in Form No. 6768, and continuing down to* *) being then and there the owner (or *agent* or *overseer* or *foreman*) of a certain cotton (or *woolen*) factory in said county, did then and there unlawfully employ (or *permit to be employed* or *employ and permit to be employed*), in the said cotton (or *woolen*) factory, of which he, the said *John Doe*, then was the owner (or *agent* or *overseer* or *foreman*) as aforesaid, one *David Roe*, he, the said *David Roe*, then being under the age of *eighteen* years,[2] to wit, of the age of *fourteen* years, for a longer period than *ten* hours[3] in one day, to wit, for a period of *twelve* hours in one day, contrary (*concluding as in Form No. 6768*).

5. Violating School Law.

Form No. 6770.[4]

State of *Maine*.

Kennebec, ss. At the *Superior* Court begun and held at *Augusta*, within and for said county of *Kennebec*, on the *first Tuesday* of *September* in the year of our Lord one thousand eight hundred and *ninety-seven*.

The jurors for the state upon their oath present that *John Doe* of *Augusta*, in the county of *Kennebec*, manufacturer, on the *first* day of *September* in the year of our Lord one thousand eight hundred and *ninety-six*, at *Augusta* aforesaid, being then and there the owner (or *agent* or *superintendent*) of a certain cotton (or *woolen*) manufactory in said *Augusta*, did then and there unlawfully, wilfully and knowingly

1. *Indiana*. — Horner's Stat. (1896), § 2125. See also § 2125*b*.

See also similar statutes as follows:

Connecticut. — Gen. Stat. (1888), § 1745.

Maine. — Rev. Stat. (1883), c. 48, § 15.

Michigan. — How. Anno. Stat. (Supp. 1890), § 1997*c*2.

Minnesota. — Stat. (1894), § 6541.

New Hampshire. — Pub. Stat. (1891), c. 180, §§ 14, 16.

Vermont. — Stat. (1894), § 5146.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 1728.

Employment Before and After Certain Hours. — In *Massachusetts* and *Minnesota* statutes exist prohibiting the employment of children under a certain age before the hour of seven in the morning and after the hour of six at night.

Massachusetts. — Stat. (1894), c. 508, § 14.

Minnesota. — Stat. (1894), § 6339.

2. **Age.** — In *Connecticut*, *Maine* and *Minnesota* the age is sixteen years; in *Vermont*, fifteen; in *Michigan*, fifteen for a female and fourteen for a male.

3. **Hours of Employment.** — In *Michigan* nine hours, and in *Wisconsin* eight hours, is the limit of a day's work.

4. This form is drawn under Me. Rev. Stat. (1883), c. 48, §§ 13, 14.

Similar statutes exist as follows:

Connecticut. — Gen. Stat. (1888), §§ 2105, 2106.

Massachusetts. — Stat. (1894), c. 508, § 14.

New Hampshire. — Pub. Stat. (1891), c. 93, §§ 11, 12.

Rhode Island. — Gen. Laws (1896), c. 64, §§ 5, 10.

Vermont. — Stat. (1894), §§ 712, 713.

In *Maine* an offender is to be proceeded against by indictment, and the county attorney shall prosecute (Rev. Stat. (1883), c. 48, § 14), while in the other states the prosecution is usually by complaint before a justice or municipal court, and by truant officers where these officers exist.

employ (or *suffer to work* or *employ and suffer to work*) in said manufactory one *David Lee*,-a child then under *tweive* (or *over twelve and under fifteen*) years of age, to wit, *ten* (or *fourteen*) years of age, the said *David Lee* not having attended a public school or a private school taught by a person qualified to be a public teacher for four (or *three*) months of the year preceding such employment as aforesaid, against the peace of said state, and contrary to the form of the statute in such case made and provided.

Wolfe Londoner, Foreman.

Ralph Irons, County Attorney.

DAMAGES, OFFER TO LIQUIDATE.

By Thomas E. O'Brien.

I. The Offer, 1018.
II. The Acceptance, 1019.

CROSS-REFERENCES.

For Forms relating to Offer to Allow Judgment, see the title COMPROMISE, ante, p. 12.
For Forms relating to Offer to Confess Judgment, see the title CONFESSION OF JUDGMENT, ante, p. 46.

I. The Offer.

Form No. 6771.[1]

Supreme Court, *Albany* County.

John Doe, plaintiff,
against
Richard Roe, defendant.

The above named defendant *Richard Roe* hereby offers that if he fails in his defense in the above action now pending in this court, the

1. **Statutory Provisions.**—In *New York*, in an action to recover damages for breach of contract, the defendant's attorney may, with the answer, serve upon the plaintiff's attorney a written offer that if the defendant fails in his defense the damages may be assessed at a specified sum. If the plaintiff serves notice that he accepts the offer with or before the notice of trial, and damages are awarded to him on the trial, they must be assessed accordingly. Code Civ. Proc., § 736 (Birds. Rev. Stat. (1896), p. 2198, § 1). If the plaintiff does not accept the offer, he cannot prove it upon the trial; but if the damages awarded to him do not exceed the sum offered, defendant is entitled to recover the expenses, necessarily incurred by him in preparing for trial, of the question of damages. The expenses must be ascertained and the amount thereof determined by the judge, or the referee by or before whom the cause is tried. Code Civ. Proc., § 737, as *amended* Laws (1877), c. 416 (Birds. Rev. Stat. (1896), p. 2198, § 2).

Similar or analogous provisions exist in the following states:

Arkansas. — Sand. & H. Dig. (1894), §§ 5901, 5902.

Iowa. — Code (1897), §§ 3820, 3821.

Kentucky. — Bullitt's Civ. Code (1895), §§ 635, 636.

Michigan. — How. Anno. Stat. (1882), §§ 7373, 7374.

Missouri. — Burns' Anno. Pr. Code (1896), § 566.

North Carolina. — Code (1883), §§ 575, 576.

North Dakota. — Rev. Codes (1895), §§ 5641, 5642.

South Carolina. — 2 Rev. Stat. (1893), §§ 387, 388.

South Dakota. — Dak. Comp. Laws (1887), §§ 5248, 5249.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), §§ 2790, 2791.

plaintiff's damages may be assessed at the sum of *five hundred* dollars.

Oliver Ellsworth, Defendant's Attorney,
No. *106 State* street, *Albany, New York.*[1]

Dated this *fifteenth* day of *March*, 1898.

To *Jeremiah Mason*, Attorney for Plaintiff.

(*Affidavit of attorney's authority.*)[2]

II. THE ACCEPTANCE.

Form No. 6772.[3]

(*Title of court and cause as in Form No. 6771.*)

To *Oliver Ellsworth*, Attorney for *Richard Roe*:

You will please take notice that the plaintiff above named hereby accepts the offer of *Richard Roe*, the defendant above named, that if he fails in his defense in the above action, plaintiff's damages may be assessed at *five hundred* dollars.

Jeremiah Mason, Attorney for Plaintiff,
No. *106 State* Street, *Albany, New York.*[1]

Dated this *fifteenth* day of *March*, 1898.

(*Affidavit of attorney's authority.*)[4]

1. Hun's Court Rules (1896), No. 2.

2. **Affidavit of Attorney's Authority.** — Unless the offer made as prescribed in the statute is subscribed by the party making it, his attorney must subscribe it and annex thereto his affidavit to the effect that he is duly authorized to make it in behalf of the party. N. Y. Code Civ. Proc., § 740 (Birds. Rev. Stat. (1896), p. 2198, § 5). The following form of affidavit is sufficient:

"*Albany* County, ss. *Oliver Ellsworth* being duly sworn, says that he is the attorney for the defendant *Richard Roe* in the above entitled action and that he is duly authorized by the said *Richard Roe* to make the above offer to liquidate damages in his behalf.

Oliver Ellsworth.

Sworn to before me this *fifteenth* day of *March*, 1898.

(SEAL) *Norton Porter*, Notary Public."

3. **Service of Notice of Acceptance.** — In *New York* the notice of acceptance must be served with or before the notice of trial. Code Civ. Proc., § 736 (Birds Rev. Stat. (1896), p. 2198, § 1). See also list of statutes cited *supra*, note 1, p. 1018.

4. **Affidavit of Attorney's Authority.** — When the acceptance is subscribed by the attorney for the plaintiff, he must annex thereto his affidavit to the effect that he is duly authorized to make it in behalf of the plaintiff. N. Y. Code Civ. Proc., § 740 (Birds. Rev. Stat. (1896), p. 2198, § 5). The following form of affidavit may be used under this section:

"*Albany* County, ss. *Jeremiah Mason*, being first duly sworn, says that he is the attorney for *John Doe*, the plaintiff above named, and that he is duly authorized by the said plaintiff to accept the above offer to liquidate damages.

Jeremiah Mason.

Subscribed and sworn to before me this *fifteenth* day of *March*, 1898.

(SEAL) *Norton Porter*, Notary Public."

DANGEROUS AND VICIOUS ANIMALS.

By W. R. Buckminster.

I. Civil Actions for Injuries, 1020.

1. *By a Bear*, 1021.
2. *By a Bull*, 1023.
3. *By a Dog*, 1024.
4. *By a Horse*, 1025.
5. *By a Ram*, 1026.

II. Criminal Prosecutions, 1027.

1. *Allowing Rabid Dog to Run at Large*, 1027.
2. *Driving or Leading Uncaged Bear*, 1027.
3. *Keeping Unruly Bull Near Public Highway*, 1028.

CROSS-REFERENCES.

For other Forms relating to Animals, see the title ANIMALS, vol. 1, p. 789.

I. Civil Actions for Injuries.[1]

1. Requisites of Complaint or Declaration — *Generally.*— For the formal parts of a complaint, petition or declaration in a particular jurisdiction consult the titles Complaints, vol. 4, p. 1019; Declarations.

For statutes relating to civil liability of the owners or keepers of a vicious or dangerous animal see as follows:

Alabama. — Civ. Code (1886), § 1379.

Georgia. — 2 Code (1895), §§ 3821, 3822.

Tennessee. — Code (1896), §§ 2988, 2989.

Scienter. — The ground of liability is the keeping of the animal after notice, actual or constructive, of its dangerous habits, and such previous knowledge must in general be alleged and proved. Mason *v.* Keeling, 12 Mod. 332; Wormley *v.* Gregg, 65 Ill. 251; Keightlinger *v.* Egan, 65 Ill. 235; Vrooman *v.* Lawyer, 13 Johns. (N. Y.) 339; Van Leuven *v.* Lyke, 1 N. Y. 515. And see also Pickering *v.* Orange, 2 Ill. 338; Partlow *v.* Haggarty, 35 Ind. 178; Murray *v.* Young, 12 Bush (Ky.) 337; Lyons *v.* Merrick, 105 Mass. 71; Hewes *v.* McNamara, 106 Mass. 281; Kelly *v.* Tilton, 2 Abb. App. Dec. (N. Y.) 495; Koney *v.* Ward, 2 Daly (N. Y.) 295; Wheeler *v.* Brant, 23 Barb. (N. Y.) 324; Rider *v.* White, 65 N. Y. 54; M'Caskill *v.* Elliot, 5 Strobh. L. (S. Car.) 196; Oakes *v.* Spaulding, 40 Vt. 347; Coggswell *v.* Baldwin, 15 Vt. 404; Kertschacke *v.* Ludwig, 28 Wis. 430. But where the animal is of a wild and ferocious nature, notice is presumed and need not be alleged. Earl *v.* Van Alstine, 8 Barb. (N. Y.) 630.

An averment that the defendant knew the dog "was of a ferocious and mischievous nature" is conformable to precedent and sufficient after verdict. M'Caskill *v.* Elliot, 5 Strobh. L. (S. Car.) 196. And an averment that defendants kept a dog "wilfully, unlawfully, and maliciously," with full knowledge of his ferocious and vicious habits, and making no effort to protect the public from his vicious attacks, will justify an award of exemplary damages. Cameron *v.* Bryan, 89 Iowa 214.

Negligence of Defendant. — The ground of liability being the keeping of the animal with or after notice of its dangerous habits, no negligence in

1. By a Bear.

Form No. 6773.

(Precedent in Marquet *v.* La Duke, 96 Mich. 596.)[1]

[The *Circuit* Court for the County of *Menominee*.

County of *Menominee*, ss.][2] *Julian Narcisse Marquet*, by his next friend, *Narcisse Marquet*, of the city of *Menominee*, in said county, plaintiff herein, by *Sawyer & Waite*, his attorneys, complains of *Anton La Duke*, defendant herein, of a plea of trespass on the case, filing this declaration, entering rule to plead, etc., as commencement of suit.

For that whereas, the defendant above named, on *October 24*, 1891, and for a long time previous thereto, had occupied and controlled the *Eagle Hotel*, a public house, situated in the city of *Menominee*, *Mich.*; that there were public grounds surrounding said hotel, to which the public was invited, and through which it (the public) was freely permitted to pass; that said *Eagle Hotel*, on said *24th* day of *October*, was occupied as a public house of entertainment, and the grounds about the same were open as a place of recreation to people in a public way, and were unenclosed, free access being given to said grounds from *Ogden* avenue, a public street, on the south, and from *Dunlap* avenue, another public street, upon the north; that upon the said *24th* day of *October*, and for a long time, to wit, for *one* month or more, previous thereto, the defendant kept *two* black bears in the grounds

guarding or securing it need be averred. Woolf *v.* Chalker, 31 Conn. 121; Brooks *v.* Taylor, 65 Mich. 208; May *v.* Burdett, 9 Q. B. 101, 58 E. C. L. 99.

Negativing Plaintiff's Negligence. — It is said to be neither necessary nor customary to insert an averment of due care on the part of the plaintiff. 2 Chit. Pl. 562, 563; 2 Green Pr. 1290; Popplewell *v.* Pierce, 10 Cush. (Mass.) 509; Brooks *v.* Taylor, 65 Mich. 208.

By Monkey. — In May *v.* Burdett, 9 Q. B. 101, 58 E. C. L. 99, the declaration which was held to be sufficient, omitting the formal parts, was as follows: "Before and at the time of the damage and injury hereinafter mentioned to the said *Sophia* the wife of the said *Stephen May*, wrongfully and injuriously kept a certain monkey, he the defendant well knowing that the said monkey was of a mischievous and ferocious nature, and was used and accustomed to attack and bite mankind, and that it was dangerous and improper to allow the monkey to be at large and unconfined: which said monkey, whilst the said defendant kept the same as aforesaid, heretofore and before the commencement of this suit, to wit, on the *2d* of *September*, 1844, did attack, bite, wound, lacerate and injure the said *Sophia*, then and still being the wife of said *Stephen May*, whereby the said *Sophia* became and was greatly terrified and alarmed, and became and was sick, sore, lame and disordered, and so remained and continued for a long time, to wit, from the day and year last aforesaid to the time of the commencement of this suit; whereby, and in consequence of the alarm and fright occasioned by the said monkey so attacking, biting, wounding, lacerating and injuring her as aforesaid, the said *Sophia* has been greatly injured in her health," etc.

1. The defendant in this case appealed from the verdict and judgment rendered against him, but the judgment was affirmed.

See substance of petition in a similar case in Vredenburg *v.* Behan, 33 La. Ann. 627, wherein it was held that where members of an unincorporated club kept a bear on their premises, and the bear slipped his collar and injured a man, who died in consequence; the members of the club were all liable, including one who, being absent, knew nothing of the bear.

2. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

about said hotel, between it and *Ogden* avenue; that said bears were untamed, savage, and ferocious, which was well known to the defendant; that said bears were not confined or excluded from contact with people who passed through said grounds, save and except by a chain fastened to a collar about their necks, and connected to a post in the ground at the other end, said chain being *10* or *12* feet long; that there was a way or road leading from *Ogden* avenue to *Dunlap* avenue, aforesaid, through the grounds above mentioned, and near where the bears aforesaid were placed, along which way, people — men, women and children — and vehicles were allowed and invited to pass by said defendant, in close proximity to said bears, so close that said bears could seize persons passing along the same; that on said *24th* day of *October*, aforesaid, the plaintiff herein, a boy between *five* and *six* years of age, in company with other children, was passing through the grounds contiguous to said *Eagle Hotel*, near where said bears were chained, when, without any negligence on the part of the plaintiff, one of said bears so kept and owned by defendant as aforesaid seized plaintiff in a ferocious manner, with its paws and teeth, and lacerated, bit, bruised and scratched him, making large wounds in his head and body with his claws and teeth, and otherwise lacerated and injured the plaintiff, whereby his under jaw was broken in three places, his left arm broken in two places and shoulder smashed in a frightful manner, and other injuries then and there did to the plaintiff, whereby he has suffered great physical pain and anguish, having to undergo painful surgical operations by reason thereof, being confined to his bed in a critical condition for a long time; that said injuries were caused solely on account of the negligence, carelessness, recklessness, and heedlessness of the defendant, who was well aware and had full knowledge and notice of the ferocious and savage nature and ugly disposition of said bears; that said defendant was negligent, heedless, reckless and careless in keeping said bears in a place so exposed, without providing a watch or guard over them, and without placing a fence or pen around them, and defendant was guilty of recklessness and negligence in keeping said bears in the open grounds, where people could come in contact with them; that it was heedless and reckless to keep said bears in such an exposed place, fastened with a chain as long as the one with which they were fastened on said day; that it was negligent in said defendant to keep said bears anywhere without having them securely guarded and protected, that children of tender years could not come in contact with them; that plaintiff suffered great damage by reason of the biting, scratching, wounding, bruising, breaking and lacerating, as aforesaid, whereby he was caused great pain and suffering, and permanently disabled and crippled, to wit, to the amount of $*10,000*. Therefore the plaintiff demands judgment against the defendant for the sum of $*10,000*, together with the costs in and about this action incurred and expended.

[*Sawyer & White*,
Attorneys for Plaintiff.][1]

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. By a Bull.

Form No. 6774.

(Precedent in Brooks *v.* Taylor, 65 Mich. 209.)[1]

State of *Michigan*, } ss.
County of *Oceana*. }

The *circuit* court for the county of *Oceana*.

Solomon Brooks, plaintiff herein, by *L. G. Rutherford*, his attorney, complains of *Lewis L. Taylor*, defendant herein, in a plea of trespass on the case, filing this declaration as commencement of suit:

For that, whereas, the said defendant heretofore, to wit, on the *first* day of *July*, 1885, at the township of *Leavitt*, in the county of *Oceana*, and from thence for a long space of time, to wit, until and at the time of the damage and injury of the said plaintiff as hereafter mentioned, to wit, at the township and county aforesaid, wrongfully and injuriously did keep a certain bull, the said defendant well knowing that the said bull there was used and accustomed to attack and gore, wound, and injure mankind, to wit, at the township and county aforesaid, and which said bull afterwards, and while said defendant kept the same as aforesaid, to wit, on the *tenth* day of *July*, 1885, at the township of *Leavitt*, in the county of *Oceana* aforesaid, did attack, and with its horns gore and bruise, said plaintiff, and did then and there greatly lacerate, hurt, bruise and wound the back, shoulder, and side of, and cause great internal injury to, the said plaintiff; and thereby he, the said plaintiff, then and there became and was sick, sore, lame, and disordered, and so remained and continued for a long space of time, to wit, for a space of *eight* months, thence next following, during which time the said plaintiff thereby suffered and underwent great pain, and was thereby then and there hindered and prevented from performing and transacting his lawful affairs and business by him during that time to be performed and transacted; and also, by means of the premises, he, the said plaintiff, was thereby then and there put to great expense, costs, and charges, in the whole amounting to a large sum of money, to wit, the sum of *one thousand* dollars, in and about endeavoring to be cured of the said wounds, sickness, lameness and disorder so occasioned as aforesaid, and has been, and is, by means of the premises, otherwise greatly injured and damnified, to wit, at the township and county aforesaid, [and therefore he brings his suit, etc.

L. G. Rutherford, Attorney for Plaintiff.][2]

1. Judgment in this case having resulted in favor of the plaintiff, defendant brought error, but the judgment was affirmed, it being held that the owner's negligence was sufficiently set forth by alleging that he wrongfully and injuriously kept the animal, well knowing that it was used and accustomed to attack and scare, wound and injure mankind, and that the place of keeping need not be stated. It is further held that it is not usual or customary to negative negligence on the part of the plaintiff.

2. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

3. By a Dog.[1]

Form No. 6775.

(8 Wentw. Pl. 437.)

Markham and Le Blanc.

Trin. Term, *59 Geo. III.*

London, to wit. *John Doe* complains of *Richard Roe* being in the custody of the marshal of the marshalsea of our lord the now king, before the king himself, of a plea of trespass on the case; * for that whereas the said *Richard Roe* on the *tenth* day of *May*, A. D. 1809, at *London* aforesaid, knowingly and wilfully kept a certain dog called a bull-dog, which said dog was used and accustomed to bite mankind, he the said *Richard Roe* then and there well knowing that the said dog was so used and accustomed to bite mankind as aforesaid, which said dog being then the dog of the said *Richard Roe* on the *tenth* day of *May*, A. D. 1809, at *London* aforesaid, did furiously seize upon and vehemently bite the said *John Doe*, and by so seizing upon and biting him the said *John Doe*, did so greatly tear, lacerate, mangle, and mar the face of him the said *John Doe* and other parts of the body of the said *John Doe* and otherwise so greatly hurt, injure, and wound him, that the said *John Doe* was not only thereby rendered in great terror and danger of his life, and lost large quantities of his blood, but the said *John Doe* was and is very much bruised, wounded, maimed, and disfigured in his face, and by reason of the said bites, and of the hurts, injuries, wounds, mars, and lacerations thereby occasioned, the said *John Doe* was and became sick and disordered, and so remained sick and disordered continually from that time until the exhibiting the bill of the said *John Doe*, and during all that time suffered and underwent great and excruciating pains and tortures both of body and mind, and was forced to lay out and expend, and hath actually laid out and expended a large sum of money, to wit, the sum of *fifty* pounds of lawful money of Great Britain, in and about his endeavors to effect a cure in this behalf, and to heal the said hurts, injuries, mars, and lacerations, and hath also during the said time, been wholly prevented and hindered from following and transacting his lawful affairs and business, and been otherwise put to great inconvenience, to wit, at *London* aforesaid. To the damage of the said *John Doe* of £50, and therefore he brings his suit, etc.

Pledges to prosecute { *John Den* and *Richard Fenn.*

Form No. 6776.[2]

State of *Indiana*, } ss. *Posey Circuit* Court.
Posey County. } *October* Term, 1897.

1. For other forms of declarations in actions to recover damages for injuries caused by a dog see Hussey *v.* King, 83 Me. 569; Searles *v.* Ladd, 123 Mass. 580; French *v.* Wilkinson, 93 Mich. 323; 2 Chit. Pl. 287.

2. This complaint contains the facts which were held on demurrer to be sufficient in Partlow *v.* Haggarty, 35 Ind. 178.

John Doe, plaintiff,
against
Richard Roe, defendant.

John Doe, plaintiff, complains of *Richard Roe*, defendant, and says that heretofore, to wit, on the *first* day of *February*, 1897, and for a long time prior to said date, the defendant kept a dog which, as he well knew, was accustomed to attack and bite all mankind, yet defendant wrongfully and negligently allowed said dog to go at large without being properly secured. That on said *first* day of *February*, 1897, the said dog, without any fault on the part of said plaintiff, attacked, bit and wounded plaintiff by (*Here state the nature of the injuries received*), by reason whereof the plaintiff became and was sick and disordered for *ten* weeks, during which time he was unable to attend to his business, and incurred in and about his endeavors to effect a cure expenses to the amount of *one hundred and fifty* dollars.

Wherefore plaintiff demands damages for *five hundred* dollars, and for other relief.

Jeremiah Mason, Plaintiff's Attorney.

4. By a Horse.

Form No. 6777.

(Precedent in Popplewell *v.* Pierce, 10 Cush. (Mass.) 509.)[1]

[*Hannah Popplewell*
against
Edwin Pierce.

Middlesex, *Sup.* Ct.
Plaintiff's Declaration.

And the plaintiff says][2] that the defendant, heretofore, to wit, on the *twenty-sixth* day of *January last past*, and from thence, for a long space of time, to wit, until and at the time of the damage and injury to the said plaintiff, as hereinafter mentioned, to wit, at *Lawrence* aforesaid, wrongfully and injuriously did keep a certain horse which was, during all that time, used and accustomed to attack and bite mankind; he, the said defendant, during all that time, well knowing that the said horse was used and accustomed to attack and bite mankind, to wit, at *Lawrence* aforesaid; and which said horse, afterwards and whilst the said defendant so kept the same as aforesaid, to wit, on the *twenty-eighth* day of *January last past*, at *Lawrence* aforesaid, did attack and bite the said plaintiff, and did then and there greatly lacerate, hurt, wound, and bruise the back of the said plaintiff, and thereby she the said plaintiff then and there became sick, sore, lame, and disordered, and so remained and continued for a long space of time, to wit, the space of *seven* weeks then next following, and still continues sick, sore, lame, and disordered thereby; during all which time the said plaintiff thereby suffered and underwent,

1. On motion in arrest of judgment, it was held in this case that a declaration charging that the defendant wrongfully kept a horse accustomed to bite mankind, and that the defendant knew it, need not aver that the injury complained of was received through the defendant's negligence in keeping the horse.

2. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

and still suffers and undergoes, great pain, and was thereby then and there, and still is, hindered and prevented from performing and transacting her lawful affairs and business by her to be performed and transacted; and also, by means of the premises, she, the said plaintiff, was thereby and still is, put to great expense, cost, and charges, in the whole amounting to a large sum of money, to wit, *seventy* dollars, in and about endeavoring to be cured of the said wounds, sickness, lameness, and disorder, so occasioned as aforesaid, and hath been and is, by means of the premises, otherwise greatly injured and damnified, to wit, at *Lawrence* aforesaid, to the damage [of the plaintiff as she says of *three hundred* dollars.

G. P. Briggs, Plaintiff's Attorney.][1]

5. By a Ram.[2]

Form No. 6778.

(8 Wentw. Pl. 581.)

(*Commencing as in Form No. 6775, and continuing down to* *) for that whereas the said *Richard Roe*, on the *first* day of *May*, *1788*, at *Rippon*, in the said county, was possessed of and kept divers, to wit, *two* tups or rams, the same being then and there very vicious, fierce, unruly, and very improper to go at large and to wander about; yet the said *Richard Roe* well knowing the said tups and rams to be so vicious, fierce, unruly, and improper to go at large and wander about, afterwards, to wit, on the same day and year aforesaid, at *Rippon* aforesaid, negligently, remissly, and carelessly permitted and suffered the said tups or rams to go at large and wander about from place to place, which said tups or rams of the said *Richard Roe* afterwards, to wit, on the same day and year aforesaid, at *Rippon* aforesaid, so

1. The words enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. **Precedent.** — In Moulton *v.* Scarborough, 71 Me. 267, the declaration was held to state a cause of action against a town for injuries caused by a vicious ram. Omitting the formal parts, the declaration was as follows:

"For that the said defendants at said *Scarborough*, on the *twenty-ninth* day of *December*, A. D. eighteen hundred and *seventy-seven*, and for a long time prior thereto, were the owners and possessed of a certain ram, of vicious disposition and accustomed to attack and butt persons, all of which was then and there well known to the defendants; yet the defendants neglecting their duty in the premises, and not exercising proper and suitable care and restraint over said ram, carelessly and negligently, on said *twenty-ninth* day of *December*, allowed him to be at loose and run at large, to the danger of the citizens of the State; and being so wrongfully and negligently at large and without any keeper, or other restraint, said ram on said day came upon the premises of one *Henry Moulton* in said *Scarborough*, where the plaintiff then lawfully was, and while she was in the front yard of said *Henry's* premises and near the house, and in the exercise of due and proper care, said ram suddenly attacked and struck the plaintiff with great force and threw her violently upon the ground, breaking her left hip, and greatly jarring and bruising her whole person, by reason of which the plaintiff has ever since been confined to her bed, and has constantly suffered great pain, and been put to great expense for doctoring and nursing, and been unable to do work as she formerly had done; and is not likely ever to recover from said injury. Whereby an action hath accrued to said plaintiff to have and recover of said defendants, compensation for her said injuries, which she alleges is," etc.

being at large and suffered to wander about by the neglect and default of the said *Richard Roe*, broke and entered a certain close of the said *John Doe*, lying and being in the said parish of *Rippon*, in the said county, the said close being then and there sufficiently fenced and inclosed, and then and there attacked, fought with, bruised, and wounded a certain tup or ram of the said *John Doe* of great value, to wit, of the value of twenty pounds, then being in the said close of the said *John Doe*, in a very grievous manner, insomuch that the said tup or ram of the said *John Doe* afterwards, to wit, on the same day and year aforesaid, at *Rippon* aforesaid, died, to the damage (*concluding as in Form No. 6775*).

II. CRIMINAL PROSECUTIONS.[1]

1. Allowing Rabid Dog to Run at Large.

Form No. 6779.[2]

The State of *Alabama*, } *Circuit* Court, *October* Term, 1897.
Dale County. }

The grand jury of said county charge that before the finding of this indictment, *Richard Roe* knowingly, wilfully and unlawfully did allow a certain dog belonging to him the said *Richard Roe* (or *under the charge and control of him the said Richard Roe*), which had become rabid (or *which he had information* or *good reason to believe had been bitten by a rabid dog*), to run at large within *six* months after becoming rabid (or *having been bitten*), as aforesaid, against the peace and dignity of the state of *Alabama*.

Daniel Webster, Solicitor of the *third* circuit.

2. Driving or Leading Uncaged Bear.

Form No. 6780.[3]

State of *Missouri*, } ss. In the *Barton Circuit* Court,
County of *Barton*. } *February* Term, A. D. 1898.

1. Requisites of Indictment, etc. — *Generally.* — For the formal parts of an indictment, information or criminal complaint in a particular jurisdiction consult the titles INDICTMENTS; INFORMATIONS; CRIMINAL COMPLAINTS, *ante*, p. 930.

For statutes relating to criminal prosecutions for various offenses connected with dangerous and vicious animals see as follows:

Alabama. — Crim. Code (1886), § 4171; Acts (1894-5), p. 696, No. 373.

District of Columbia. — Comp. Stat. (1894), p. 48, § 9.

Missouri. — Rev. Stat. (1889), § 3923.

New York. — Birds. Rev. Stat. (1896), p. 1938, cl. 11.

Oregon. — Hill's Anno. Laws (1892), § 1894.

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 3485.

Manslaughter. — For statutes making it manslaughter where death of human being ensues from keeping a vicious animal see as follows:

California. — Pen. Code (1897), § 399.

Florida. — Rev. Stat. (1892), § 2389.

Idaho. — Rev. Stat. (1887), § 6931.

Minnesota. — Stat. (1894), § 6452.

Mississippi. — Anno. Code (1892), § 1162.

New York. — Pen. Code, § 196 (Birds. Rev. Stat. (1896), p. 1466, § 18).

2. *Alabama.* — Acts (1894-1895), p. 696, No. 373. See also *supra*, note 1, p. 1027, for other statutes against allowing dangerous or vicious animals to run at large.

3. *Missouri.* — Rev. Stat. (1889), § 3923.

The grand jurors for the state of *Missouri*, impaneled, sworn and charged to inquire within and for the county of *Barton* and state aforesaid, do present that *Richard Roe*, on the *first* day of *January*, in the year of our Lord one thousand eight hundred and *ninety-eight*, in the county aforesaid, did unlawfully lead and drive through and in said *Barton* county, in the state of *Missouri*, a certain bear (*or other savage animal, naming it*), a savage animal, wild by nature, the said bear being then and there uncaged, against the peace and dignity of the state.

Daniel Webster,
Prosecuting Attorney for the County of *Barton*.

3. Keeping Unruly Bull Near Public Highway.[1]

Form No. 6781.

(3 Chit. Cr. L. 642.)

Essex. The jurors for our lord the king, upon their oath present that *Richard Roe*, late of the parish of *Danbury* in said county, *yeoman*, on the *first* day of *May* in the year of our Lord one thousand eight hundred and *one*, and on divers other days and times between that day and the day of the taking of this inquisition, unlawfully did keep at large, and still doth keep at large, a certain bull, of a very fierce, furious, and unruly nature, in a certain open field called *Black acre*, situate, lying, and being in the parish of *Danbury*, in the said county of *Essex*, (the same field, on the days and times aforesaid, and still being, in the possession and occupation of him the said *Richard Roe*) and, that from time whereof the memory of man is not to the contrary, there was and still is[2] a certain ancient and common public footway, leading from the town of *Shrewsbury*, in the parish aforesaid, through and along the said field, towards and unto the town of *Hampden* in the same county, used for all the liege subjects of our said lord the king, to pass and repass, in, through, over, and along the same, at their free will and pleasure, about their lawful affairs and business. And that the said bull, on, the said *first* day of *May*, at the parish of *Danbury* aforesaid, furiously ran at, to, and against one *Sarah Short*, a liege subject of our said lord the king, then passing in and along the said footway, in the said field, about her lawful affairs and business; and then and there, with his head and horns, furiously pushed at, cast down, and prostrated the said *Sarah Short* there, and greatly hurt, bruised, gored and wounded the said *Sarah Short* in and upon the left shoulder of her the said *Sarah Short*, insomuch that her life was greatly despaired of. And the jurors aforesaid upon their oath aforesaid, do further present, that the said bull afterwards, to wit, on the said *first* day of *May*, and on

New York. — Birds. Rev. Stat. (1896), p. 1938, cl. 11.

1. Baiting Bull in Public Place. — For an indictment for baiting a bull in a market place being the king's highway see 4 Wentw. Pl. 213.

2. The preferable allegation is, "that before, and at the time of the continuing of the offense hereinafter mentioned, there was and still is a certain common and public footway," etc. 3 Chit. Cr. L. 642.

the said other days and times above mentioned, at the parish of *Danbury*, aforesaid, so being in the said field, and of such nature as aforesaid, furiously ran at and after divers other liege subjects of our said lord the king, then passing and repassing, in and along the said footway, in the said field there, about their lawful affairs and business and thereby greatly affrighted, terrified, and alarmed, the said last mentioned subjects, and divers other liege subjects of our said lord the king, insomuch that the same subjects on the days and times aforesaid, having occasion to pass and repass, in and along the said footway, in the said field, could not, nor can they now pass or repass in and along the same, without great hazard and danger of being torn, gored, and wounded by the said bull, (he the said *Richard Roe* on the said days and times respectively above mentioned, and long before, and still well knowing the said bull to be of such fierce, furious, and unruly nature, and accustomed to run at and after, and injure persons passing and repassing, over, through, and along the said field there,) to the great damage of the said *Sarah Short*, to the great terror and common nuisance of all the liege subjects of our said lord the king, passing and repassing, in and along the said footway, in the said field there, to the evil and pernicious example of all others, and against the peace of our said lord the king, his crown and dignity.

DEAD BODIES AND CEMETERIES.

By Michael F. Hennessy.

I. Actions Relating to Cemeteries, 1031.

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II. Action for Performing Autopsy Without Permission, 1053.

III. Criminal Prosecutions, 1056.

1. *For Failure to Bury Dead Body,* 1056.
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3. *For Stealing Body,* 1058.
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4. *For Receiving Stolen Body,* 1060.
5. *For Destroying Cemetery Property,* 1061.

CROSS-REFERENCES.

For Forms in Prosecutions for Concealment of Death, see the title CONCEALMENT OF BIRTH OR DEATH, ante, p. 30.

For Forms for Incorporation, where Incorporation Proceedings are had in Court, see the title CORPORATIONS, ante, p. 523.

For Forms in Proceedings to Condemn Private Property for Cemetery Purposes, see the title EMINENT DOMAIN.

For matters of Procedure, generally, see the title CEMETERIES AND BURIALS, 3 Encyclopædia of Pleading and Practice, p. 910.

I. ACTIONS RELATING TO CEMETERIES.

1. By Cemetery.

a. Assessment Proceedings.

(1) PETITION FOR CERTIORARI TO REVIEW ASSESSMENT ON CEMETERY PROPERTY.[1]

Form No. 6782.[2]

To Hon. *Willard Bartlett*, a Justice of the *Supreme* Court of the *Second* Judicial District.

The petition of the *Trustees of St. Patrick's Cathedral, in the city of New York*, respectfully shows that your petitioners are the owners in fee of certain lands and real estate situate in the *second* ward of *Long Island City*, *Queens* county, *New York*, hereinafter described. That your petitioner is a corporation duly incorporated pursuant to the laws of the state of *New York*.

That said lands have been owned by your petitioner for upwards of *fifteen* years last past, and for many years past have been and are still used for cemetery purposes, being actually and exclusively used and occupied for the purpose of the burial therein of the mortal remains of human beings.

And on information and belief:

That *James Davren*, *William Feth* and *George Casey* are now assessors of *Long Island City*, and *William Smith* is the supervisor thereof.

That the said lands have never before, since they were purchased by your petitioner and used and occupied for cemetery purposes as aforesaid, been assessed for purposes of taxation until this year.

That said lands have been assessed this year as follows:

Block.	Lot.		Valuation in Dollars.
295	*29 1-2*	Unknown	$37,500
296	*47 3-4*	Unknown	42,500
297	*48 1-4*	Unknown	37,500
298	*39*	Unknown	37,500
299	*54 1-4*	Unknown	45,000

That by chapter 310 of the laws of 1879 it is provided that no land actually used and occupied for cemetery purposes shall be sold under execution or for any tax or assessment, nor shall such tax or assessment be levied, collected or imposed.

That said assessment is illegal because controverting the terms of said statute.

That said assessment is unequal, in that the assessment has been made at a higher proportionate valuation than any other real estate on the same roll by the same officers.

1. For other forms relating to the review of assessment proceedings by certiorari see vol. 4, p. 586 *et seq.*

2. This petition is copied from the records in People *v.* Davren, 131 N. Y. 601, in which case an order of the general term of the supreme court affirming an order of the special term striking from the assessment roll an assessment on the relator's real estate was affirmed.

That it is erroneous by reason of overvaluation.

That said assessors, on the *third* day of *December*, 1890, finally completed and verified said assessment roll and delivered same to *William Smith*, supervisor, the officer designated by law for that purpose.

And your petitioners allege that they have been aggrieved and injured by such illegality, such erroneous assessment and such inequality in the assessment of their said property and the other real estate in said town.

That the value of petitioners' real property is substantially the same this year as it was during the years 1887, 1888, and 1889.

That several pieces of land so as aforesaid assessed at an aggregate of *two hundred thousand* dollars are not in greater value in proportion to the other real estate in said town than *one hundred thousand* dollars.

Wherefore, your petitioners pray that a writ of certiorari may issue to the said *James Davren*, *William Feth* and *George Casey*, assessors, and *William Smith*, supervisor, commanding them to certify and return the assessment roll made by them in the year 1890, or a sworn or certified copy thereof, and all papers appertaining to said assessment, and the proofs and papers before them relating to the value of said petitioners' said property and the other real estate in said town.

December 18, 1890.

Trustees of St. Patrick's Cathedral in the City of New York,
(SEAL) by *Geo. B. Coleman*, Clerk.

T. G. Barry,
Attorney for Petitioners,
120 Broadway, N. Y.
(*Verification by Coleman as clerk.*)[1]

(2) Answer in Action to Vacate Assessment.

Form No. 6783.[2]

Superior Court *of Buffalo.*

The Buffalo City Cemetery, plaintiff,
vs.
The City of Buffalo, defendant.
} Answer.

The defendant, for its answer to the complaint in this action, states as its first defense thereto, that it has not knowledge or in-

1. For forms of verification consult the title VERIFICATIONS.

2. This form is copied from the record in Buffalo City Cemetery *v.* Buffalo, 46 N. Y. 506. The action in that case was brought by the cemetery corporation to vacate an assessment to defray the expense of laying certain sidewalks in the vicinity of their property, the corporation claiming that under the provisions of an act providing for the incorporation of rural cemetery corporations they were exempt from "all public taxes, rates and assessments." The general term of the superior court of the city of Buffalo reversed a judgment in favor of the plaintiff entered upon the decision of the court at special term, and dismissed plaintiff's complaint, and this judgment was affirmed on appeal, the court of appeals holding that "public taxes, rates and assessments are those which are levied for some public or general use or purpose, in which the person assessed has no direct, immediate and peculiar interest. Those charges

formation sufficient to form a belief whether the following facts alleged in said complaint are true, and therefore it denies the same, that is to say:

That the plaintiff is a rural cemetery association, incorporated by virtue of an act of the state of *New York*, entitled "An Act authorizing the incorporation of rural cemetery associations," passed April 27, 1847, and the various acts amendatory thereof; that the plaintiff is the owner of portions of a tract of land fronting on *North* street in the city of *Buffalo*, and bounded on the *east* by *Delaware* street *455* feet, *north* by *North* street *454.5* feet, and *south* by a line parallel to *North* street *357* feet, and *west* by *Bowery* street *443* feet; that the land owned by the plaintiff is held and occupied by it as a burial ground for the dead, and for cemetery purposes only, and not otherwise; that a large portion of said tract of land is owned, held and occupied by various persons other than the plaintiff, to whom the same has been conveyed by the grantors of this plaintiff in small lots or parcels, to be by them respectively held, used and occupied as a place for the burial of their dead, and that the same was so held and occupied by them at the time of the making of the assessment therein mentioned; that on the map or plan annexed to said complaint, the portions of said map marked "*B. C. C.*" were at same time and are held and owned by persons other than the plaintiff; that a large portion of said tract was and is owned and occupied by persons other than the plaintiff, and that the lands of the plaintiff were at the time of the making of said assessments exempt therefrom.

And for its second defense to the plaintiff's cause of action, the defendant alleges that by an act of the legislature of the state of *New York*, passed April 19, 1858, entitled "An Act to amend an act entitled 'An Act to revise the charter of the city of Buffalo, and enlarge its boundaries,'" passed April 13, 1853, it is provided that any person owning property in the city of *Buffalo*, upon which property, together with the property of others, a tax or assessment may have been made under the charter of the defendant, may pay a part of any such tax or assessment upon any part of the property owned by himself and others, and so taxed and assessed, and have an equitable proportion of such property released from such tax or assessment; and the common council of the defendant are required, upon application showing such right and payment, to release such just and equitable proportion; and that the plaintiff has not paid or offered to pay any such equitable part of the assessment set forth in said complaint as the property alleged in said complaint to belong to the plaintiff would bear to the whole of the tract fronting upon *North* street, between *Delaware* and *Bowery* streets, mentioned in said complaint.

And for its third defense to the plaintiff's complaint, the defendant alleges that the several persons stated in said complaint to be the owners of large portions of said tract of land mentioned in said

and impositions, which are laid directly upon the property in a circumscribed locality, to effect some work of local convenience, beneficial to the property especially assessed for the expense of it, are not public, but are local and private, so far as this statute is concerned."

complaint are not the owners thereof, but are owners of only the right of interment therein.

Wherefore, the defendant demands judgment, that the prayer of the complaint be denied, and that it recover its costs in this action from the plaintiff.

Dated *Buffalo, April 20,* 1869.

David F. Day,
Attorney for the Defendant.

(*Verification.*)[1]

b. To Restrain Burial of Noncommunicant.[2]

Form No. 6784.[3]

State of *Indiana*, } ss. *Tippecanoe Superior* Court.
Tippecanoe County. } *February* Term, 1884.

Joseph J. Dwenger and Edwin P. Walters, plaintiffs,
against
John Geary, defendant.

The plaintiffs above named complain of the defendants, and allege:

That *Joseph J. Dwenger* is the *bishop* of the *Roman Catholic church* for the diocese of *Fort Wayne, Indiana*, and that *Edwin P. Walters* is the pastor of the congregation of the *Roman Catholic church* known as *St. Mary's* of *Lafayette, Indiana*, and that the ecclesiastical jurisdiction of the said *Joseph J. Dwenger* as such *Roman Catholic bishop* embraces the said city of *Lafayette, Indiana.*

That in accordance with the principles and polity of the *Roman Catholic church* the title and control of all church property are vested in the *bishop* of the diocese in which such property is situated, and that he holds it in trust for the congregations and societies of the church, to be by them used and enjoyed according to its principles and polity.

That the congregation of *St. Mary's* of *Lafayette, Indiana*, holds and enjoys a cemetery, which, for about *twenty-five* years past, has been held and occupied as a place of burial for the deceased members of that congregation, under the control and authority of the *bishop* of the diocese of *Fort Wayne, Indiana*, and that said cemetery has been so used exclusively for the interment of those who at the time of their death, were in regular standing in the church, according to its principles, usages and doctrines.

That pursuant to those principles, usages and doctrines, a great part of the said cemetery has been set apart and consecrated for the burial of the dead according to the rites, usages and doctrines of

1. For the form of verification in a particular jurisdiction consult the title VERIFICATIONS.

2. For a case in which a bill will lie to restrain the burial of persons not members of a family in a family plot see Lewis *v.* Walker, 165 Pa. St. 30.

3. This form is based on the facts in the first paragraph of plaintiff's complaint in Dwenger *v.* Geary, 113 Ind. 107, in which case a judgment sustaining a demurrer to the complaint was reversed, the supreme court holding that the defendant had no right to inter the body of his dead son in a lot held under a license from the church, and that the plaintiffs had, at the time the suit was begun, a right to restrain him from so doing.

the church, and that in such consecrated ground only members of the *Roman Catholic church* of good standing are allowed sepulture.

That part of said cemetery ground, although held by the congregation of *St. Mary's* aforesaid, has not been specially consecrated, but is open to use for the burial of persons not in good standing as members of the *Roman Catholic church.*

That on the *tenth* day of *February*, 1884, one *James Geary* died by his own hand and that his body is now awaiting burial.

That defendant *John Geary*, the father of the deceased *James Geary*, owns a lot in the cemetery and claims a right to there inter the body of his deceased son and will so inter it unless enjoined.

That said *John Geary* has no right to bury his son in the lot owned by him as aforesaid, because the cemetery is distinctively consecrated ground, for the burial only of true and faithful *Catholics*, who die in full communion with the church, and *James Geary*, at the time of his death, was not a faithful *Catholic*, in good standing with the church; for although he may have once been a *Catholic*, he had, by a wicked and depraved life, and by a failure to observe the doctrines, practices, rules and regulations of the church, and by failing to contribute to its support, and by failing to receive its sacraments, long before lost and forfeited his membership and standing, and had, as he well knew, absolved and released the church from all duty toward and authority over him, and had forfeited his right to burial in ground consecrated by the church.

That on or about the *second* day of *February*, 1858, *Peter Ball* and *Owen Ball*, communicants in good standing of *St. Mary's* aforesaid, conveyed the land on which the said cemetery is now located to *John H. Luers*, the then *bishop* of the diocese of *Fort Wayne*, *Indiana*; that said deed of conveyance was in the words and figures following (*Here set out a copy of the deed*); that on said date the said *John H. Luers*, *bishop* as aforesaid, took the said land in trust as a burying ground for the *Catholics* of the city of *Lafayette*, and immediately after the conveyance of said land to the said *John H. Luers*, the congregation of *St. Mary's*, under the authority of the said *bishop*, and with the co-operation of *Peter* and *Owen Ball*, caused the ground to be laid off into lots and plotted, and caused to be set apart and consecrated according to the ritual and principles of the *Roman Catholic church* for the burial of the bodies of such persons as were entitled to sepulture according to the rites and doctrines of the church, and the privilege of burying in many of the lots was granted, for a consideration, to members of the church and a certificate executed to them, but the right so granted was subject to the rules of the church, and among other requirements necessary to entitle one to interment, it was required that he must have been at the time of his death a member of the church in full communion, and must have performed all of his church duties, and by the rules and doctrines of the church, a person who committed suicide was not entitled to burial in consecrated ground, and it was the rule governing the cemetery of *St. Mary's*, that, before any one could be interred in consecrated ground, a permit must be issued by the pastor of *St. Mary's* congregation, and that a permit was asked for by the said *John Geary* for the burial

of his son in the lot situated in consecrated ground and was refused.

That the said *James Geary* at the time of his death was not living in the family of his father, *John Geary*, but was living away from his father's home.

That if the body of the said *James Geary* is buried in his father's lot it will destroy the character of consecration with which the ground is sacredly invested, and greatly tend to set at naught the authority of the plaintiffs and the discipline of the church.

Wherefore, the plaintiffs pray that the said *John Geary* be enjoined from interring the body of the said *James Geary* in the lot in the cemetery of the congregation of *St. Mary's*, purchased by the said *John Geary*, and for all other proper relief.

James F. McHugh, Attorney for Plaintiffs.

(*Verification.*)[1]

c. To Recover Plot — Answer Setting Up Dedication and Occupancy.

Form No. 6785.[2]

Supreme Court, *Rockland* County.

Clarence R. Conger and Margaret Conger
against
John Treadway.

For answer to the complaint of the plaintiffs herein the defendant alleges and shows to this court the following facts, to wit:

I. He denies each and every allegation of the complaint.

II. For a further defense and claim for affirmative relief he alleges that the said parcel of land described in the complaint is, and has been for many years last past, a burial plot in said *Mount Repose Cemetery*.

III. That the lands of which said lot was part were, about the year *1853*, owned by one *Asbury De Noyelles*, who, on or about the *second* day of *May*, *1853*, made and executed a deed conveying to one *John S. Gurnee and others, ten undivided eleventh parts* of said lands and retained one *undivided eleventh* part thereof, being so conveyed for the purpose of a cemetery or burying place of the dead, for no other purpose, and so expressed in the deed.

IV. That thereafter and about *April*, *1867*, this defendant purchased the plot described in the complaint from the aforesaid owners of said cemetery lands, for the price of *$72.50*, and that soon after making said purchase this defendant paid to the agents of said owners the sum of *$30.50* of said purchase price, and received a receipt from said agent therefor, leaving a balance unpaid of about *$42*.

V. That as part of said agreement of purchase, a deed conveying said plot to this defendant was to be executed and delivered soon thereafter, and when such deed was executed and delivered to this defendant the balance of said purchase money was to be paid by him.

1. For the form of verification in a particular jurisdiction consult the title VERIFICATIONS.

2. This form is copied from the records in the case of Conger *v.* Treadway, 132 N. Y. 259. The action was ejectment to recover a plot of ground known as lot No. 192 of Mount Repose Cemetery in Haverstraw, New York. The answer was held to set up a good defense.

That after such purchase of said plot by this defendant, he entered into immediate possession of same, and has ever since said purchase continued in actual possession and buried therein his wife and two children and five grandchildren, and improved the lot.

VI. That as this defendant is informed and believes, the plaintiff, *Clarence R. Conger*, in an action for partition, wherein *Susan D. Gardner* was a plaintiff and *Cornelia G. Ayers* and other defendants, to which, however, this defendant was not a party, became the purchaser of all the right, title and interest of the aforesaid owners of said cemetery and of their respective heirs at law and devisees, in and to the lands of said cemetery, of which defendant's plot was a part, but subject to defendant's right as such purchaser and occupant of said plot under and by a deed from *Irving Brown*, *referee*, bearing date the *nineteenth* day of *January*, 1882, and that at and prior to the time of purchase the said plaintiff, as defendant is informed and believes, had information and notice of defendant's purchase of said plot and occupancy thereof.

VII. That at all times since the purchase of said plot as aforesaid by this defendant, he has been ready and willing to pay the balance of said purchase money upon receiving a deed therefor, and that since the said plaintiff, *Clarence R. Conger*, acquired the title of the aforesaid owners, their heirs and devisees, by said deed in partition, this defendant has tendered to the said plaintiff the balance of said purchase money, but that he refused and still refuses to receive the same, or give a deed therefor, and that this defendant is now ready and willing to perform his part of said contract of purchase, and pay the balance of said purchase money, and offers now so to do.

Wherefore this defendant asks judgment that the plaintiffs be decreed to perform the said contract of sale by receiving the balance of said purchase money, and to execute and deliver to this defendant a proper deed of said burial plot, with costs of action.

George W. Weiant, Defendant's Attorney.

(*Verification.*)[1]

(2) Against Cemeteries.

a. Petition for Mandamus to Compel Issuance of Burial Permit.

Form No. 6786.[2]

The Commonwealth of Pennsylvania, ex relatione William H. Boileau and Margaret Jones,
against
The Mount Moriah Cemetery Association.

Your petitioner respectfully represents:

I. That the defendant was incorporated under the laws of this

1. For the form of verification in a particular jurisdiction consult the title VERIFICATIONS.

2. This petition is substantially the same as that in Mount Moriah Cemetery Assoc. *v.* Com., 81 Pa. St. 235, in which case it was held that the relator Boileau had the right to bury the husband of the relator Jones, and that the refusal to issue a permit was arbitrary and unreasonable, and that mandamus lay to compel the company to issue the permit. When Boileau purchased, there being no restriction on his right to burial, the company could not afterward abridge his rights.

commonwealth by act of assembly of March 27, 1855 (Pamph. L. of 1857, p. 729). That said act of incorporation was as follows: (*Here set out the act of incorporation.*)

II. That on the *sixteenth* day of *April*, 1875, the said *Mount Moriah Cemetery Association* conveyed to the said *William H. Boileau* a lot in said *Mount Moriah Cemetery* in the city of *Philadelphia*, known as lot No. *48*, containing *two hundred and forty* square feet, and being one-half of section *58*, the said lot to be used for burial purposes. That said lot was paid for by said *William H. Boileau*, and the deed therefor duly registered. That appended to said deed was a note that all transfers of lots, to be valid, must be approved by the secretary and registered (*stating the method and place of approval and registration*).

III. That on said *sixteenth* day of *April*, 1875, the said *William H. Boileau* entered into a parol agreement to convey a portion of said lot to *Mrs. Margaret Jones*, a colored woman and wife of the late *Henry Jones*, deceased, which said *Margaret Jones* joins in this petition. That the consideration for said agreement was the sum of *one hundred* dollars, which amount at said date was by the said *Margaret Jones* paid to the said *William H. Boileau*. That at or about said date the said lot in question was inspected by the petitioners, *Boileau* and *Jones*, in the presence of the superintendent and secretary of said *Mount Moriah Cemetery Association*, who drew out the plan of said lot and interposed no objection whatever to the contemplated transfer of this lot to said *Margaret Jones*.

IV. That on the *seventeenth* day of *April*, 1875, upon the order of said *William H. Boileau*, and with the full knowledge and tacit consent of said *Mount Moriah Cemetery Association*, through its authorized officers, the body of one *Elizabeth Clark*, a colored woman and a sister of the said *Margaret Jones*, was interred in the said lot after due public notice, given by advertisement in newspapers published in said city, which expressly stated that the remains of the deceased woman would be conveyed to *Mount Moriah Cemetery* from *Bethel Church*, which place of worship was well known by the community to be attended solely by colored people.

V. That on the *tenth* day of *May*, 1875, the said *William H. Boileau*, by deed in proper form and legally acknowledged, conveyed to the said *Margaret Jones* the entire lot hereinbefore referred to, to be used by her for burial purposes. That the consideration therefor was *one hundred and eighty* dollars, which said sum was paid in full by said *Margaret Jones*. That the deed in question was forthwith delivered to the said *Margaret Jones*, but without the formality of approval by the secretary and registration.

VI. That said *William H. Boileau* omitted to obtain said approval and registration of said deed before delivery thereof to said *Margaret Jones* because to his knowledge the rule enjoining such approval and registration was in most cases virtually a dead letter, and was never strictly enforced. That this knowledge was based on the fact that said *William H. Boileau* had disposed to purchasers lots of said corporation of the value of more than *fifty thousand* dollars, and not one-half of the deeds to the lots so sold were ever approved

and registered, although in many instances interments of bodies took place in the lots referred to in said conveyances with the knowledge and full consent of the corporation aforesaid.

VII. That the transfer of said lot to the said *Margaret Jones* was made with the full knowledge of *H. P. Connell*, who was the secretary and superintendent of said *Mount Moriah Cemetery Association* and entrusted with its general management. The previous interment of a colored woman in the lot, that the said *Margaret Jones* was a colored woman, and the prospective uses of said lot for the interment of colored members of the family of the said *Margaret Jones* were known to him, and not only was no objection interposed to the said conveyance, either by the said *Connell* or by the said corporation, but at or about the time of said sale and conveyance to said *Margaret Jones* the said *Connell* expressed to said *Boileau* a regret that the corporation itself had not made the said transfer to the said *Margaret Jones* direct, and a desire that the improving the lot for the use of the said *Margaret Jones* should be entrusted to himself and another official.

VIII. That after the date of the last mentioned conveyance the said *Margaret Jones* and her late husband, *Henry Jones*, commenced to adorn and improve said burial lot, and contracted with one *Daniel Connell* for the erection of an iron railing which should enclose the lot attached to marble posts, each conspicuously marked "*Henry Jones*," which work was completed in the summer of 1875, and the sum of *one hundred and sixty* dollars paid therefor, the said *Daniel Connell's* name having been suggested to the said *Margaret Jones* by the officer in charge of said cemetery.

IX. That neither the said *William H. Boileau* or *Margaret Jones* was notified of any opposition to the approval and registration of the said deed to said *Margaret Jones*, nor of any objection to the occupancy of the lot by the members of the family on account of their color, until the *twenty-seventh* day of *September*, 1875.

X. That on the *twenty-fifth* day of *September*, 1875, the said *Margaret Jones* sent a messenger to the officers in charge of said cemetery acquainting them with the death of her husband, and of her desire and intention to inter his remains in the said lot on the *twenty-seventh* day of *September*, 1875. That the officer in charge of the grounds promised compliance with the request, and that a grave should be dug in the lot in proper time to receive the case which was intended to enclose the coffin of the deceased.

XI. That full arrangements were thereupon made for the funeral, and advertisements were inserted in the public press, and a large concourse of friends assembled at the house of the deceased on the *twenty-seventh* day of *September*, 1875, to participate in the religious exercises and to attend the corpse to the grave.

XII. That about *fifteen* minutes prior to the time advertised for the funeral a note, of which the following is a copy, was left at the dwelling of the said *Margaret Jones*: — "Madam: I am in receipt of a note from you, requesting a grave to be dug in lot No. *48* in *Mount Moriah Cemetery*. I am unable to comply with your request, because the lot in question is registered as belonging to *William H. Boileau*,

and the rules of the company require me to act only under the orders of the registered owner. Very respectfully,

H. P. Connell, Superintendent."

XIII. That said note was immediately sent to said *William H. Boileau*, who forthwith indorsed thereon as follows, to wit:

"*Philadelphia, Sept. 27th*, 1875.

"Dear Sir: — Please to let the bearer bury in the lot.

W. H. Boileau."

That the note so indorsed was at once conveyed to the cemetery, and with the two deeds was handed to the officer in charge, who acknowledged the validity of the order but asserted that, objection having been made by some of the lot holders to the interment of colored people in the cemetery, he was instructed by the managers not to allow the bodies of colored people to be brought within the grounds, and refused to allow the body of the deceased to be temporarily placed in the receiving vault until said *Margaret Jones* could make other arrangements for its interment.

XIV. That unaware of this prohibition, upon conclusion of the religious exercises at the late home of the deceased, the funeral procession traversed its route to the cemetery, but was checked in its passage by parties purporting to be sent by the superintendent for the purpose of notifying them of the prohibition.

XV. That the said *Margaret Jones* was thereupon compelled to convey the remains of her late husband to the receiving vault of *Lebanon Cemetery* in the said city of *Philadelphia*, where it still remains unburied.

XVI. That upon the *twenty-ninth* day of *September*, 1875, the said *William H. Boileau* and the said *Margaret Jones* made a demand upon *James Smyth*, the president of the said *Mount Moriah Cemetery Association*, and upon the said *H. P. Connell*, secretary thereof, forthwith to approve and register the deed to the said *Margaret Jones* of the lot in question from the said *William H. Boileau*, or should that demand be refused, that they acknowledge and execute the order of *Boileau* for interment, and give permission to said *Margaret Jones* to bury her late husband in said lot. That to this demand the president has made no reply; but that the secretary and superintendent has answered with a peremptory refusal upon the part of the said corporation to approve or register the deed to the said *Margaret Jones* or to honor the order for interment.

XVII. Your petitioners therefore pray this honorable court to issue a writ of mandamus directed to the *Mount Moriah Cemetery Association*, and to each of its officers, to accept and carry into execution the order of the said *William H. Boileau*, and at once permit the body of *Henry Jones* to be interred in lot No. *48* in said *Mount Moriah Cemetery*.

And your petitioners will ever pray, etc.

William H. Boileau.
Margaret Jones.

City and County of *Philadelphia*, ss.

William H. Boileau, being duly sworn according to law, deposes

and says that the facts set forth in the above petition are just and true to the best of his knowledge and belief.

William H. Boileau.

Sworn to and subscribed before me this *twenty-eighth* day of *February*, 1876.

Norton Porter, Notary Public.

b. Bill for Permission to Remove Body.

Form No. 6787.[1]

Commonwealth of *Massachusetts.*
Supreme Judicial Court.

Suffolk, ss. In Equity.

Between
Nathaniel Weld
and
Gideon Walker, George Ivers and Forest Hills Cemetery Corporation.
} Bill of Complaint.

To the Honorable the Justices of the *Supreme Judicial* Court in and for the County of *Suffolk* in the *Commonwealth* of *Massachusetts*, sitting in equity:

Respectfully represents *Nathaniel Weld* of *Boston* in the county of *Suffolk*, aforesaid, that *Gideon Walker*, of said *Boston*, and *George Ivers*, of *Evans' Mills* in the county of *Jefferson* in the state of *New York*, were, on the *twenty-ninth* day of *August*, 1875, the owners of a certain burial right or lot numbered *2442*, in the cemetery known and called the *Forest Hills Cemetery*, in the said city of *Boston*, which said cemetery is owned, occupied, carried on, taken care of and controlled by the *Forest Hills Cemetery*, a corporation duly established by law, and having its usual place of business in said *Boston*, and the said corporation claim and exercise the control over the interment and removal of bodies, and over persons going into said cemetery and while they are within the same.

Your petitioner further shows, that his wife, *Mary P. Weld*, died at said *Boston*, on the *twenty-seventh* day of *August*, 1875, and was buried in said *Forest Hills Cemetery* in said lot No. *2442*, then and now owned by said *Walker* and *Ivers*; and your petitioner has no legal right or title therein; that the said *Mary P. Weld* was the sister of *Isabella Walker* and *Eunice W. Ivers*, the wives of said *Walker* and *Ivers*, and that upon the decease of said *Mary P.*, the said *Isabella* and *Eunice W.*, together with the said *Walker*, immediately commenced importuning your petitioner to have his wife, the said *Mary*

1. This form is copied from the record in the case of Weld *v.* Walker, 130 Mass. 422. In this case a decree was entered in conformity with the prayer of the bill, from which the defendant Walker appealed, but the decree was affirmed on appeal, the court holding that if a husband has not freely consented to the burial of his wife in a lot of land owned by another person, with the intention or understanding that it should be her final resting-place, a court of equity may permit him, after such burial, to remove her body, coffin and tombstones to his own land, and restrain that person from interfering with such removal.

For the present form of a bill in equity in *Massachusetts* see vol. 3, Form No. 4273.

P., buried in their said lot, and that your petitioner, being then in great distress of mind, and being worn out in taking care of his said wife in her sickness, yielded to their continued importunities, much against his wishes and feelings, fearing that they would make trouble for him if he did not consent; and he finally consented that she might be buried in the said lot, which he should not have done had his mind been in condition to realize the situation; and that he procured a casket and clothes for her burial, and the body was clothed in the said clothes and put into the said casket of your petitioner, and so buried in the said lot on the *twenty-ninth* day of *August*, 1875, and has there remained from thence to the bringing of this petition; and your petitioner says that he has no right or authority to take care of her said grave, to erect grave-stones or monuments thereon or to beautify or adorn the same or the said grave lot, or to bury other of his or her friends or family by her side, or to be buried by her side himself; all of which he feels that he may desire to do.

And your petitioner further says, that he is a joint owner in a burial lot in the *Mount Hope Cemetery*, a cemetery in said city of *Boston*, the said lot belonging to the heirs of *E. Weld*, of whom he is one, in which his father and mother are buried and in which he has the right to bury and to set up grave-stones and monuments and to beautify the said lot and the grave, and to be buried therein himself at his decease; and that he desires to remove the casket containing the remains of his said wife, together with said remains and said clothes for her burial, and any stones or monuments that he has placed at her grave, from the said lot in said *Forest Hills Cemetery*, belonging to said *Walker* and *Ivers*, to his said lot in *Mount Hope Cemetery*, in which no near relative of said *Mary P.* is now buried; that the said remains may be buried with his relatives and in his said burial-place, and where, at his decease, he may be buried at her side; and that he has obtained a permit in due form of law from the proper authorities, to wit, the board of health of the city of *Boston*, to so remove the said casket and clothes for her burial and the remains from said lot in said *Forest Hills Cemetery*, and to bury the same in his said lot in said *Mount Hope Cemetery*; and your petitioner says that in law and in equity and good conscience, he had and has the right to so remove the same and bury them in said *Mount Hope Cemetery*.

And your petitioner further says that he applied in a friendly and proper manner to the said *Gideon Walker* and said *George Ivers*, and requested permission, in a careful and proper manner, doing no unnecessary damage to the said lot, to take up the said casket and clothes and the remains of his said wife, and the said stones and monuments, and remove the same to his said lot in *Mount Hope Cemetery*, leaving the said lot in good and proper condition; and they declined to grant to him the said permission, and did refuse to permit him to remove the same, and refuse to let him or any one for him enter upon said lot; and the said defendant, *Gideon Walker*, as your petitioner is informed and believes, gave to one *Abner Moulton*, who was and is the superintendent and agent of said *Forest Hills Cemetery Corporation* and cemetery, a notice or order in writing in words and figures as follows, to wit:

"To *Abner Moulton*, Esq.,
Superintendent of *Forest Hills Cemetery*.
You are forbidden to allow the removal of the remains of *Mary P. Weld*, buried in the cemetery lot *2442*, nor to permit any trespass in said lot nor entry in same, as the above lot belongs to me.
Boston, October 27, 1877. *Gideon Walker*."

And your petitioner further says that he requested permission to remove the said casket, clothes, remains, stones and monuments of and from the said *Forest Hills Cemetery Corporation*, and said corporation refused to grant said permission, alleging that it had no authority to grant the same and forbid him his removing the same and from going into said cemetery for that purpose; and he further says, that said defendants *Walker* and *Ivers* and said *Forest Hills Cemetery Corporation* threaten him with suits at law and criminal prosecutions if he shall remove or attempt to remove said casket, clothes, stones or monuments and remains of said *Mary P. Weld*, his said wife, from said lot, whereby he is unable to remove the same.

All of which actings and doing of said defendants are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of your petitioner in the premises; and forasmuch as your petitioner is remediless in the premises at and by the strict rules of the common law, and is relievable only in a court of equity, where matters of this nature are properly cognizable and relievable;

To the end therefore, that the said defendants and each of them may, to the best of their and each of their knowledge, remembrance, information and belief, full, true, direct and perfect answers and answer make to all and singular the matters aforesaid, but not upon their or either of their corporal oath or oaths, which is hereby waived, and further, that your petitioner may, by the decree and direction of this court, be permitted to remove the remains of said *Mary P. Weld* and said casket, clothes, stones and monuments from said lot in said *Forest Hills Cemetery* to said petitioner's lot in said *Mount Hope Cemetery* in such manner as this court shall direct; and that said defendants and each of them and their and each of their agents, attorneys and servants, may be restrained, by an injunction issuing out of this court, from hindering, opposing, objecting to or preventing your petitioner from removing the said casket, clothes, stones, monuments and remains from said lot in said *Forest Hills Cemetery* to said lot in said *Mount Hope Cemetery*, and also from in any way interefering to prevent the same; and for such other and further relief in the premises as the nature and circumstances of this case may require and to your honors shall seem meet:

May it please your honors to grant unto your petitioner, not only a writ of injunction issuing out and under the seal of this court, to be directed to said defendants and each of them, and to their and each of their agents and servants, restraining them and each of them from objecting to, opposing or hindering or in any way interfering with your petitioner in removing the said casket, clothes, remains, stones and monuments in said *Forest Hills Cemetery* to said lot in said *Mount Hope Cemetery*; but also a writ of subpœna to be directed to

the said *Gideon Walker*, *George Ivers* and the said *Forest Hills Cemetery Corporation*, defendants, thereby commanding them and each of them, at a certain time and under a certain penalty therein to be limited, to appear before this court, and then and full, direct and perfect answers make to all and singular the premises; and further, to stand to, perform and abide such further orders, directions and decrees therein as to this court shall seem meet.

Nath'l Weld.

Burbank & Lund,
Plaintiff's Solicitors.

c. Bill for Injunction to Prevent Removal of Body.

Form No. 6788.[1]

The First Presbyterian Church in the Northern Liberties, Mary Ann Wilson, Benjamin Benner, Margaret Benner, William S. Magee, James H. Magee and James White, plaintiffs,
against
The Second Presbyterian Church in the City of Philadelphia, Edward K. Tryon and Pearson Yard, defendants.

In the Court *of Common Pleas*, No. *1*, for the *City and* County of *Philadelphia*, of *June* Term, 1*885*. No. *3*. Sitting in Chancery.

To the Honorable the Judges of the said Court.

Your orators complain and say: I. That the *Second Presbyterian Church in the City of Philadelphia*, in *April* A. D. 1*805*, established a branch church in the *Northern Liberties*, and that both churches were under the same pastor, the same trustees, and the members of each church were regarded as members of the same body corporate.

II. That at the time the said branch church was established the *Second Presbyterian Church* purchased a lot of ground on *Noble* and *Buttonwood* streets between *Fifth* and *Sixth* streets, in the city of *Philadelphia*, in the state of *Pennsylvania*, as a burial ground for the use of both churches.

III. That by an ordinance of said church corporation, adopted the *ninth* day of *September*, A. D. 1*805*, every member of either congregation having a family and being desirous of having graves contiguous to each other should have the privilege of having sufficient ground reserved when the first interment took place on payment of *two* dollars for each space for a grave reserved, not exceeding *three* spaces in the whole, and that each holder of a pew in such branch church thereby became entitled to the right of burial in said ground.

1. This bill is in substance that used in First Presbyterian Church *v.* Second Presbyterian Church, 2 Brews. (Pa.) 372, in which case the removal of the remains was enjoined, although the bill was dismissed as to the First Presbyterian Church on the ground that it had no interest in the burial ground, having disposed of such interest prior to the bill; and as to the complainant Mary Ann Wilson, she having signified her desire to withdraw from the suit as complainant.

IV. That interments of deceased members of said branch church were made in said ground, and additional spaces for graves were reserved for their families in pursuance of said ordinance.

V. That in the year 1*813* an agreement was made for the separation of the said branch church from the *Second Presbyterian Church in the City of Philadelphia*, which was sanctioned by the *presbytery*, and the said branch church was duly incorporated the *sixth* day of *January*, 1*814*, under the name of "*The First Presbyterian Church in the Northern Liberties.*"

VI. That by the agreement for the separation, it was provided that the right of burial in the above mentioned burying ground should continue in the members of both churches, the same as before the separation, which right was subsequently, in the year 1*819*, restricted to certain families in the congregation, and has been continually enjoyed since the separation, and a burial was made in said burial ground as late as A. D. 1*856*.

VII. That in the year 1*819*, the *First Presbyterian Church in the Northern Liberties* sold to the *Second Presbyterian Church in the City of Philadelphia* the right of said *First Presbyterian Church* in said burial ground, making reservations for such families as should desire to continue their right of burial in said ground.

VIII. That the individual plaintiffs in this bill have ancestors interred in said ground, and being members of families for whom the reservation of burial rights in said ground was made, and also being members of the *First Presbyterian Church in the Northern Liberties* aforesaid, are entitled to retain and enjoy said rights.

IX. That the said *Second Presbyterian Church* has sold said burial ground to the defendant *Edward K. Tryon*, and to put said ground in a suitable condition to perfect the sale, the trustees of said church have caused a notice to be published by their agent, *Pearson Yard*, of their intention to remove the bodies interred in said ground, in violation of the rights of the plaintiffs in the premises.

Wherefore your orators pray:

I. That said defendants be restrained by the injunction of this honorable court from removing the remains of the dead from said cemetery, as aforesaid.

II. General relief.

John L. Shoemaker,
Solicitor for Complainants.

d. Bill to Compel Restoration of Body to Lot.[1]

Form No. 6789.[2]

1. In an action to restrain defendant from desecrating a burial lot reserved in a deed from plaintiff's ancestor and for damages, the complaint need not aver that such ancestor died intestate, nor is it necessary that the complaint show that all persons having an interest therein are made parties to the action, as the plaintiffs can only recover the damages they have themselves sustained. Mitchell *v.* Thorne, 134 N. Y. 536, *affirming* 47 N. Y. St. Rep. 896.

2. This form is based on the facts in the case of Pierce *v.* Swan Point Cemetery, 10 R. I. 227. In that case a demurrer was filed on behalf of Almira T. Metcalf, for want of equity and an answer interposed on behalf of the Pro-

Providence, Sc. *Supreme* Court, *Appellate* Division.

William G. Pierce and Almira F. Pierce, his wife, plaintiffs,
vs.
Proprietors of Swan Point Cemetery and Almira T. Metcalf, defendants.
Bill in Equity.

William G. Pierce and Almira F. Pierce, his wife, of the city of *Providence*, in the said county of *Providence*, bring this bill of complaint against *Proprietors of Swan Point Cemetery and Almira T. Metcalf*, of the same place, and thereupon complaining say,

I. That defendant, *Proprietors of Swan Point Cemetery*, is a corporation duly created under the laws of this state.

II. That on the *fourth* day of *May*, 1856, one *Whiting Metcalf* died leaving the complainant *Almira F. Pierce* his sole heir at law, and the said *Almira T. Metcalf*, his widow, him surviving.

III. That during his lifetime the said *Whiting Metcalf* had conveyed to him, and became the owner of a certain burial lot in the *First Congregational Society's Burial Ground* in *Swan Point Cemetery*; that he was a *Unitarian* in religious belief, a communicant of that denomination, and a prominent member of the so called and well known "*First Congregational Society of the City of Providence*," and that the burial lot so purchased by him was one of a family group of lots, of which group the several lots were held and owned by the brothers and kindred of said *Whiting Metcalf*.

IV. That upon the decease of the said *Whiting Metcalf* he was buried in said lot, and as the plaintiffs allege upon information and belief, in accordance with his wishes and desires expressed during his lifetime and with the approbation of his widow, the said *Almira T. Metcalf*; and his remains remained for about *thirteen* years in said place of burial.

V. That the said lot in the *Swan Point Cemetery* became the absolute property, by descent, of the complainant, *Almira F. Pierce*, upon the death of the said *Whiting Metcalf*, she being his only child, heir at law and next of kin.

VI. That on or about the *twenty-second* day of *July*, 1869, the defendant, *Almira T. Metcalf*, requested in writing the permission of the gentlemen having charge of the *Unitarian Cemetery* for the removal of his remains, and set forth as her reasons therefor the fact that

prietors of Swan Point Cemetery, in which they denied the jurisdiction of the court to direct or control the management of their internal affairs, or in the subject matter of the bill, so far as relief was prayed against them, but stated that they believed all the facts stated and charged in the bill to be true, and submitted to execute, or to allow to be executed within their grounds, such order and decree in the premises as the court might see fit to enter up between the other parties to the bill. The court held that while consent of the defendant corporation could not give jurisdiction to the court, yet that said corporation was in fact a trustee for certain purposes, and that when the trust was not properly executed the court had the same jurisdiction to compel its execution as in the case of any other trust. The demurrer of Mrs. Metcalf was overruled.

she had secured a lot in *Swan Point Cemetery*, and wished to remove to it the remains of her late husband, and there erect a suitable monument to his memory.

VII. That such consent was refused by the authorities of said cemetery unless accompanied by "the written request of the relatives, countersigned by the society's committee"; and that afterwards the complainants protested to the actuary of the defendant corporation against such removal, positively forbidding the same; and that the filing of said protest was known to the respondent, *Almira T. Metcalf*, before the removal, as the complainants are informed and believe.

VIII. That on or about the *first* day of *August*, 1869, the remains of the said *Whiting Metcalf* were forcibly, without the authority, consent or approval of the complainants, in violation of the by-laws of the defendant corporation, in violation of law, of right, and of the sacredness of the tomb, removed, under the direction of the said *Almira T. Metcalf*, from the lot aforesaid and placed in another lot in said cemetery.

IX. That after said body had been removed, and while it was exposed, the *superintendent* of said cemetery did not direct its immediate reinterment in the grave whence it was taken, but permitted its interment in the lot to which it had been removed.

X. That on the *ninth* day of *August*, 1869, the complainants requested the directors of the defendant corporation to restore said remains to the place whence the same had been taken, and the defendant corporation neglected and refused to comply with such request, but afterwards passed a vote declaring that what had been done was in violation of their by-laws.

XI. That on the *twenty-first* day of *February*, 1870, the complainants notified the defendant, *Almira T. Metcalf*, of their protest hereinbefore referred to, requesting and desiring her to restore said remains to the place from whence they were taken, and said request was refused.

XII. That all of said acts on the part of the said *Almira T. Metcalf* and the *directors* of the *Swan Point Cemetery*, were in direct, absolute and palpable violation of the rights of the complainants herein.

In consideration whereof and forasmuch as the complainants can have no adequate remedy at and by the strict rules of the common law, and is relievable only in a court of equity where matters of this nature are properly cognizable and relievable.

To the end, therefore, that the *Proprietors of the Swan Point Cemetery* and *Almira T. Metcalf* may to the best and utmost of their respective knowledge, remembrance, information and belief, full, true, direct and perfect answer make to all and singular the matters aforesaid but not upon oath, the benefit of which is hereby expressly waived, and that as full and particularly as if the same were here repeated and they and each of them distinctly interrogated thereto, and that the defendant corporation, the *Proprietors of Swan Point Cemetery*, be directed and ordered to restore and replace the remains of the said *Whiting Metcalf* in the lot from whence they were taken, and that the said *Almira T. Metcalf* be enjoined from interfering

with or in any manner preventing, or attempting to prevent, said restoration and replacement, and be also perpetually enjoined from again removing or intermeddling with said remains.

May it please your honors to grant unto the complainants a writ of subpœna directed to the *Proprietors of Swan Point Cemetery* and *Almira T. Metcalf*, aforesaid, thereby commanding them and each of them at a certain time and under a certain penalty, therein to be limited, personally to appear before this honorable court and then and there full, true, direct and perfect answer make to all and singular the premises, and further to stand to and perform and abide such further order, direction and decree therein as to this honorable court shall seem agreeable to equity and to good conscience.

William G. Pierce.

James Jones, of Counsel for Complainants.
(*Verification.*)[1]

e. Actions for Damages.[2]

(1) For Burying Stranger in Plaintiff's Plot.

Form No. 6790.[3]

Commonwealth of *Massachusetts*.

Suffolk, ss. *Superior* Court, *July* Term, 1885.

Donnelly
against
Catholic Cemetery Association.

Plaintiff's declaration.

First count. And the plaintiff says that he is the owner and proprietor of a certain burial lot and grave in a cemetery in said *Boston*, which said cemetery is established, occupied and under the management and control of the defendant as a body corporate of this *commonwealth*, subject to the exclusive right of the plaintiff to bury in said grave certain persons on their decease. That on or about the *eighth* day of *March*, A. D. 1883, the said association, by its servants and agents, with force and arms, unlawfully broke and entered the plaintiff's said lot and grave, the said lot being numbered *twenty*, range *one hundred and nineteen*, section *four*, and dug up the soil of the same and disturbed and removed the dead bodies of the plaintiff's father and child at that time and for a long time before buried there, and did put and bury in said grave the dead body and coffin of a certain other person without the consent or knowledge of the plaintiff and without authority or justification. And the plaintiff says that said

1. As to the verification of a bill in *Rhode Island* see vol. 3, p. 458, note 4.

2. For the formal parts of a complaint, petition or declaration in a particular jurisdiction consult the title Complaints, vol. 4, p. 1019; Declarations.

3. This form is copied from the record in the case of Donnelly *v.* Boston Catholic Cemetery Assoc., 146 Mass. 163, in which case the superior court justice ordered a verdict for the defendant, but reported the case for the determination of the full court: if his ruling was correct, judgment to be entered on the verdict; if incorrect, judgment to be entered for the plaintiff, by agreement of parties, in the sum of two hundred and fifty dollars. Judgment was given for the plaintiff, the court holding that the cemetery corporation was liable to the proprietor of a grave for the negligent burial of a stranger therein.

dead body of said other person was unlawfully kept by said defendant in said grave from the time of said burial of the same until on or about the *eighth* day of *March*, 1884, when the plaintiff went to said cemetery to bury and to attend to the burial of the body of his wife in said grave, that he was accompanied thereto by the friends and relatives of his said wife and himself; that because of the burial of said certain other person in plaintiff's said grave, the plaintiff, to whom such burial was at that time unknown, was greatly hurt and wounded in his feelings; the burial of the body of plaintiff's wife delayed for a long space of time, to wit, for *one* hour, and the plaintiff put to great mental distress and suffering thereof.

Second count. And the plaintiff says, that on or about the *eighth* day of *March*, 1883, and ever since that day, he being the owner and proprietor of a burial lot and grave as aforesaid, in said cemetery as aforesaid, and he having the exclusive right to bury the bodies of deceased persons in said grave or lot as aforesaid, subject to certain conditions as aforesaid; the said defendant, by its agents and servants, wilfully, negligently and carelessly did enter in and upon said lot and grave and did so dig up and open said grave, and did negligently, carelessly and without authority or right put and bury in said grave, in which the bodies of the plaintiff's deceased father and child had been and still were buried for a long time, the dead body of a strange person, and have so put and buried said dead body unlawfully, negligently and carelessly kept and continued said body buried therein until on or about the *eighth* day of *March*, 1884, at which time the plaintiff, not knowing of said unlawful and negligent acts and burial as aforesaid and having lost his wife and having proceeded with her dead body in company with certain friends and relatives of himself and his said wife to said cemetery and said lot for the purpose of her burial therein, and of having the usual funeral services, the plaintiff then became informed of said burial of said strange body in his said grave and of the acts aforesaid of the defendant, its agents and servants, and because of said burial and finding of said strange body in said grave, and because of a dispute in consequence as to the ownership of the plaintiff's grave, then dug and ready to receive the body of his said wife, and the performance of said funeral services were greatly delayed, to wit, for the space of *one* hour, and the plaintiff put to great shame, distress and mental suffering, and all in consequence of the unlawful and negligent acts of the defendant's agents and servants.

By his Attorney, *J. L. Eldredge.*

(2) For Injuries Caused by Poison Ivy.

Form No. 6791.[1]

Supreme Court, *Kings* County.

Barbara E. George, plaintiff,
against
Cypress Hills Cemetery, defendant.
} Complaint.

The plaintiff above named complaining of the defendant alleges:

1. This form is copied from the records in George *v.* Cemetery Co., 2nd Department, Appellate Division, N. Y. The case has not as yet been reported.

I. Upon information and belief the defendant is a corporation duly organized under the laws of the state of *New York* for the purpose of interring the dead at a cemetery known as "*Cypress Hills Cemetery*," situated partly in the counties of *Kings* and *Queens* in the state of *New York*.

II. That the plaintiff is the owner of a certain grave, plot or lot known as No. *6857* in the portion of said cemetery known as *Locust Grove*, and the said lot being under the charge, care and control of said defendant.

III. That on or about the *thirtieth* day of *June*, 1895, said plaintiff while lawfully visiting said grave or plot in said cemetery and without any fault or negligence on her part, was poisoned by a certain shrub or plant commonly known as "*poison ivy*," which the defendant had carelessly and negligently allowed to grow about said grave or plot, and in consequence of such poisoning the plaintiff became sick, sore and disordered, and suffered severe bodily pain and anguish and still suffers great pain and anguish, and will continue so to do, and was prevented from attending to her business and was compelled to procure medical attendance and medicine, all to her damage *ten thousand* dollars.

John A. Anderson, Attorney for Plaintiff,
303 Washington St., Brooklyn, N. Y.

(3) For Removal of Body from Plot.[1]

Form No. 6792.[2]

Suffolk, ss. *Superior* Court, *July* Term, 1867.

Thomas F. Meagher
vs.
James Driscoll.

And the plaintiff says that the defendant with force and arms took and carried away the goods belonging to the plaintiff, viz., one coffin, and the body of the plaintiff's child contained therein, and converted the same to the use of the defendant, against the peace of the *commonwealth* and to the damage of the plaintiff, as he alleges, in the sum of *three thousand* dollars.

And the plaintiff says he was owner by certificate of a certain lot, being lot numbered *four* in *Holyhood Cemetery*, situate in the county of *Norfolk*, and of a right of burial in said lot in said cemetery, and that on or about the *sixth* day of *December*, 1863, he purchased a coffin and placed therein the body of his child who had died, and he had said coffin placed in said lot numbered *four*, and his child's

1. See also Bessemer Land, etc., Co. *v.* Jenkins, 111 Ala. 135; Smith *v.* Thompson, 55 Md. 5.

2. This form is copied from the record in Meagher *v.* Driscoll, 99 Mass. 281, in which case the jury returned a verdict for the plaintiff, to which defendant alleged exceptions, which were overruled by the supreme court. It was held further that in measuring damages the jury may take into consideration the injury of the plaintiff's feelings, if it appears that the defendant acted in wilful disregard or careless ignorance of the plaintiff's rights.

body interred therein, and that the defendant, on or about the *twenty-third* day of *September*, 1865, wrongfully, unlawfully and maliciously, and without the knowledge or permission of the plaintiff, entered upon said lot and dug up the same, and removed the body of the plaintiff's child and the coffin containing the same, and placed the same in a charity grave, and placed in the said lot in which the plaintiff then had the right of burial the body of a stranger.

2. The plaintiff says that he is and was entitled to a right of burial in lot numbered *four* in *Holyhood Cemetery*, situate in the county of *Norfolk*, and that he had placed in said lot a coffin containing the body of his child, deceased; that the defendant, while he, the plaintiff, was in possession of said right of burial, entered upon said lot without authority, and with wicked intent, and disturbed him in said right of burial, and wickedly and wrongfully dug up and carried away his said child, and maliciously and deceitfully tried to conceal from the plaintiff that his said child had been removed from said burial lot and that the defendant placed the plaintiff's child in a charity grave, and wickedly tried to conceal from the plaintiff that he had so done, and the plaintiff was kept in ignorance of the disturbance of his possession of said burial lot and of the removal of his child from the same for a long time, to the great injury of the plaintiff's feelings, as he says.

3. The plaintiff further says that he owned a coffin, and that on or about the *sixth* day of *December*, 1863, he put the body of his child, deceased, in said coffin and buried it in his own lot, being lot numbered *four* in the *Holyhood Cemetery*, situate in the county of *Norfolk*, and that the defendant, on or about the *twenty-third* day of *September*, 1865, did unlawfully, wrongfully, and with malicious intent, and without the knowledge or consent of the plaintiff, dig up and remove the coffin, the property of the plaintiff, containing the body of the plaintiff's child, to the great damage and injury of the plaintiff's feelings, as he says.

4. And the plaintiff further says that the defendant has put the body of a stranger into his, the plaintiff's burial lot, to the great damage and injury of the plaintiff, as he says.

5. And the plaintiff further says that the defendant, on or about the *twenty-third* day of *September*, 1865, with force and arms broke and entered the plaintiff's close, viz., a burial lot numbered *four*, situate in *Holyhood Cemetery*, in the county of *Norfolk*, and with his feet in walking trod down, trampled upon, consumed and spoiled the grass and herbage of the plaintiff then and there growing and being of great value, and with the implements for digging, dug up the earth; and heaped the earth upon the grass and herbage then and there growing, and being of great value, to the great injury of the same; and other wrongs to the plaintiff then and there did against the peace and to the great damage of the plaintiff, as he says.

R. D. Smith,
W. Emery,
Attorneys for Plaintiff.

f. By Holders of Cemetery Bonds to Compel Accounting.

Form No. 6793.[1]

Supreme Court, *Broome* County, *New York.*

Martha E. Seymour
against
The Spring Forest Cemetery Association, Erasmus D. Robinson, Tracy R. Morgan, Job N. Congdon, Benjamin Devoe, Edward B. Stephens, Alonzo C. Matthews, Harris G. Rodgers, Robert Brown, Cyrus Strong.

The above named plaintiff, complaining of the above named defendants, says:

That the defendant, *The Spring Forest Cemetery Association*, is a corporation duly organized under the laws of the state of *New York*; that as such corporation it duly, and to pay for lands purchased by it, issued bonds or certificates of indebtedness in the aggregate amount of *twenty-one thousand* dollars, as follows: One bond (without having any number), bearing date *March 13*, 1855, in the penal sum of *six thousand* dollars, conditioned for the payment of *three thousand* dollars, with interest, to *Tracy R. Morgan*, or to his attorney, executor, administrator or assigns; that the full text of said bond is as follows: (*Here was set out a copy of bond and a list of bonds numbered from 2 to 28 inclusive, payable and conditioned in the same manner.*) Plaintiff further says that no other bonds were issued by said *The Spring Forest Cemetery Association.*

Plaintiff further says that she is the owner and holder of all said bonds, and entitled to all the moneys and rights secured by said bonds.

Plaintiff further says that since the *first* day of *July*, 1878, no account has been rendered to the holders of said bonds of the income and receipts of the said *The Spring Forest Cemetery Association*, applicable to the payment of said bonds, and no account has been rendered to the holders of said bonds since the *first* day of *July*, 1878, of the receipts of the said *The Spring Forest Cemetery Association*, so that the amount properly applicable to said bonds can be obtained; and that demand has often been made of said *The Spring Forest Cemetery Association*, and of its officers, in behalf of the owners and holders of said bonds, for an account of the said receipts, and such demands have all been refused.

Plaintiff further says that the defendants, *Erasmus D. Robinson, Tracy R. Morgan, Job N. Congdon, Benjamin Devoe, Edward B. Stephens, Alonzo C. Matthews, Harris G. Rodgers, Robert Brown* and *Cyrus Strong*, claim to be and are acting as trustees of the said *The Spring Forest Cemetery Association*; that they have the custody of all the money and property of the said *The Spring Forest Cemetery Association*; that the number of the trustees of the said association, as

1. This complaint is copied from the records in the case of Seymour *v.* Spring Forest Cemetery Assoc., 144 N. Y. 333.

provided by law, is nine; that only a very small portion of the moneys received by the said *The Spring Forest Cemetery Association* has been paid on said bonds since the *first* day of *July*, 1878; that a large amount of money, but what amount plaintiff is unable to state, further than that it is between *five thousand* and *twenty-five thousand* dollars, at the time this complaint is made, has been received by the defendants, which is applicable and should be applied to said bonds; that said defendants neglect and refuse to make any account whatever, refuse to recognize the validity of said bonds, and refuse to make any payment on said bonds, although such account and payment have often been demanded by the holders and owners of said bonds.

Wherefore plaintiff demands judgment in her favor for an accounting by the defendants of all the receipts of said *The Spring Forest Cemetery Association* since the *first* day of *July*, 1878, that the amount applicable to said bonds may be ascertained, deducting all payments made on said bonds since the *first* day of *July*, 1878, and that plaintiff be paid the net amount applicable on said bonds, with interest on the sums withheld from the time the payments withheld should have been applied; and the plaintiff further demands that the defendants *Erasmus D. Robinson*, *Tracy R. Morgan*, *Job N. Congdon*, *Benjamin Devoe*, *Edward B. Stephens*, *Alonzo C. Matthews*, *Harris G. Rodgers*, *Robert Brown* and *Cyrus Strong* be held personally liable for the payments so withheld, and be adjudged to pay the same; and plaintiff asks for such other and further relief as shall be just, with costs of suit.

Edward K. Clark,
Plaintiff's Attorney, *Binghamton*, *N. Y.*

(*Verification.*)[1]

II. ACTION FOR PERFORMING AUTOPSY WITHOUT PERMISSION.

Form No. 6794.[2]

Commonwealth of *Massachusetts*.

Suffolk, ss. In the *Superior* Court,
September Term, A. D. 1897.

Samuel C. Burney
v.
The Children's Hospital in Boston.
} Plaintiff's Declaration.

And the plaintiff says that on the *ninth* day of *July*, in the year of our Lord one thousand eight hundred and *ninety-six*, he was the lawful father and natural guardian of an infant child named *Charles H. Burney*, and by reason thereof was the custodian of the person and body of said child, and had and exercised control of the will and movements of said child and that said child was then and there in his legal possession; and the plaintiff says that he then and there

1. For the form of verification in a particular jurisdiction consult the title VERIFICATIONS.

2. This form is copied from the record in Burney *v.* Children's Hospital, 169 Mass. 57, in which case the declaration was held sufficient on demurrer.

delivered said child to the defendant in the trust and confidence and upon the promises of the defendant that it would endeavor to alleviate a condition of body in said child known as hernia, and he delivered said child to the defendant for no other purpose than as aforesaid; and while said child was in the possession and custody of the defendant said child died; and thereupon it became and was the duty of the defendant to deliver the body of said child to the plaintiff in the same condition in which it then was, to be by the plaintiff properly and decently buried; yet the defendant, unmindful of said duty, wilfully, fraudulently, without the authority and against the wishes of the plaintiff, but in violation and in disregard thereof and apart from its promise as aforesaid, and trespassing upon the rights of plaintiff as custodian of the body and person of the said child as hereinbefore set forth, and outraging said body and also the plaintiff, and against, as well, the good morals and the peace of the community, did upon the deceased body of said child, make and cause to be made, a surgical operation or dissection, and said body did, with sharp instruments, cruelly, outrageously and sacrilegiously cut, open, hack, tear and disfigure, and the head and neck so-called commonly and parts thereof did cut into and displace, and remove and take away; thereby causing said body prematurely to decay and rendering the same unfit to be embalmed, as plaintiff had prepared and contracted to have done to said body; and by reason of the wrongful acts of the defendant as herein set forth, the plaintiff was greatly injured in his feelings and was compelled to bury said child with indecent haste, and to fix an earlier and an unsuitable day and hour than that first by him announced to the relatives and friends of the plaintiff for the funeral and religious rites and ceremonies, upon said body to be performed, and was otherwise greatly outraged in his feelings and caused great pain of mind.

Second count. And the plaintiff says that he was the father and natural guardian of an infant child named *Charles H. Burney*, and was the lawful custodian of said child, and on the *ninth* day of *July*, A. D. 1*896*, said child was in his legal possession; and on said day said child was suffering from a condition of body called hernia; and he delivered said child to the defendant and said defendant took said child for the sole purpose of alleviating said condition of body; and while said child was so in the custody of the defendant for the purpose of being treated for hernia, on the afternoon of said day said child died; and thereupon it became and was the duty of the defendant to deliver the body of said child to the plaintiff in the same condition in which it then was to be by said plaintiff decently and properly buried; yet the defendant, unmindful of its duty in this behalf, refused to deliver said body to the plaintiff, and on the morning following wilfully, fraudulently and against the consent of the plaintiff did upon the deceased body of said child make and cause to be made a surgical operation or dissection, and said body did, with sharp instruments, cruelly, outrageously and sacrilegiously cut, open, hack, tear and disfigure, and the head and neck so-called commonly and parts thereof did cut into and displace and remove and take away; thereby causing said body prematurely to

decay and rendering the same unfit to be embalmed, as plaintiff had prepared and contracted to have done to said body; and by reason of the wrongful acts of the defendant, as herein set forth, the plaintiff was greatly injured in his feelings and was compelled to bury said child with indecent haste, and to fix an earlier and an unsuitable day and hour than that first announced by him to the relatives and friends of the plaintiff for the funeral and religious rites and ceremonies upon said body to be performed, and was otherwise greatly outraged in his feelings and caused great pain of mind.

And the plaintiff says that both counts are for one and the same cause of action.

Samuel C. Burney,
By *Ralph W. Gloag,* his Attorney.

Form No. 6795.[1]

Supreme Court, *New York* County.

Ann A. Foley, plaintiff,
vs.
Charles Phelps, defendant.
} Complaint.

The plaintiff complains of defendant and for cause of action alleges,

I. That on or about the *sixteenth* day of *May*, 1894, in the city of *New York*, *Thomas F. Foley*, who was at said time the husband of the plaintiff, fell through an elevator shaft at the *Windsor Flat*, No. *1700 Broadway*, *New York City*, from the effects of which his ribs on the left side were broken, and he was otherwise greatly injured by the shock and fall.

II. That thereupon, without plaintiff's knowledge or consent, he was immediately carried to *Bellevue Hospital*, *New York City*, in an unconscious condition, and within three hours thereafter, from the effects of said fall, he died intestate, and without having given the right to perform an autopsy on his body after his death.

III. That at the time of said death plaintiff, who was a devoted and loving wife, and upon whom the legal duty and right of burying her said husband devolved, was present and claimed and demanded his body, and begged and implored those who were in charge of it at said hospital not to allow or permit an autopsy to be performed on it, and gave them notice that she would immediately send an under-

1. This form is copied from the record in Foley *v.* Phelps, 1 N. Y. App. Div. 551. The defendant demurred to the complaint upon the following grounds, to wit:

1. That the plaintiff has not legal capacity to sue. 2. That the complaint does not state facts sufficient to constitute a cause of action.

In overruling the demurrer the court says: "The unauthorized dissection of human remains is a misdemeanor under the provisions of sections 308 and 309 of the Penal Code of this state. * * * There is a statute specially applicable to the case of a patient who dies, as this plaintiff's husband did, in one of the hospitals of the state. The act of 1854 (chap. 123) * * * expressly prohibits the dissection of a dead body, or its delivery to any one for the purposes of dissection, if the relatives and friends of the deceased object, or if they make application within a certain time (as appears to have been done in this case) for the remains for the purpose of burial."

The decision of the special term overruling the demurrer was affirmed on appeal.

taker for the body, who would remove it to her home and properly prepare it for burial, under her directions.

IV. But that notwithstanding said facts, and her protestations and legal rights in the premises, the defendant, without her knowledge or consent, procured, assisted, aided and abetted in performing an autopsy on her said husband's body, which said autopsy was performed without any authority of law and was wilfully, negligently and carelessly performed by dissecting and cutting open, mutilating and otherwise abusing and maltreating said dead body of *Thomas F. Foley*.

V. That by reason of said acts the right of the plaintiff, who was a lawful, loving and devoted wife of said *Thomas F. Foley*, has been recklessly and wilfully disregarded and her feelings cruelly lacerated, and the devotion, love and respect that the plaintiff entertained for her said husband, has been shocked and wounded and the plaintiff has suffered greatly therefrom, both in body and mind, to her damages to wit, in the sum of *ten thousand* dollars.

Wherefore, she prays judgment against the defendant for the sum of *ten thousand* dollars (*$10,000*), together with the costs and disbursements.

DeWitt & Tabor,
Attorneys for the Plaintiff,
Office and P. O. address, *206 Broadway, New York City*.

III. CRIMINAL PROSECUTIONS.[1]

1. For Failure to Bury Dead Body.

1. For the formal parts of an indictment, information or criminal complaint in a particular jurisdiction consult the titles INDICTMENTS; INFORMATIONS; CRIMINAL COMPLAINTS, *ante*, p. 930.

For statutes relating to the subject of dead bodies see as follows:

Alabama. — Crim. Code (1886), §§ 4023–4027.

Arizona. — Pen. Code. (1887), §§ 491–497.

Arkansas. — Sand. & H. Dig. (1894), §§ 1923–1927.

California. — Pen. Code (1897), §§ 290–297.

Colorado. — Mills' Anno. Stat. (1891), § 1367.

Florida. — Rev. Stat. (1891), § 2625.

Illinois. — Starr & C. Anno. Stat. (1896), p. 1306, par. 270.

Indiana. — Horner's Stat. (1896), §§ 2166–2168.

Iowa. — Code (1897), § 4946.

Kansas. — 2 Gen. Stat. (1897), p. 341, §§ 252–254.

Kentucky. — Stat. (1894), § 1335.

Maryland. — Pub. Gen. Laws (1888), p. 505, § 133.

Minnesota. — Stat. (1894), §§ 6562–6567.

Mississippi. — Anno. Code (1892), §§ 1023–1025.

Missouri. — Rev. Stat. (1889), §§ 3842–3845.

Montana. — Pen. Code (1895), §§ 510–515.

Nebraska. — Comp. Stat. (1897), § 6915.

Nevada. — Gen. Stat. (1885), § 4870.

New Hampshire. — Pub. Stat. (1891), c. 266, § 7.

New Jersey. — Gen. Stats. (1895), p. 357, § 45.

New York. — Birds. Rev. Stat. (1896), p. 320, § 1 *et seq.*, p. 882, § 1 *et seq.*

North Dakota. — Rev. Codes (1895), §§ 7188–7202.

Ohio. — Bates' Anno. Stat. (1897), §§ 7034, 7034a, 7035.

Oklahoma. — Stat. (1893), §§ 2188–2202, 2489.

Pennsylvania. — Pepp. & L. Dig. (1894), p. 1161, § 156.

Rhode Island. — Gen. Laws (1896), c. 257, § 2; c. 281, § 21.

Tennessee. — Code (1896), §§ 6771–6774.

Texas. — Pen. Code (1895), art. 367.

Form No. 6796.[1]

In the *District* Court of the *First* Judicial District of the Territory of *Arizona*, in and for the County of *Pima*, the *second* day of *June*, 1898.

Territory of Arizona
against
John Doe.

John Doe is accused by the district attorney by this information of the crime of failing to bury a dead body, committed as follows: The said *John Doe*, on the *first* day of *April*, A. D. 1898, at the county of *Pima* aforesaid, was a person upon whom was imposed by law the duty of making burial of the remains of a deceased person, to wit, *Sarah Doe*, the *wife* of the said *John Doe*, who died on the said *first* day of *April*, A. D. 1898, and he the said *John Doe* unlawfully neglected to perform said duty within a reasonable time, but kept said remains unburied until the *twentieth* day of *April*, A. D. 1898.

Daniel Webster, District Attorney.

2. For Removing Body.[2]

Form No. 6797.

(Precedent in People *v.* Dalton, 58 Cal. 226.)[3]

[In the *Superior* Court of the *City and* County of *San Francisco*, State of *California*, *Monday*, the *third* day of *February*, 1880.

The People of the State of California
against
Eugene Dalton.
} Indictment.

Eugene Dalton is accused by the grand jury of the *city and* county of *San Francisco*, state of *California*, by this indictment of the crime

Utah. — Rev. Stat. (1898), §§ 4230, 4231.

Vermont. — Stat. (1894), § 5004.

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 7248.

West Virginia. — Code (1891), c. 149, § 13.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 4592, p. 2309.

Wyoming. — Rev. Stat. (1887), § 1029.

Must Follow Statute. — The indictment in charging the offense must strictly follow the statute; thus where the statute makes it an offense only where the removal is with the intent to sell or dissect the same, such an intent must be averred and proved. Com. *v.* Slack, 19 Pick. (Mass.) 304; State *v.* Fox, 136 Mo. 141.

Ownership. — It is unnecessary to aver the ownership of the cemetery from which the body is removed, and if averred it need not be proved. Com. *v.* Cooley, 10 Pick. (Mass.) 37.

1. *Arizona.* — Pen. Code (1887), § 494.
California. — Pen. Code (1897), § 293.
Montana. — Pen. Code (1895), § 513.
North Dakota. — Rev. Codes (1895), § 7196.

2. **Alabama.** — The form given in Ala. Crim. Code (1886), p. 275, No. 71, drawn under section 4023 of the Code, charges the offense as follows: "*John Doe* removed from the grave the dead body of *Samuel Short* from wantonness, or for the purpose of dissection or sale."

3. It was held that this indictment sufficiently designated and described the offense, and that a demurrer thereto was improperly sustained. See Cal. Pen. Code (1897), § 290, and statutes cited *supra*, note 1, p. 1056.

See also the first count to Form No. 6801, *infra*.

of][1] violating sepulture, committed as follows: The said *Eugene Dalton*, on the *8th* day of *July*, A. D. 1879, at the *City and* County of *San Francisco*, without authority of law, disinterred and removed from his place of sepulture, at *Laurel Hill Cemetery*, in said *City and* County of *San Francisco*, the dead body of the late *Elias Lipsis*, a human being, the said dead body not being the dead body of a relative or friend of the said *Eugene Dalton* removed for reinterment, contrary [to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the people of the state of *California*.

D. L. Smoot, District Attorney.][1]

3. For Stealing Body.

a. For Purpose of Dissection.[2]

Form No. 6798.[3]

Commonwealth of *Massachusetts*.

Essex, to wit: At the *Superior* Court, begun and holden at the city of *Salem*, within and for the county of *Essex*, for the transaction of criminal business, on the *first Monday* of *November*, in the year of our Lord one thousand eight hundred and *ninety-seven*, the jurors for the *commonwealth* of *Massachusetts* on their oath present: that *Richard Roe* and *Richard Fen*, both of *Saugus*, in said county, on the *first* day of *October*, in the year of our Lord one thousand eight hundred and *ninety-seven*, at *Saugus*, in the county of *Essex*, with force and arms, the common burying-ground there situate,[4] being known as the *Granary Burying-ground*, unlawfully and wilfully did break and enter, and a grave there, in which a certain human body, to wit, the body of one *John Smith*, had lately before been interred, and then was, then and there unlawfully and wilfully did open, and the body of the said *John Smith* then and there in the grave aforesaid being, then and there unlawfully and wilfully did dig up and disinter, remove and convey away from and out of the grave aforesaid, the said *Richard Roe* and *Richard Fen* then and there intending to use and dispose of the said body for the purpose of dissection;[5] the said *Richard Roe* and *Richard Fen* not being then and there authorized so to do, either by the board of health, or the overseers of the poor, or the directors of the workhouse, or the selectmen of the said town of *Saugus*, in which the said grave and the burying-ground aforesaid was and is situate;[6] against the peace of said *commonwealth* and contrary to the form of the statute in such case made and provided.

Daniel Webster, District Attorney.

1. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. See also the second count of Form No. 6801, *infra*.

3. *Massachusetts*. — Pub. Stat. (1882), c. 207, § 47.

4. It is not necessary to allege to whom the burying-ground belonged. Com. *v.* Cooley, 10 Pick. (Mass.) 37.

5. This is a necessary averment. Com. *v.* Slack, 19 Pick. (Mass. 304.

6. It is sufficient to aver that the defendants were not authorized by the selectmen, overseers, etc., of the town where the body was buried. Com. *v.* Loring, 8 Pick. (Mass.) 370.

Form No. 6799.[1]

Supreme Court, *Chemung* County.

The People of the State of New York
against
Eucebia Fitzgerald, Edmund A. Reilly and J. Thomas Nealson.

The grand jury of *Chemung* county by this indictment accuse *Eucebia Fitzgerald, Edmund A. Reilly* and *J. Thomas Nealson* of the crime of body stealing, committed as follows: That said *Eucebia Fitzgerald, Edmund A. Reilly and J. Thomas Nealson*, on the *ninth* day of *April*, 1*885*, at the city of *Elmira*, in the county of *Chemung*, with force and arms, unlawfully and feloniously did remove the dead body of a human being, to wit, that of *William Irvine*, from a grave or place where the same had been buried, without authority of law, for the purpose of dissection, for procuring the reward for the return of same and for the purpose of malice and wantonness, against the form of the statute in such case made and provided.

William H. Smith, District Attorney.

b. For Purpose of Selling.[2]

Form No. 6800.

(Precedent in State *v.* Fox, 136 Mo. 141.)[3]

[State of *Missouri*, } ss. In the *Chariton Circuit* Court,
County of *Chariton*. } *June* term, 1*895*.][4]

The grand jurors for the state of *Missouri*, chosen, selected and summoned from the body of the county of *Chariton*, in the state of *Missouri*, and impaneled, sworn, and charged to inquire within and for the body of the said county of *Chariton*, upon their oath do charge and present that one *James R. Fox*, on or about the *seventh* day of *March*, A. D. 1*895*, at the county of *Chariton*, in the state of *Missouri*, did then and there unlawfully and feloniously dig up and disinter and remove the dead body and remains of one *Leona Gates*, deceased, from the grave in which said body and remains had before been interred, and then and there was, for the purpose of selling the said dead body and remains, against the peace and dignity of the state.

* * *[5] And the grand jurors aforesaid, upon their oaths aforesaid,

1. This form is substantially the indictment in the case of People *v.* Fitzgerald, 43 Hun (N. Y.) 35, in which case the conviction was afterward reversed by the court of appeals (155 N. Y. 151), although the indictment as to form is good. See N. Y. Pen. Code, § 311 (Birds. Rev. Stat. (1896), p. 321, § 4).

2. See also the third count of Form No. 6801, *infra*.

3. It was held in this case that a conviction could not be sustained, for the evidence, although showing the disinterment, failed to disclose any intention of selling the corpse. The indictment was drawn under Mo. Rev. Stat. (1889), § 3842. See also list of statutes cited *supra*, note 1, p. 1056.

4. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

5. A demurrer was sustained to a further count in this indictment, which was as follows:

"And the grand jurors aforesaid, upon their oaths aforesaid, do further present and charge that one *James R. Fox*, on or about the *twelfth* day of

do further charge and present that the said *James R. Fox*, on or about the *twelfth* day of *March*, A. D. 18*95*, at and in the county of *Chariton*, in the state of *Missouri*, did then and there unlawfully and feloniously dig up, and disinter and remove the dead body and remains of a human being, to wit, the dead body and remains of one *Leona Gates*, deceased, from the grave in which said body and remains had then before been interred, and then and there was, from mere wantonness and mischief, against the peace and dignity of the state.

[*Solomon Sayers*, Prosecuting Attorney
for the County of *Chariton*.][1]

4. For Receiving Stolen Body.

Form No. 6801.

(Precedent in People *v.* Graves, 5 Park. Cr. Rep. (N. Y. Supreme Ct.) 135.)[2]

State of *New York*, *Ontario* County, ss.

The jurors for the People of the State of *New York*, and for the body of the county of *Ontario*, to wit, *Jonas M. Wheeler* (*Here follow names of the grand jurors*), being sworn and charged to inquire for the People of the said State and for the body of the county aforesaid, upon their oath, present that *John C. Weed*, *Alanson R. Simmons* and *Judson H. Graves*, late of the town of *Bristol*, in the county aforesaid, on the *1st* day of *June*, 18*58*, with force and arms, at the town of *Bristol*, in the county aforesaid, a graveyard situated in the said town of *Bristol*, county of *Ontario* aforesaid, did enter, and the grave therein in which the body of one *Martha J. Brockelbank*, deceased, had lately before then been interred, and then was, with force and arms unlawfully, voluntarily, willfully and indecently did dig, open and afterward, to wit: on the same day and year aforesaid, with force and arms at the town of *Bristol*, in the county aforesaid, the dead body of her, the said *Martha J. Brockelbank*, out of the grave aforesaid, unlawfully, feloniously and indecently did take and carry away, against the form of the statute in such case made and provided and against the People of the State of *New York* and their dignity.

And the jurors aforesaid upon their oath aforesaid do further present that the said *John C. Weed*, *Alanson R. Simmons* and *Judson H. Graves*, on the day and year last aforesaid, and at the town, county and state aforesaid, a graveyard situated in the said town of *Bristol* and county aforesaid, did enter and the grave in which the

March, A. D. 18*95*, at the county of *Chariton* in the state of *Missouri*, did then and there unlawfully and feloniously dig up, disinter and remove the dead body and remains of a human being, to wit, the dead body and remains of one *Leona Gates*, from the grave in which the said dead body and remains had then before been interred and then and there was, for the purpose of dissection and surgical and anatomical experiment and preparation of said dead body and remains, against the peace and dignity of the state."

1. The words and figures enclosed by [ ] will not be found in the reported case, but have been added to render the form complete.

2. The third count only of this indictment is for receiving a stolen body; the first is for stealing generally, the second for stealing for the purpose of dissection, and the third for stealing for the purpose of sale.

body of one *Martha J. Brockelbank*, deceased, had lately before then been interred, and then was, with force and arms, unlawfully, voluntarily, willfully, feloniously and indecently, did dig, open and afterward, to wit: on the same day and year aforesaid, with force and arms at the town of *Bristol* in the county and state aforesaid, the dead body of her, the said *Martha J. Brockelbank*, out of the grave aforesaid, unlawfully, feloniously and indecently did take, remove and carry away for the purpose of dissection, against the form of the statute in such case made and provided and against the peace of the People of the State of *New York* and their dignity.

And the jurors aforesaid upon their oath aforesaid do further present that the said *John C. Weed*, *Alanson R. Simmons* and *Judson H. Graves* on the day and year aforesaid, at the town, county and state aforesaid, a graveyard situated in the said town of *Bristol*, county aforesaid, unlawfully did enter and the grave there, in which the body of one *Martha J. Brockelbank*, deceased, had lately before then been interred and then was, with force and arms unlawfully, voluntarily, willfully, feloniously and indecently did dig open and afterward, to wit: on the same day and year aforesaid, with force and arms, at the town and county aforesaid, the dead body of her the said *Martha J. Brockelbank*, out of the grave aforesaid, unlawfully, feloniously and indecently did take, remove and carry away, for the purpose of selling the same, against the form of the statute in such case made and provided and against the peace of the People of the State of *New York* and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present that the said *John C. Weed*, *Alanson R. Simmons* and *Judson H. Graves* afterward, to wit: on the same day and year last aforesaid at the town of *Bristol*, in the county aforesaid, the dead body of one *Martha J. Brockelbank*, deceased so as aforesaid, unlawfully, feloniously and indecently dug up from the grave aforesaid and unlawfully and indecently taken and carried away as aforesaid, from said grave, unlawfully, feloniously and indecently, did receive for the purpose of dissection, they, the said *John C. Weed*, *Alanson R. Simmons* and *Judson H. Graves* then and there well knowing the said dead body of the said *Martha J. Brockelbank*, deceased, to have been so as aforesaid, unlawfully, feloniously and indecently dug up, taken and carried away from the grave aforesaid for the purpose of dissection, against the peace of the People of the State of *New York* and their dignity, and against the form of the statute in such case made and provided.

Wm. H. Smith, District Attorney.

5. For Destroying Cemetery Property.

Form No. 6802.[1]

In the name and by the authority of the state of *Texas*. The

1. The charging part of this indictment was held sufficient in Phillips *v.* State, 29 Tex. 226, under a statute identical with Tex. Pen. Code (1895), art. 266.
For other statutory provisions relat-

grand jurors for the county of *Wharton* and state of *Texas*, duly organized as such at the *October* Term, A. D. 1897, of the *District* Court for said county, upon their oaths in said court, present that *William J. Phillips* and *Jim Phillips*, on the *twenty-fifth* day of *March*, A. D. 1896, with force and arms, in the county aforesaid, did then and there [1] wrongfully destroy and remove [2] the fence from around a certain graveyard [3] near the town of *Wharton*, in said county and state, which said fence was placed around said graveyard for its protection and inclosure, against the peace and dignity of the state of *Texas*.

James Joyce, Foreman of the Grand Jury.

ing to the destruction of cemetery property and unlawful usage of cemeteries see as follows:

Alabama.— Crim. Code (1886), § 4028.

Arizona. — Pen. Code (1887), § 497.

California. — Pen. Code (1897), § 296.

Delaware. — Rev. Stat. (1893), p. 970, c. 170, § 1.

Florida. — Rev. Stat. (1892), § 2626.

Georgia. — 3 Code (1895), §§ 719, 720.

Illinois. — Starr & C. Anno. Stat. (1896), p. 552, par. 15, p. 1306, par. 271.

Indiana. — Horner's Stat. (1896), § 1962.

Iowa. — Code (1897), § 558.

Kentucky. — Stat. (1894), § 1336.

Maryland. — Pub. Gen. Laws (1888), p. 506, § 135.

Massachusetts. — Pub. Stat. (Supp. 1888), p. 786, c. 395.

Minnesota. — Stat. (1894), § 6786.

Montana. — Pen. Code (1895), § 516.

Nebraska. — Comp. Stat. (1897), §§ 6761, 6762.

New Hampshire. — Pub. Stat. (1891), c. 266, §§ 8–10.

New Jersey. — Gen. Stat. (1895), p. 361, §§ 57, 58.

New York. — Birds. Rev. Stat. (1896), p. 1938, cl. 10.

North Carolina. — Code (1883), § 1088.

North Dakota. — Rev. Codes (1895), § 7204.

Ohio. — Bates' Anno. Stat. (1897), §§ 7036, 7037.

Oklahoma. — Stat. (1893), § 2204.

Oregon. — 1 Hill's Anno. Laws (1892), §§ 1876, 1877.

Pennsylvania. — Pepp. & L. Dig. (1894), p. 516, § 6, p. 1260, § 417.

Rhode Island. — Gen. Laws (1896), c. 279, § 23, c. 281, § 22.

Tennessee. — Code (1896), § 89.

Utah. — Rev. Stat. (1898), § 4232.

Vermont. — Stat. (1894), § 5007.

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 7249.

Wisconsin. — Sanb. & B. Anno. Stat. (1889), § 4443.

1. Then and There. — An indictment for cutting trees on the land of a cemetery company is sufficiently specific without containing the words "then and there." Mettler *v.* People, 36 Ill. App. 324.

2. Description of Acts. — The indictment may properly charge conjunctively acts constituting the offense which are stated disjunctively in the statute. Phillips *v.* State, 29 Tex. 226.

3. Description of Cemetery. — The indictment is sufficiently specific without describing the land. Mettler *v.* People, 36 Ill. App. 324. Nor need the indictment show whether the cemetery is public or private; nor that it has been dedicated or set apart for public or private use in some method prescribed by the laws of the state. Lay *v.* State, 12 Ind. App. 362. But if an indictment for wrongfully desecrating a public burying ground contains an accurate description by metes and bounds, the proof must correspond with the averment, and it is not sufficient to prove that a part of the lot described was a public burying ground, although the acts complained of were committed upon that part. Com. *v.* Wellington, 7 Allen (Mass.) 299.

The indictment need not designate the name of the person whose tomb has been defaced, nor is it necessary to charge that the dead body was that of a human being. State *v.* Wilson, 94 N. Car. 1015.

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